

Bahrain vs Qatar: Examining the viability of Arbitration and Mediation in International Territorial Disputes

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Introduction

On the 16th of March 2001, the International Court of Justice witnessed the end of its longest running case. The case involved the territorial and maritime dispute of Bahrain and Qatar. It also came to be the only territorial dispute between two Arab countries that was successfully resolved by the ICJ. Understanding this dispute and how it reached the ICJ helps give context to the complex relationship between Bahrain and Qatar. This paper will explore how this dispute was not merely about two countries but finds its history intertwined with colonial interests, politics of oil and the goals of regional powers and international powers. The case dealt with the dispute over Hawar Islands, the fashts (shoals) of al-Jaradah and al-Dibal, territorial waters of the Persian Gulf and the district of Zubara. (Qatar v. Bahrain). This paper however, will mainly focus on the question of Hawar islands and Zubara.

A Historical Background

Qatar's claim to the Hawar islands stems from the proximity of the country to it. Bahrain on the other hand, claim on the fact that the Dowasir tribe was granted permission to settle in the region around 1800 by an appointee of the Bahraini government- the Qadi of Zubara. Qatar has contended this claim and accused Bahrain of never producing any evidence confirming the occurrence of such an event. The tribe continued to reside in the area well into the twentieth century and there was no habitation by Qatar until the 1930s. Bahrain chose to deploy a garrison of troops and started military exercises in the islands which made the case harder to solve with the help of Saudi diplomacy and mediation. (Reply of Qatar (Qatar v. Bahrain), 2001)

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Additionally, an understanding of the role that Britain played in this dispute is essential to understanding the final judgement and perceived settlement of the same. The British supported and recognized Qatar's Al-Thani's sovereignty over Zubara and prevented interference of Bahrain's Al-Khalifa in 1868. Qatar had started aligning its loyalties with the Ottoman Empire in the 1870s and received support in extending its authority over Zubara by the empire. What makes the claim of Qatar stronger is the fact that despite Britain's opposition towards Al-Thani's effort (as it saw this as an attempt of the Ottoman Empire to expand its authority), it did not allow Bahrain's Al-Khalifa's ruler from interfering in Zubara. This dedication to help Al-Thani secure sovereignty over the region was solidified in the 1913 Anglo-Ottoman Agreement. (Abdulla & Ibrahim, 1981)

In 1937, over 4000 men were sent by Abdullah Bin Jassim (Emir of Qatar) to crush the rising rebellion of the Naim tribe in the area whose loyalty lay with the Al Khalifah (the royal family of Bahrain) in Zubara. The tribe was taken over and they switched their loyalties towards Abdullah Bin Jasim. To this, Hamad Al Khalifah responded with an economic embargo on Qatar. On 23rd July 1937, Beirut's newspaper, Al Nida covered this exchange under the title "War declared between two Arabian States" (Roberts, David, & Bryn, 2013). This incident will be referred to as the "1937 conflict" further on in this paper.

The tribe of Zubara, Al-Naim, considered Zubara their homeland. The scarceness of the region was not an issue enough for them to migrate, they learnt how to make effective and efficient use of the scarce resources. More importantly, they did not avoid the developments happening in the region, they took advantage of their location to import goods including food. The tribe was not completely loyal to the ruler of Bahrain; due to an intratribal schism, the tribe split and one of its Sheikhs named Ramazin requested the Qatari ruler for support against Sheikh Rashid of the tribe in 1937. The ruler of Qatar took advantage of this split and extended his aid to Ramazin by acting against Radhid and his connections with Sheikh Hamad Al-Khalia. He influenced Ramazin's men to conspire against Rashid's followers and this led to a deeper divide within the tribe.

This conflict of 1937, however must be seen as more than the extension of an indigenous power conflict. It strengthened the role of Zubara as a border between the two gulf countries. In fact, the Al-Thani ruler initiated physical border practices which included surveillance and customs regimes, embargoes, bars and the use of force to separate the seminomadic Bedouin inhabitants of Zubara. (Springer, 2020)

This conflict also led the Sheikh of Qatar to build a fort as a symbolic gesture of claiming the land. This Fort of Zubara was more than just a building, located just a few hundred yards from the Al-Murair Fort, it was built as a response of Sheik Hamad Al-Khalifa's (of Bahrain) claim to the historical built landscape of Zubara. (British Library: India Office REcords and Private Papers, 1947). The builders went to the extent of using the remnants of the ruins to build the new fort. This structure may not have had the history but it compensated that with its building feature which were traditional and usage of local materials like limestone mud, juss and stones give it a highly indigenous feel and acted as the perfect symbol of the Al-Thani's claim of sovereignty over Zubara. This new but traditional and ancient looking fort served as a tool to carry out actions of modern states such as customs inspection and detainment of border crossers who did so illegally. (Birmingham Archeology, 2010)

Al Thani mentioned that fort was constructed as Sheikh Hamad had done the same by constructing his own fort in the Hawar islands. The construction of the Fort of Zubara is also important to study because of the implications it had on the regional stability of the region. For instance, in 1953, a few students had visited Zubara on a school trip. They decided to draw graffiti on the walls of the fort which said "Al-Bahrain". Qatar's Sheik Ali took this matter very seriously and saw it as a deep insult towards his father who had built the fort. Bahrain's Sheikh tried to dismiss it by calling the entire event just a prank played by the children but the Qatari government's way of handling the issue was perceived as an act of state aggression. (Schofield & Blake, 1988)

Assessing the different dispute resolution mechanism employed

This section will assess the role of different third parties in trying to resolve the territorial dispute between Bahrain and Qatar. It is necessary to clarify the difference between arbitration, mediation and litigation to understand this section better.

Arbitration is when a third party serves in the capacity of a judge to resolve the dispute, their decisions cannot be appealed. An arbitrator is one who holds a formal arbitration between two parties before passing a judgement; Britain in this case is referred to an arbiter (as opposed to an "arbitrator") because while its judgement remains binding and unappealable (like an arbitrator's would), it did not hold any formal session with the two parties to resolve their conflict.

Mediation involves a neutral third party helping the disputants to come on a resolution on their own accord. A mediator's decision is no way binding on the parties and this process is considered to be informal and friendly. In the case of the two Gulf countries, Saudi Arabia served as their mediator. Finally, on litigation, this type of dispute resolution the face-off between a defendant and a plaintiff in front of a judge (or a judge along with a jury). This option was sought by Qatar when it felt that the meditation sessions were not going in a desirable direction. In this case the International Court of Justice served as a judge. (Pon staff, 2020)

The Arbiter

The first arbitrator of these two gulf countries was Britain. Pirates based in Bahrain and Qatar were raiding British ships in the 1800s. This strategic position of Bahrain amidst the Persian Gulf's important trade routes invoked colonial interest in the country. The relationship between Britain and Bahrain grew to such an extent that an agreement between the British Political resident in the Gulf and the Chief of Bahrain restricted the Bahraini chief and his heirs from entering into any agreement with a power other than the British Government and stopped the entry of agents of other nationalities from entering terrain of Bahrain without the approval of the British.

Qatari tribes too had entered into agreements with Britain during the 1800s. However, Qatar aligned its interests with the Ottoman empire more than the Britishers in response to Bahrain's growing affinity with Britain. After the Ottoman's influence started diminishing the tribal leaders of Qatar started shifting their loyalties towards the British which resulted in more agreements being signed in 1913 and 1916 between the two and these agreements guaranteed the independence of Qatar and banned the influence of Bahrain in its territory. These agreements may not have dealt with land agreements in detail, but they did put Britain in a position to turn into the first arbiter to resolve the dispute.

It is pertinent to note the years and the nature of these agreements (between Qatar and Britain) as they become a relevant point of discussion during the case, which this paper will explore in the subsequent section.

Political loyalties were considered to be more important as compared to land in the 1800s, which is why both the countries were focusing on aligning themselves with a superpower. Hence, the territorial dispute between the two countries did not emerge out of nowhere or in a

vacuum, in fact, the reason the territorial dispute emerged was because of oil. The Bahraini Petroleum company discovered oil in May 1932, this made the regions which were previously not occupied, valuable. Soon enough, Qatar moved towards claiming Hawar islands and signed an oil concession in 1934. As mentioned earlier, Qatar tried to claim Zubara and remove Bahrain's hold over it. It was in 1939 that Britain put forward its decision to allow Bahrain to have Hawar islands under it but not have Zubarah. Qatar seemed to reluctantly agree as it could not challenge an arbiter's decision easily (as mentioned earlier) let alone afford to face the repercussions of aggressively protesting a colonial power with significant influence over the region. It did however lodge a formal protest in 1938 which will be discussed in the context of ICJ's judgement. This was how Britain exercised its role as an arbiter, the ICJ seems to have reinforced this decision in its ruling.

The constant usage of the word arbiter to refer to Britain becomes important as even the ICJ respects the authoritative position held by the colonial power and that in turn gives legitimacy and credibility to the agreements signed under its supervision and direction.

The Mediator

Saudi Arabia played the role of a mediator between the two gulf countries for around 10 years. It was able to do so because of the general tendency of gulf nations to opt against the option of third-party intervention from institutions or states that are not within the Arab region as well as Saudi Arabia's position as a major power in the region and the nation with the highest level of military and economic capabilities. The country's inclination towards keeping this dispute along with others "within" the Gulf region stemmed from two aspects: realism and Islamic law.

In brief, according to realism, states should prioritize their own interests such as protection of territory which is sovereign to it or maintaining power preponderance. Hence, this theory can explain Saudi Arabia's choice of personally overlooking the territorial dispute in question by the way of mediation as it did not have enough authority to act as an arbiter. This could have been a way to stop western mechanisms which brings us to the second aspect of Islamic Law. The trend of the ICJ ignoring Islamic law in its ruling makes the option of approaching it undesirable to an Islamic law state like Saudi Arabia. Islamic law prefers informal resolution procedures and believes that formalized legal adjudication brings about unwanted hatred and strains relationships whereas reconciliation brings them together. (Wiegand, 2014)

Saudi Arabia failed in resolving the dispute between the two nations as Qatar believed that it had a strong enough case to present in court which will be expanded on in the next section.

Analysing the International Court of Justice's judgement

Finally, the territorial dispute reached the International Court of Justice and the matter was settled for once and for all. This section will deal with the different rulings given out by the court such as that of its jurisdiction, the question of intent, maritime delimitation, specific judgements over Hawar islands and Zubara and then the relationship between Islamic law and international law as carried out by the ICJ in this dispute will be assessed.

On the question of "intent" during negotiations & jurisdiction

Other than the final ruling and the way in which the ICJ dealt with maritime delimitation in this case, the court's ruling on what constitutes an "international agreement" and when intent is formed. Qatar filed an application before the ICJ, it argued that the court had jurisdiction of this dispute based on two agreements between the parties in December 1987 and December 1990. Before coming to the court and in the process of resolving the issue outside of it, the two countries exchanged letters in 1987, which was accepted by the heads of the states but no action was taken was ever taken. A tripartite committee was created in 1987 with Bahrain, Qatar and Saudi Arabia, "for the purpose of approaching the ICJ and to satisfy the requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling which is binding upon both parties can be issued."

The meetings of the committee resulted in minutes which reasserted the process and gave the Saudi King a certain period of time to resolve the dispute, the failure of which would allow the dispute to go to the ICJ. The committee, despite meeting several times could not reach a resolution. In 1990, Qatar had accepted the Bahraini formula (Doha minutes) which was a request to the court to "Decide any matter of territorial right or title or interest which may be a matter of difference between their respective maritime areas of seabed, subsoil and suprajacent waters". The Doha minutes reaffirmed the previous understanding between the two parties that they will work along with Saudi Arabia until May 1991 after which the matter will be taken to the ICJ while conforming to the Bahraini formula. This step by Qatar of filing the application to the ICJ was opposed by Bahrain.

Hence, one of the main issues that arose in front of the court was if the exchange of letters between two countries and the minutes of meetings can create rights and obligations for the signatories. The Court ruled that it did and was binding in nature. Bahrain did not get behind this decision and argued that these minutes were simply a record of the meeting and not under the court's jurisdiction. The ICJ did not agree with this and there is precedence that supports this decision; the Vienna convention of laws and treaties states that international agreements can take many forms and this court has enforced this rule in the past. In this dispute the minutes of the meetings reaffirm the obligations of the countries that they had previously agreed to such as the agreement on allowing Saudi Arabia to find a resolution and indicating the involvement of the ICJ. The foreign minister of Bahrain asserted that there couldn't have been an agreement because he did not "intend" to get into one. The court countered this claim by stating that he did sign the documents in question which in turn created rights and obligations for his country. This case thus expanded the ICJ's power by enforcing the precedent which was set out in the Vienna Convention. (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2021)

On Hawar islands

The parties argued over six legal grounds on which sovereignty over Hawar Islands must depend, the Court only chose to deal with one, *res judicata*. *Res judicata* is a concept that is used in civil law and common law legal systems which states that if a final case for a judgement has been given, it is can no longer be subject to appeal.

Interestingly, in this case the court decided to treat Britain's decision of letting Bahrain occupy Hawar islands as a judgement which cannot be decided up on again. The decision in question was made on July 11th 1939 by the British government, the coloniser made this decision based on the exclusivity agreements it signed in 1892 and 1916 with the ruler of Bahrain and Qatar. The two rulers agreed to not communicate or have diplomatic communications with other powers or cede land to them. Here is where the aspect of oil politics discussed earlier becomes relevant and most prominent. A British oil company in 1928, had started negotiating with the ruler of Bahrain for concessions over the Bahraini land which was not allocated to it.

These negotiations stopped in 1933 but were brought alive with another oil company wanting to take a part in the bidding over receiving concession on the Hawara islands. This other oil company was enjoying concession over the land of Qatar and it turned to Britain to explain its

view on the matter of Hawar island's sovereignty. Britain "ruled" in favour of Bahrain after which its ruler decided that Bahrain would take occupation of the main part of the islands and he did so in May 1938. The ruler of Qatar did not like this move and in two years (May 1938) it lodged a formal protest with Britain. This launched a short series of claims and counter claims made by the British political agent in Bahrain and the ruler of Qatar. Great Britain felt that Qatar did not give any concrete evidence of why they should have claim over the islands and their assertion of sovereignty was bare in nature and not sufficient. Based on this, Britain reasserted its prior decision and gave a final answer of Hawar islands belonging to Bahrain. (Plant, Maritime Delimitation and Territorial Questions between Qatar and Bahrain)

On Zubarah

In deciding who Zubara belonged to, the court referred to the Anglo-Ottoman Convention of 1913 which confirmed the British recognition of Zubarah as a part of the sheikhdom of Qatar. The court was quite brief in its decision of granting the land to Qatar. The court observed and depended on the British acknowledgment of Qatar's authority over the territory and how it consolidated the land under it. This acknowledgment by the British was certainly formal as it was noted in treaties between the Ottoman Empire and Britain.

Brief reflection on the maritime delimitation aspect

The fact that the ICJ was able to resolve a dispute which had both territorial and maritime issues under it set a remarkable precedent to deal with cases with both these components. This was the first time that ICJ applied the equidistance method to a delimitation relating to adjacent coasts under customary law. Since neither of the countries were a party to the 1958 Geneva Conventions on the Law of the sea, Qatar was just a signatory of the 1982 UN Convention on the Law of the Sea (even though Bahrain ratified it), customary law was applied to this case. The approach taken by the ICJ was not that common in institutions carrying out international law and this may be why scholars may consider this case to be a landmark judgement when it comes to maritime delimitation. (Tanaka, 2003)

Islamic law and the Court's judgement

Countries which follow Islamic law tend to be weary of international law being used in a legally binding manner mainly because of how such mechanisms and institutions (like the ICJ) leave out Islamic law in its assessments. For instance, after studying 83 contentious cases that were

taken up by the ICJ from its establishment till 2006, it was observed that only two of these judgements mentioned Islamic law. This makes it difficult for such countries to agree to a binding judgement by an institution which is not inclusive of their laws. Hence, when it comes to this dispute as well, it is not surprising that the two Gulf countries only approached the ICJ after exhausting all their options. A major aspect that Islamic law deals with is the question of sovereignty and territoriality. It places the focus and importance on the people or inhabitants over the territory in question. This is in contrast to the traditional notion of sovereignty which is based on territory. (Wiegand, 2014) Tribal allegiance hence, becomes an important component to consider.

In the case of Bahrain vs Qatar, the judgement does not mention Islamic law nor was there much importance given to the choice of the inhabitants of the disputed lands. In fact, in one of its letters to the ICJ, Bahrain had mentioned how it had proposed holding a plebiscite among the Naim tribe to find out who they considered Zubara to be under, this was rejected by Qatar. (Bahrain to ICJ Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) This conversation does not come up again in the judgment and the option of a plebiscite is not explored in depth whatsoever. ICJ's decision to avoid concepts of Islamic law and to make a purely law decision based on "credible" legal documents made it turn towards treaties and agreements which were overlooked by a colonial entity time and again. Its decision of assigning Hawar islands to Bahrain and Zubara to Qatar is exactly in line with Britain's decision in these disputes.

However, it can be said that integrating Islamic law might have been more difficult in this case than it appears to be. Islamic law traditions have been developing over a long period of over a thousand years and according to some scholars its application can be difficult on states that are independent and don't run on the concept of personal sovereignty but territorial sovereignty. In this case especially, personal sovereignty would have become difficult to assess due to the ambiguous and fluid loyalties of the tribes involved as is mentioned in the first part of this paper. The Naim tribe initially supported the ruler of Bahrain as their ruler firmly but changed its stance after 1937. It cannot be guaranteed that they would not have been influenced by other factors in the future and maybe if the ICJ made their decision solely based on personal sovereignty, it might have worked out in the immediate future. However, if the tribes changed their stance again, that would undermine the decision of the court and it might have become easier to hinder its binding nature.

Conclusion

This case goes to show how important it is to contextualize the history of territorial disputes before passing any judgement on it. This dispute was not just about two countries being at loggerheads with each other over some pieces of land- multiple actors impacted this dispute. The conflict over oil concessions (in 1934) highlights how the question of sovereignty over the Hawar islands did not arise due on the prior claims of the rulers of Bahrain and Qatar or on the inhabitants of the region. It also raises the question that if these lands did not potentially foster oil, would this entire dispute have ever even taken place when it did or not. One way to look at it is that the British government simply had to split the land between two oil companies which belonged to its very own country. Had this not been the case and/or if there was no sign of the presence of oil in these regions, then would the British government have played such an active role and given clear and unambiguous judgements as it did or not? Because in this case, while Bahrain and Qatar had their vested interests in the disputed land, it is difficult to say that this would have been reason enough for the colonial power to interject.

Which would then mean that there would have been no formal agreements which are “binding” in nature. This would have significantly handicapped ICJ’s ability to give a legally sound decision. While this case is considered to be a landmark judgement and the court is applauded for its efforts, it still had to depend on colonial documents extensively. This hints at the fact that modern international dispute resolution mechanisms are highly dependent on the colonial frameworks that were set ages ago and are now outdated. Maybe it is time for the ICJ to start exploring methods through which it can incorporate regional laws (like Islamic law) or are more accommodative of a country’s history outside its colonial past. This can help the court in attracting more countries which face disputes surrounding sovereignty and build a more comprehensive legal framework for the world.

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