Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice
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CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN (QATAR *v.* BAHRAIN) (JURISDICTION AND ADMISSIBILITY)

Judgment of 1 July 1994

The Court delivered a Judgment in the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Ruda; Registrar Valencia-Ospina.

The operative paragraph of the Judgment reads as follows:

"41. For these reasons,

THE COURT,

(1) By 15 votes to 1,

Finds that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain dated 19 and 26 December 1987, and the document headed 'Minutes' and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, are international agreements creating rights and obligations for the Parties;

. . .

(2) By 15 votes to 1,

Finds that by the terms of those agreements 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 on 26 October 1988, and accepted by Qatar in December 1990, referred to in the 1990 Doha Minutes as the 'Bahraini formula';

. . .

(3) By 15 votes to 1,

Decides to afford the Parties the opportunity to submit to the Court the whole of the dispute;

. . .

(4) By 15 votes to 1,

Fixes 30 November 1994 as the time-limit within which the Parties are, jointly or separately, to take action to this end;

. . .

(5) By 15 votes to 1,

Reserves any other matters for subsequent decision."

Those who voted IN FAVOUR were: President Bedjaoui; Vice-President Schwebel; Judges Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Ruda; and

AGAINST: Judge Oda.

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Judge Shahabuddeen appended a declaration to the Judgment; Vice-President Schwebel and Judge *ad hoc* Valticos appended separate opinions; Judge Oda appended a dissenting opinion.

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History of the case
(paras. 1-14)

In its Judgment, the Court recalls that on 8 July 1991 the Minister for Foreign Affairs of the State of Qatar filed in the Registry of the Court an Application instituting proceedings against the State of Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

The Court then recites the history of the case. It recalls that in its Application Qatar founded the jurisdiction of the Court upon two agreements between the Parties stated to have been concluded in December 1987 and December 1990, respectively, the subject and scope of the commitment to jurisdiction being determined, according to the Applicant, by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990. Bahrain contested the basis of jurisdiction invoked by Qatar.

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The Court then refers to the different stages of the proceedings before it and to the submissions of the Parties.

Summary of the circumstances in which a solution to the dispute between Bahrain and Qatar has been sought over the past two decades
(paras. 15-20)

Endeavours to find a solution to the dispute took place in the context of a mediation, sometimes referred to as "good offices", beginning in 1976, by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar, which led, during a tripartite meeting in March 1983, to the approval of a set of "Principles for the Framework for Reaching a Settlement". The first of these principles specified that

> "All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together."

Then, in 1987, the King of Saudi Arabia sent the Amirs of Qatar and Bahrain letters in identical terms, in which he put forward new proposals. The Saudi proposals which were adopted by the two Heads of State included four points, the first of which was that

> "All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms."

The third provided for formation of a Tripartite Committee, composed of representatives of the States of Bahrain and Qatar and of the Kingdom of Saudi Arabia,

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued".

Then, in 1988, following an initiative by Saudi Arabia, the Heir Apparent of Bahrain, when on a visit to Qatar, transmitted to the Heir Apparent of Qatar a text (subsequently known as the *Bahraini formula*) which reads as follows:

> "*Question*
>
> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters."

The matter was again the subject of discussion two years later, on the occasion of the annual meeting of the Co-operation Council of Arab States of the Gulf at Doha in December 1990. Qatar then let it be known that it was ready to accept the Bahraini formula. The Minutes of the meeting which then took place stated that the two Parties had reaffirmed what was agreed previously between them; had agreed to continue the good offices of King Fahd of Saudi Arabia until May 1991; that after this period, the matter might be submitted to the International Court of Justice in accordance with the Bahraini formula, while Saudi Arabia's good offices would continue during the submission of the matter to arbitration; and that, should a brotherly solution acceptable to the two Parties be reached, the case would be withdrawn from arbitration.

The good offices of King Fahd did not lead to the desired outcome within the time-limit thus fixed, and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain.

According to Qatar, the two States "have made express commitments in the Agreements of December 1987 . . . and December 1990 . . . , to refer their disputes to the . . . Court". Qatar therefore considers that the Court has been enabled "to exercise jurisdiction to adjudicate upon those disputes" and, as a consequence, upon the Application of Qatar.

Bahrain maintains on the contrary that the 1990 Minutes do not constitute a legally binding instrument. It goes on to say that, in any event, the combined provisions of the 1987 exchanges of letters and of the 1990 Minutes were not such as to enable Qatar to seise the Court unilaterally and concludes that the Court lacks jurisdiction to deal with the Application of Qatar.

The nature of the exchanges of letters of 1987 and of the 1990 Doha Minutes
(paras. 21-30)

The Court begins by enquiring into the nature of the texts upon which Qatar relies before turning to an analysis of the content of those texts. It observes that the Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations, but that Bahrain maintains that the Minutes of 25 December 1990 were no more than a simple record of negotiations, similar in nature to the Minutes of the Tripartite Committee, and that accordingly they did not rank as an international agreement and could not, therefore, serve as a basis for the jurisdiction of the Court.

After examining the 1990 Minutes (see above), the Court observes that they are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.

Bahrain maintains that the signatories of the 1990 Minutes never intended to conclude an agreement of that kind. The Court does not, however, find it necessary to consider what might have been, in that regard, the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. Nor does it accept Bahrain's contention that the subsequent conduct of the Parties showed that they never considered the 1990 Minutes to be an agreement of this kind.

The content of the exchanges of letters of 1987 and of the 1990 Doha Minutes
(paras. 31-39)

Turning to an analysis of the content of these texts, and of the rights and obligations to which they give rise, the Court first observes that, by the exchanges of letters of December 1987 (see above), Bahrain and Qatar entered into an undertaking to refer all the disputed matters to the Court and to determine, with the assistance of Saudi Arabia (in the Tripartite Committee), the way in which the Court was to be seised in accordance with the undertaking thus given.

The question of the determination of the "disputed matters" was only settled by the Minutes of December 1990.

Those Minutes placed on record the fact that Qatar had finally accepted the Bahraini formula. Both Parties thus accepted that the Court, once seised, should decide "any matter of territorial right or other title or interest which may be a matter of difference between [the Parties]"; and should "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

The formula thus adopted determined the limits of the dispute with which the Court would be asked to deal. It was devised to circumscribe that dispute, but, whatever the manner of seisin, it left open the possibility for each of the Parties to present its own claims to the Court, within the framework thus fixed. However, while the Bahraini formula permitted the presentation of distinct claims by each of the Parties, it none the less presupposed that the whole of the dispute would be submitted to the Court.

The Court notes that at present it has before it solely an Application by Qatar setting out the particular claims of that State within the framework of the Bahraini formula. Article 40 of the Court's Statute provides that when cases are brought before the Court "the subject of the dispute and the parties shall be indicated". In the present case the identity of the parties presents no difficulty, but the subject of the dispute is another matter.

In the view of Bahrain, the Qatar Application comprises only some of the elements of the subject-matter intended to be comprised in the Bahraini formula and that was in effect acknowledged by Qatar.

The Court consequently decides to afford the Parties the opportunity to ensure the submission to the Court of the whole of the dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed. The Parties may do so by a joint act or by separate acts; the result should in any case be that the Court has before it "any matter of territorial right or other title or interest which may be a matter of difference between" the Parties, and a request that it "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

Declaration of Judge Shahabuddeen

My preference would have been for the issue of jurisdiction to be fully decided at this stage. I have, however, voted for the Judgment, understanding the intent to be to offer to the Parties an opportunity, which merits acceptance, to submit the whole of the dispute to the Court. The reasons for the preference are accordingly not set out.

Separate opinion of Vice-President Schwebel

Vice-President Schwebel, who voted for the operative paragraphs of the Judgment as "unobjectionable", described the Judgment as novel and disquieting. It lacked an essential quality of a judgment of this or any court: it did not adjudge the principal issues submitted to it. It was a commanding feature of the practice of the Court that its judgments disposed of the submissions of the parties, but this Judgment failed to do so, because it neither upheld nor declined jurisdiction. Vice-President Schwebel questioned whether the judicial function is served by such an innovation.

Separate opinion of Judge Valticos

In his separate opinion, Judge Valticos took the view that the case in hand was confused and that it was not really clear whether the two States had agreed to refer their dispute to the Court or whether their agreement had also related to the subject of the dispute and the method of seisin. One could, of course, accept that an agreement was reached but, as regards the Minutes of the Doha meeting, it was couched in ambiguous terms. There was, in particular, a problem relating to the Arabic term "*al-tarafan*" used in that connection by the Parties.

In any case, the Court should only proceed to deal with the merits of the present case if both States were to seise it of their disputes, whether jointly or separately, and in accordance with the formula which has been accepted by them and which provides that each State is to submit to the Court the questions with which it would like the Court to deal.

Dissenting opinion of Judge Oda

Judge Oda finds himself unable to vote in favour of the present Judgment, as it transforms the unilateral Application by Qatar into a unilateral filing of an agreement which is found to have been improperly drafted. In his view, the Court should rather have determined whether it had jurisdiction to entertain that unilateral Application. The Court now appears—for the first time in its history—to render an interlocutory judgment. Judge Oda maintains, however, that it cannot take this course without first having settled the jurisdictional issue. What will happen if the Parties do not "take action" to submit the whole of the dispute to the Court? Will either or both Parties be considered not to have complied with the present Judgment; or will the Court simply decide to discontinue the present case, which has already been entered in the General List and of which it will assume that it has been seised? It seems to Judge Oda that the Court is simply making a gesture of issuing an invitation, in the guise of a Judgment, to the Parties to proceed to the submission of a new case independently of the present Application.

The question in the present case is whether the "1987 Agreement" or the "1990 Agreement" is of the nature of "treaties and conventions in force" within the meaning of Article 36 (1) of the Statute, i.e., whether they contain a compromissory clause. After an examination of the nature and contents of the 1987 and 1990 documents, Judge Oda comes to the conclusion that neither Agreement falls within this category.

What were Qatar and Bahrain then trying to achieve in the negotiations by endorsing those documents?

After examining the negotiations which had been going on for more than two decades, Judge Oda concludes that if any mutual understanding was reached between Qatar and Bahrain in December 1987, it was simply an agreement to form a Tripartite Committee, which was to facilitate the drafting of a *special agreement*; he further concludes that the Tripartite Committee was unable to produce an agreed draft of a special agreement; and that the Parties in signing the Minutes of the Doha meeting agreed that reference to the International Court of Justice was to be an alternative to Saudi Arabia's good offices, which did not, however, imply any authorization such as to permit one Party to make an approach to the Court by unilateral application, ignoring "what was agreed previously between the two parties", that is to say, the drafting of a special agreement in accordance with the Bahraini formula.

In conclusion, Judge Oda is confident that neither the "1987 Agreement" nor the "1990 Agreement" can be deemed to constitute a basis for the jurisdiction of the Court in the event of a unilateral application under Article 38 (1) of the Rules of Court and that the Court is not empowered to exercise jurisdiction in respect of the relevant disputes unless they are jointly referred to the Court by a special agreement under Article 39 (1) of the Rules of Court which, in his view, has not occurred in this case. The Court has none the less opted for the role of conciliator instead of finding, as he believes it ought to have done, that it lacks jurisdiction to entertain the Application filed by Qatar on 8 July 1991.