

A DELIMITATION DISPUTE BETWEEN QATAR AND BAHRAIN

On 8 July 1991 Qatar filed an application against Bahrain in connection with a dispute over various islands and the maritime boundary between the two states. Bahrain contested the jurisdiction of the Court, and the parties reached agreement that the question of jurisdiction should be decided first. On 1 July 1994 the Court delivered a first judgment on jurisdiction and admissibility. By a 15 to 1 majority the Court decided a number of questions, the only negative votes being cast by Judge Oda.⁶¹ The Court found:

that two exchanges of letters between the King of Saudi Arabia and the respective parties and a document headed 'Minutes', signed by the Ministers of Foreign Affairs of the three states in 1990 in Doha are international agreements creating rights and obligations for the parties; and that by the terms of those agreement the parties have undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the text proposed by Bahrain to Qatar in 1988 and accepted by Qatar in 1990, referred to as the 'Bahraini formula'.⁶²

The Court decided to afford the parties the opportunity to submit to the Court the whole of the dispute and fixed 30 November 1994 as the time-limit within which the parties were, jointly or separately, to take action to this end. There were separate opinions by Vice-President Schwebel and Judge *ad hoc* Valticos, a declaration by Judge Shahabuddeen and a dissenting opinion by Judge Oda.

The parties concurred with the Court that the exchanges of letters with the King of Saudi Arabia constituted an international agreement with binding force in their mutual relations. This is in accordance with international practice, which places weight on substance, not form, to establish whether commitments in writing constitute an international agreement in the sense of the Vienna Convention on the Law of Treaties.

The parties did not agree on whether the 1990 Minutes constituted an agreement and to what rights and obligations it and the 1987 instruments gave rise. The Minutes were signed by the Foreign Ministers of Qatar and Bahrain and provided for submission of their dispute to the Court. The Court had to decide if the Minutes formed a record of the meeting between the Foreign Ministers, or whether they contained a commitment to submit the dispute to the Court. The Court adhered to the second point of view, pointing out that the Minutes did not merely give an account of discussions and summarize points of agreement and disagreement, but enumerated the commitments to which the parties had consented. Thus, they constituted an international agreement.

The 1987 exchanges of notes and the 1990 Minutes indicated that the parties can refer certain matters in dispute between to the Court. These documents indicated the subject matter of a submission and the method of seising the Court. The Court found that the parties had agreed to submit the whole of their dispute to the Court. It observed that the application of Qatar did not contain all elements of the dispute. Bahrain had contended that under the 1990 Minutes the Court could only be seised jointly by the two parties, and not unilaterally as had been done by Qatar. The Court did not squarely face this issue but provided the parties an opportunity, if they could reach agreement, to submit the whole of the dispute as defined in the 1990 Minutes and the Bahraini formula to the Court.

A particularity of the judgment, which was called “novel - and disquieting”⁶³ by Vice-President Schwebel in his separate opinion, is that it did not address the final submissions of either of the parties. Qatar had requested the Court in its final submissions to hold that it had jurisdiction to entertain the dispute referred to in the application by Qatar and that it was admissible. Bahrain’s final submission was that the Court did not have jurisdiction over the dispute brought before it by the application.

Judge Oda in his dissenting opinion observed in this connection that the Court had “opted for the role of conciliator instead of finding, as I believe it ought to have done, that it lacks jurisdiction.”⁶⁴ This raises the question whether the Court went beyond the powers accorded to it by its Statute. It has been noted that the Statute attributes a broad discretion to the Court as to how it will deal with matters of jurisdiction. In a number of cases preceding the 1994 judgment, there had also been signs that the Court is prepared to accept delays in the judicial treatment of a dispute if this is conducive to the settlement of a dispute being reached outside the Court.⁶⁵ In the present case, the Court found with an overwhelming majority that there was an agreement between the parties to bring the whole dispute before it. The Court in its judgment indicated the parties a course for them to do this, without prejudice to the rights of either party and leaving open all questions which the submissions of the parties asked it to decide. This ‘cautious’ approach is also justified by the consideration that the parties in any case would have had the possibility to submit the whole dispute to the Court, even if the Court would have ruled that it could not entertain the 1991 application of Qatar because it did not cover the whole dispute.

On 30 November 1994 the Agent of Qatar filed a document in the Registry to comply with paragraphs 3 and 4 of the judgment of the Court of 1 July 1994. The document noted the absence of agreement between the parties to act jointly and that it was intended to submit the whole of the dispute between Qatar and Bahrain as circumscribed by the text of the 1990 Minutes and the Bahraini formula. This document included among the issues in dispute the status of the Zubarah region in the peninsula of Qatar. This matter had not been included in the 1991 application of Qatar. On the same day, Bahrain submitted a document to the Registry, indicating that it considered that submission of the dispute had to be consensual. Moreover, Qatar had denied Bahrain the possibility to define the dispute over Zubarah in a way it considered acceptable.

The Court found that the 1990 Minutes permitted a submission by one of the parties. This finding was not only based on an interpretation of the text in accordance with the ordinary meaning to be given to terms in their context, but also by the object and purpose of the 1990 Minutes, which was to advance settlement of the dispute by giving formal effect to the commitment of the parties to refer their dispute to the Court.

The Court also had to deal with the issue of admissibility of the submission as Bahrain had contended that Qatar had limited the scope of the dispute by the way in which it had formulated the issues to be decided by the Court. The Court considered that the terms used by Qatar accurately described the subject of the dispute and concluded that the application of Qatar was admissible. The Court decided that it had jurisdiction and that the application of Qatar as formulated on 30 November 1994 was admissible by 10 votes to 5. Vice-President Schwebel, Judges Oda, Shahabuddeen and Koroma and Judge *ad hoc* Valticos appended dissenting opinions to the judgment.

In this second judgment on jurisdiction and admissibility the Court had to address whether both parties had given their consent to submission of the dispute to it. In its first judgment on these matters of 1994 the Court had circumvented this question by offering

the parties a time period to reach agreement on the definition of the dispute and its submission. These two judgments on jurisdiction and admissibility recognize the significance of framework agreements for the submission of disputes to the Court. Although in these cases there is agreement on the principle of settlement of a dispute by the Court, the parties have not been able to work out the specific terms of reference. The judgments indicate that this does not preclude the Court from adjudicating upon the dispute. At the same time, the absence of a special agreement defining the dispute and its mode of submission open up the possibility to argue, as did Bahrain, that the consent of one of the parties to bring the dispute to the Court was lacking. Moreover, the framework agreement itself was open to different interpretations on this point. These themes were also raised in a number of the dissenting opinions appended to the second judgment.⁶⁶

Following the second judgment on jurisdiction and admissibility the merits phase of the case was initiated. One particularity of this phase was that Bahrain questioned the authenticity of 82 documents presented by Qatar. On 30 September 1998 Qatar submitted a report, in which it indicated it had decided to “disregard all the 82 challenged documents for the purposes of the present case so as to enable the Court to address the merits of the case without further procedural complications.” In an order of the President of the Court of 17 February 1999 this decision was placed on record and it was decided that the Replies of the parties would not rely on these documents. This event had a significant impact on the case as these documents played an essential role in Qatar’s arguments concerning sovereignty over the Hawar Islands. Once the authenticity of these documents had been successfully challenged by Bahrain, Qatar did not abandon its claim to the Hawar islands, but developed an alternative argument, which it had not employed initially.

On 16 March 2001 the Court handed down its judgment on the merits. The Court found unanimously that Qatar had sovereignty over Zubarah. By 12 votes to 5 it found that Bahrain had sovereignty over the Hawar Islands. By thirteen votes to four it found that Qatar had sovereignty over Janan Island. By twelve votes to five it found that Bahrain had sovereignty over the island of Qit’at Jaradah. By a unanimous vote, the Court decided that the low-tide elevation of Fasht ad Dibal fell under the sovereignty of Qatar. By thirteen votes to four it established the single maritime boundary dividing the various maritime zones of the parties. Judge Oda appended a separate opinion, Judges Bedjaoui, Ranjeva and Koroma appended a joint dissenting opinion, Judges Herczegh, Vereshchetin and Higgins appended declarations, Judges Parra-Aranguren, Kooijmans and Al-Khasawneh appended separate opinions, Judge *ad hoc* Torres Bernárdez appended a dissenting opinion, and Judge *ad hoc* Fortier appended a separate opinion.⁶⁷

Probably the most contentious issue in the merits phase was the basis upon which the sovereignty over the Hawar Islands had to be decided. The majority of the Court upheld a decision by the British authorities of 1939, which had decided that these islands, which are situated very close to the coast of Qatar, formed part of Bahrain. It would certainly not be impossible to question this finding. The acceptance of the 1939 decision by the ruler of Qatar is not without a certain ambiguity. At the same time, it does not seem that other arguments advanced by the parties offered a better basis upon which to decide the issue of sovereignty over the Hawar Islands. Such a choice at the same time would have implied disregarding or diminishing the significance of the 1939 decision of the British authorities. This would have opened up the possibility to other