

QATAR V. BAHRAIN

A Case Summary for the
Maritime Dispute Resolution Project
Round II



U.S.-ASIA LAW INSTITUTE
NEW YORK UNIVERSITY SCHOOL OF LAW

Maritime Dispute Resolution Project

Maritime Delimitation and Territorial
Questions between Qatar and Bahrain
(*Qatar v. Bahrain*)

Case Summary*



A research project of the
U.S.-Asia Law Institute

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Project Overview

This case summary was prepared as part of the U.S.-Asia Law Institute's Maritime Dispute Resolution Project. The institute began the project in 2018 in order to better understand the circumstances in which interstate maritime disputes are successfully resolved and distill lessons for governments.

The two main questions the project seeks to answer are:

- When are international institutional dispute resolution mechanisms effective in resolving maritime disputes?
- What insights can be applied to the maritime disputes in East Asia?

To address these questions, leading international lawyers and legal scholars held workshops to analyze selected disputes from around the world. This and other case studies were prepared for the workshops and are based on the official records.

Citation:

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Jurisdiction and Admissibility, 1994 I.C.J. Rep. 112 (July 1); Jurisdiction and Admissibility, 1995 I.C.J. Rep. 6 (Feb. 15); Judgment, 2001 I.C.J. Rep. 40 (Mar. 16).

Section I – Summary of the Case

The case between Qatar and Bahrain involved a longstanding territorial sovereignty and maritime boundary dispute between the two gulf neighbors. Central to the question of sovereignty was a 1939 decision by the British government, which at the time considered both Qatar and Bahrain British “protected states,” that the Hawar Islands¹ belonged to Bahrain. Qatar protested that decision for decades, including after its status as a British protected state ended in 1971. The two sides sought to mediate the dispute under the good offices of the Kingdom of Saudi Arabia beginning in 1976. After those mediation efforts failed, Qatar instituted proceedings before the International Court of Justice in 1991, submitting to the court the whole of the dispute and asking it to “draw a single maritime boundary between their respective areas of seabed, subsoil and superjacent waters.”²

After a lengthy jurisdictional phase, the court issued its merits judgment, awarding sovereignty over the Hawar Islands to Bahrain, and over Zubarah³ and Janan Island,⁴ including Hadd Janan, to Qatar. The court’s sovereignty determinations factored

¹ The Hawar Islands are located approximately 10 nautical miles (nm) to the southeast of the main island of Bahrain, and in the immediate vicinity of the central part of the west coast of the Qatar peninsula.

² Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, para. 33 (hereinafter “*Qatar v. Bahrain*”).

³ An area on the northwest side of the Qatar Peninsula.

⁴ A small uninhabited island and shoal located south of the Hawar Islands and close to the coast of Qatar.

The maritime boundary established by the court consists of 42 turning points that delimit the territorial sea as well as the exclusive economic zone (EEZ) and continental shelf of the two sides. Within the territorial sea, the court constructed an equidistance line, giving full effect to islands on both sides (with one exception) but disregarding the presence of low-tide elevations within the area of overlapping 12 nm territorial sea entitlements. Beyond the territorial sea, the court provisionally drew an equidistance line, and then adjusted that line to disregard the presence of a feature that, had it been included, would have in the court's assessment led to an inequitable result. The southern terminus is where the boundary intersects with the delimitation line between the maritime zones of Saudi Arabia on the one hand and of Bahrain and Qatar on the other. The northern terminus is where the boundary intersects with the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

Section II – Summary of Key Substantive Issues

After founding its jurisdiction on several “agreements” (exchanges of letters) concluded during the efforts to mediate the dispute under the good offices of the Kingdom of Saudi Arabia, the court addressed competing sovereignty claims over the Hawar Islands and several other features, as discussed below. The court then delimited a single, all-purpose maritime boundary delimiting the territorial sea, EEZ, and continental shelf of the two states. In the course of delimiting the maritime boundary, the court evaluated whether low-tide elevations should be treated with reference to the rules of international law governing territorial acquisition, as well as Bahrain's arguments concerning the applicability of article 7 (straight baselines) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to its coastal geography, or its ability to assimilate itself to an archipelagic state for purposes of establishing archipelagic baselines under article 47. Because Bahrain is a party

to the UNCLOS, but Qatar is not, the court noted that customary international law governed these issues.

This case study will briefly review the parties' arguments and the court's determinations on jurisdiction and sovereignty before turning to the issues of maritime boundary delimitation.

1. Jurisdiction

Qatar invoked as the basis for the court's jurisdiction several exchanges of letters between the king of Saudi Arabia and the amir of Qatar, and between the king of Saudi Arabia and the amir of Bahrain, as well as a document signed by the ministers for foreign affairs of Bahrain, Qatar, and Saudi Arabia in the course of their mediation efforts under the good offices of the Kingdom of Saudi Arabia. Qatar argued that these exchanges of letters constituted international agreements and represented the parties' consent to the court's jurisdiction over the entire dispute according to a formula proposed by Bahrain to Qatar on October 26, 1988 and accepted by Qatar in December 1990 (the Bahraini formula), which read as follows:

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.⁵

During the jurisdictional phase, Qatar argued that the exchange of letters constituted "express commitments" by the two sides to refer their disputes to the court, and that the court was therefore

⁵ Qatar v. Bahrain, Jurisdiction and Admissibility Judgment, 1994 I.C.J. Rep. 112, para. 18.

empowered to exercise jurisdiction to adjudicate the dispute.⁶ Bahrain argued that the exchanges did not constitute a legally binding instrument, and that the court lacked jurisdiction to adjudicate the dispute absent its consent.⁷

The court sided with Qatar, finding that the exchanges of letters were international agreements creating rights and obligations for the parties, and that under the terms of those agreements, the parties had undertaken to submit to the court the whole of the dispute between them, as circumscribed by the Bahraini formula.⁸

2. Sovereignty

At the core of the dispute were competing sovereignty claims over the (i) Hawar Islands, (ii) Janan Island, and (iii) Zubarah. Although the sovereignty dispute had a lengthy and complex history, central to it was a 1939 decision of the British government that the Hawar Islands belonged to Bahrain. Qatar protested that decision for decades and contested its validity in the merits proceedings before the court.

(i) *Hawar Islands*

Qatar invoked in support of its claimed sovereignty over the Hawar Islands the importance of proximity and territorial unity, given that most of the Hawar Islands fell within 3 nm of Qatar's coast and all

⁶ *Id.* para. 20.

⁷ *Id.*

⁸ *Id.* para. 41.

of them fell within 12 nm.⁹ Qatar also contested the validity of the 1939 decision of the British government, claiming that it had not consented to the process that led to that decision.¹⁰

Bahrain rejected the significance of geographic proximity and maintained that such proximity could not deprive Bahrain of title it had exercised over the Hawar Islands since the eighteenth century.¹¹ Bahrain also relied on the 1939 decision of the British government, which it argued should be regarded as a binding arbitral award, or, alternatively, a binding political decision.¹²

The court concluded that although the 1939 decision should not be regarded as a binding arbitral award, Bahrain and Qatar had entrusted the British government with making a decision on the Hawar Islands, and that decision was in turn binding on the parties.¹³ In light of this conclusion, the court found it unnecessary to address the parties' other arguments (not addressed above) regarding the existence of an original title, *effectivités*, or the applicability of the principle of *uti possidetis juris*.¹⁴

⁹ Qatar v. Bahrain, *supra* note 2, para. 99.

¹⁰ *Id.* para. 106.

¹¹ *Id.* para. 100.

¹² *Id.* para. 103.

¹³ *Id.* paras. 139-146.

¹⁴ *Id.* para. 148.

(ii) *Janan Island*

With regard to Janan Island, which lies south of the Hawar Islands near the coast of Qatar, Bahrain argued that the 1939 decision extended to Janan as part of the Hawar Islands. The court rejected Bahrain's argument, finding instead that the 1939 decision supported Qatar's sovereignty over Janan Island, including Hadd Janan.¹⁵

(iii) *Zubarah*

With regard to Zubarah, situated in the northwestern part of the Qatar peninsula, the court found in favor of Qatar, noting that the sheikh of Qatar gradually consolidated authority over it beginning in 1868, that this authority was acknowledged in a 1913 Anglo-Ottoman Convention, and that it was "definitively established" in 1937. The court further noted that, contrary to Bahrain's arguments, Great Britain had not regarded Zubarah as belonging to Bahrain.¹⁶

3. Maritime Boundary

Qatar asked the court to delimit a single, all-purpose maritime boundary "between their respective maritime areas of seabed, subsoil and superjacent water."¹⁷ By the time the court reached the maritime boundary issues, however, aspects of both sides' maritime boundary positions had been negated by the court's resolution of one or more sovereignty claims in favor of the other side. This

¹⁵ *Id.* para. 165.

¹⁶ *Id.* paras. 86-97.

¹⁷ *Id.* para. 168.

naturally follows from the principle of “the land dominates the sea,” leading the court to start largely from scratch in deciding the approach to be followed for delimiting the maritime boundary. The court decided to address the maritime boundary in two sectors: (1) the southern part of the delimitation area, where the coasts of the parties are opposite each other and where the distance between them is no more than 24 nm; and (2) the northern part of the delimitation area, where the coasts of the two states are “comparable to adjacent coasts” and where the court’s task was to delimit the EEZ and continental shelf boundary.¹⁸ The court noted at the outset that because Bahrain is a party to the UNCLOS but Qatar is not, the delimitation of their maritime boundary would be governed by customary international law.¹⁹

(1) Territorial Sea Boundary

The parties and the court all agreed that article 15 of the UNCLOS reflects the applicable customary international law governing the delimitation of the territorial sea, which the court referred to as the “equidistance/special circumstances” rule.²⁰ Since neither party had specified baselines for measuring the breadth of the territorial sea, the court first sought to determine the location of baseline points to be used in the construction of an equidistance line.

Qatar had argued that for purposes of this delimitation, the court should use baseline points on the two countries’ mainland coasts, with Qatar and the Hawar Islands on one side and Bahrain’s main island of al-Awal, together with al-Muharraq and Sitrah, on the

¹⁸ *Id.* paras. 169.

¹⁹ *Id.* para. 167.

²⁰ *Id.* para. 231.

other.²¹ Qatar also advocated use of the high-water line rather than the low-water line for the construction of an equidistance line, noting that the low-water line used for the normal baseline need not be used in the construction of a maritime boundary.²²

Bahrain sought to enclose its outermost islands within a system of baselines, arguing that it is a “*de facto* archipelagic State,” and that as a result it is entitled to draw baselines in line with article 47 of the convention.²³ Bahrain also advocated for the use of the low-water line, rather than the high-water line. Finally, Bahrain sought to assert a sovereignty claim over Qit’at Jaradah (the tidal status of which was contested) and Fasht ad Dibal (a low-tide elevation) arguing that it had “displayed its authority” in various ways over both features for a long period of time.²⁴ Qatar argued that both features were low-tide elevations and were not subject to rules of territorial acquisition.

The court upheld Bahrain’s sovereignty claim over Qit’at Jaradah, which it concluded was above water at high tide,²⁵ but questioned whether similar rules (governing territorial acquisition) could be applied to low-tide elevations. The court observed that “[i]t is...not established that...low-tide elevations can, from the viewpoint of

²¹ *Id.* para. 179.

²² *Id.*

²³ *Id.* paras. 180-181.

²⁴ *Id.* para. 196.

²⁵ The Court concluded that Qit’at Jaradah is “a very small island situated within the 12-mile limit of both States.” *Id.* para. 197.

the acquisition of sovereignty, be fully assimilated with islands or other land territory.”²⁶

Because Fasht ad Dibal and other low-tide elevations were located within an area of overlapping territorial seas, and either party could in principle use them as relevant baseline points, the court concluded that for purposes of drawing the equidistance line, such low-tide elevations “must be disregarded.”²⁷

In response to Bahrain’s arguments that it was entitled, as a multiple-island state, to connect its outermost islands and low-tide elevations using the method of straight (or archipelagic) baselines, the court observed:

[T]he method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily either that the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.²⁸

Since the geography of Bahrain’s coastline does not meet the geographic criteria set forth in article 7 of the UNCLOS, the court concluded that Bahrain was not entitled to draw straight baselines.²⁹ The court further rejected Bahrain’s argument that it could

²⁶ *Id.* para. 206.

²⁷ *Id.* para. 209.

²⁸ *Id.* para. 212 (emphasis added).

²⁹ *Id.* paras. 213-215.

assimilate itself to an archipelagic state for purposes of drawing archipelagic baselines.³⁰

The court then turned to whether any special circumstances made it necessary to adjust the provisionally drawn equidistance line.³¹

(i) *Fasht al Azm*

The court first looked at whether Fasht al Azm, an extensive area of drying shoals reaching east from the main Bahraini islands about halfway to Qatar, should be regarded as a freestanding low-tide elevation or a low-water feature connected to Bahrain's island of Sitrah. Rather than answering that question, the court simply determined that Fasht al Azm should not be factored into the construction of the boundary line, because, if it were, it would place the boundary "disproportionately close to Qatar's mainland coast" or otherwise result in an "inappropriate delimitation line."³²

(ii) *Qit'at Jaradah*

The court then looked at whether Qit'at Jaradah, a small uninhabited Bahraini island, should be used for the construction of the boundary. The court noted that the "tiny island" lies about midway between the main island of Bahrain and the Qatar peninsula, and thus using it would result in an "insignificant maritime feature" having a "disproportionate effect."³³

³⁰ *Id.* para. 213.

³¹ *Id.* para. 217.

³² *Id.* para. 218.

³³ *Id.* para. 219.

Finally, the court determined it would be appropriate to simplify the delimitation line “in accordance with common practice”³⁴ in the region of the Hawar Islands, but failed to specify the technical approach used to accomplish that task.

The resulting delimitation line gave full effect to a number of small islands in the Hawar Islands, with all of the maritime space between Bahrain’s main islands and the Hawar Islands falling on Bahrain’s side of the maritime boundary. This left only a shallow, narrow channel between the boundary line and Qatar’s coast. The court emphasized that, since Bahrain is not entitled to use straight baselines, Qatari vessels, like the vessels of all states, enjoy the right of innocent passage in the areas of territorial sea lying between the Hawar Islands and Bahrain’s main islands.

(2) EEZ and Continental Shelf Boundary

The court described its approach for delimiting the EEZ and continental shelf as “closely interrelated” to the rules governing the delimitation of the territorial sea,³⁵ and described its task as to first provisionally draw an equidistance line and then consider whether any circumstances are present that justify making adjustments to that line.³⁶ The court considered whether several arguments advanced by the parties presented the type of circumstance that might lead to the adjustment of the equidistance line in order to produce an equitable result:

³⁴ *Id.* para. 221.

³⁵ *Id.* para. 231.

³⁶ *Id.* para. 230.

- The court rejected Bahrain’s argument that certain pearl fishing banks north of Qatar, traditionally used by pearl divers from Bahrain, should alter the location of the maritime boundary in Bahrain’s favor.³⁷
- The court rejected Qatar’s argument that a 1947 decision of the British government dividing rights to the seabed between the two sides for oil concession purposes had any direct relevance to the delimitation of the maritime boundary.³⁸
- The court also rejected Qatar’s argument that the disparity in relevant coastal lengths should be taken into account as a special or relevant circumstance, which Qatar argued should lead to an adjustment of the boundary line in Qatar’s favor.³⁹

The only circumstance that the court *did* conclude necessitated an adjustment to the provisionally drawn equidistance line was the presence of Fasht al Jarim, a sizable maritime feature partly situated in Bahrain’s territorial sea. The court described the feature as a “remote projection of Bahrain’s coastline in the Gulf area, which, if given full effect, would ‘distort the boundary and have disproportionate effects.’ ”⁴⁰ The court went on to note that using this feature “would not lead to an equitable solution” and that it

³⁷ *Id.* para. 236.

³⁸ *Id.* para. 240.

³⁹ *Id.* para. 243. Note that Qatar made this argument on the assumption that it, and not Bahrain, had sovereignty over the Hawar Islands.

⁴⁰ *Id.* para. 247 (quoting *Delimitation of the Continental Shelf (Fr. v. U.K.)*, 18 R.I.A.A. 3, 114, para. 244).

should therefore have no effect in determining the boundary line in the northern sector.⁴¹

Section III – Implementation of the Tribunal’s Decision

It appears overall that the two sides have not contested the court’s decision on sovereignty over any of the features in question or on the location of the maritime boundary, notwithstanding rhetoric apparently used by Bahrain’s state news agency in the context of the broader Gulf crisis in 2017.⁴²

For its part, Qatar deposited a list of coordinates with the United Nations in 2016 and an enclosed illustrative map that depicts the maritime boundary between Qatar and Bahrain as established by the court as the outer limit of Qatar’s maritime zones in relevant areas.⁴³

Section IV – Conclusions

Overall, the case stands as a successful example of dispute settlement by adjudication of an extraordinarily complex,

⁴¹ *Id.* para. 248.

⁴² *See* Bahrain re-opens border dispute with Qatar, Al Jazeera (Nov. 5, 2017), <https://www.aljazeera.com/news/2017/11/bahrain-opens-border-dispute-qatar-171105062102281.html>.

⁴³ U.N. Div. for Ocean Aff. and the Law of the Sea, Deposit by the State of Qatar of a list of Geographical Coordinates of Points, Pursuant to Article 16, Paragraph 2 of the Convention, M.Z.N.125.2017.LOS (Feb. 13, 2017), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATE_FILES/QAT.htm.

historically fraught, and longstanding territorial and maritime dispute between two neighbors. A decision of this scope was only possible because the entirety of the dispute was submitted to the court, since, pursuant to the principle of “the land dominates the sea,” the maritime boundary could not be resolved without first determining which party had sovereignty over, and was therefore entitled to claim maritime zones from, various contested features. Because the parties argued their territorial sovereignty and maritime boundary positions simultaneously, and because each side’s boundary position rested heavily on its sovereignty claims, the boundary ultimately delimited by the court departed substantially from either side’s proposed boundary line.

In terms of its significance for the development of the law of maritime boundary delimitation, the court’s judgment seemed to affirm the court’s inclination to favor equidistance (or “adjusted equidistance”) both within and beyond the territorial sea, and with respect to both opposite and adjacent coasts, accounting for, and giving full effect to, nearly all of the small offshore features. In the context of the coastal geography of the two states, however, and in particular the proximity of small features that the court awarded to Bahrain to Qatar’s coast, it is perhaps open to debate whether the court should have considered enclaving small features in the Hawar Islands or giving them lesser effect.

The court also made two observations that were significant not only for the law of maritime boundary delimitation, but also for the international law of the sea more broadly:

- With regard to baselines, the court affirmed that article 7 straight baselines are an exception to the rule reflected in article 5 (normal baselines) and should be applied restrictively. It follows that for a non-archipelagic state, unless its coastal geography meets one of the two geographic

criteria set forth in article 7 (namely, that it is deeply indented and cut into or has a fringe of islands along the coast in its immediate vicinity), and meets the other requirements set forth in article 7, its baseline is the low-water line along the coast, as provided in article 5.

- With regard to low-tide elevations, the court declined to evaluate them with reference to the rules of international law governing the acquisition of territory. This served as a foundation for the court's 2008 conclusion in the *Malaysia v. Singapore* case that sovereignty over a low-tide elevation within the overlapping territorial seas of two states belongs to the state in the territorial sea of which it is located.⁴⁴

While the court's judgment did contribute in some significant ways as noted above, it failed to provide any real clarity about what criteria should be used to evaluate whether use of a particular feature or baseline point would produce a disproportionate effect such that it should be disregarded in the construction of a maritime boundary. The court's analysis offered little in the way of generally applicable guidance that could be carried forward in other maritime boundary contexts.

From a technical perspective, the court also failed to provide a technical report identifying relevant basepoints used in the construction of the maritime boundary and failed to specify how it approached the task of simplifying the adjusted equidistance line.

⁴⁴ Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), 2008 I.C.J. Rep. 12, paras. 295-299 (May 23).



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