

private-actor-initiated dispute settlement under the auspices of NAFTA and ICSID (International Centre for the Settlement of Investment Disputes), where private actors are drawing on compulsory enforcement provisions to adjudicate disputes with foreign governments. Chapter 6's case studies are more controversial, and they generate less compliance, perhaps because they are self-binding, constraining rather than extending the power of the central state.

II. INTERSTATE DISPUTE SETTLEMENT IN ACTION

Chapter 3 showed that the Middle East and Asia tend to avoid committing to compulsory IC jurisdiction. Russia is a member of regional ICs and in 2013 it joined the WTO, meanwhile Bahrain and Qatar only accept the jurisdiction of the World Trade Organization. Concern about IC's compulsory jurisdiction does not mean, however, that countries are entirely adverse to international adjudication. This section discusses two long-standing interstate disputes where IC involvement led to meaningful changes in state behavior and a settlement of the conflict at hand. In the "Qatar v. Bahrain territorial dispute," the government of Bahrain initially contested the ICJ's assertion of jurisdiction so that Qatar's decision to approach the ICJ appeared to escalate the conflict. The "Japan v. Russia seizing of vessels" case study shows that ICs can create tailored solutions within their limited grants of jurisdiction. The changes induced by IC involvement clearly left both governments better off, and thus the immediate compliance with the IC rulings is neither unexpected nor surprising. These cases are strong illustrations of the interstate arbiter conception of how ICs influence political outcomes. Section III will briefly discuss two more ICJ cases involving the United States and Iran which did not garner compliance.

5.1. "Qatar v. Bahrain territorial dispute"—*International Court of Justice resolves a territorial dispute, which facilitates regional economic development*

The Hawar Islands are located 1.4 kilometers from the Qatar coast, and almost 20 kilometres from Bahrain. Geography notwithstanding, Bahrain asserted ownership over these islands and over Janan, which is so close to Qatar that at low tide one can walk to the islands. Bahrain also claimed ownership over Zubarah, which is actually on Qatar's land mass. With the Hawar Islands part of Bahrain, the government could claim gas and oil located in the territorial waters of both countries. Supporting Bahrain's claim was the fact that its leaders had been able to extract British promises regarding the disputed islands. The ICJ's solution split the dif-

ference, awarding each side some of the disputed lands, generating an outcome that was not all that different from the decision created by colonial Britain. The passage of time, the carefully crafted compromise, and the sense that the ICJ was the most neutral arbiter for the case allowed the ICJ to create a resolution that had eluded both the British and Saudi Arabia. There are many excellent legal analyses of the ruling;¹⁴ this case study focuses instead on how the ICJ was able to resolve a long-standing dispute that had eluded resolution by others.

The first question to address is how Bahrain came to have a legally legitimate claim over land that was much closer to Qatar? Britain became involved in the Persian Gulf region in the 1800s because pirates based in Qatar and Bahrain were plundering British ships. What is today known as Bahrain attracted colonial attention because of its strategic location along important trade routes in the Persian Gulf. Bahrain's reserves of fresh water also attracted interest from powerful families in the region. Bahraini tribal leaders saw agreements with the British as a way to secure their claims over the territory. The Preliminary Treaty for Maritime Peace of 1820 was the first agreement between Britain and Bahraini tribal leaders. Continuing wars led Bahrain to bind itself even closer to the British, essentially ceding sovereignty to British rule. The 1892 Exclusive Protection Agreement between the Chief of Bahrain and the British Political Resident in the Gulf stipulated that neither the Bahraini chief nor his heirs were to enter into agreement or communication "with any other power other than the British Government." This agreement also stipulated that agents from other countries could not enter Bahraini terrain without British approval.¹⁵ These agreements are how Britain came to generate documents justifying Bahraini land claims.

Qatar had a less attractive geography, and thus it generated less interest from the British or from Qatar's neighbors. Under duress, the tribes governing Qatar had also entered into agreements with British powers in the 1800s. Qatar's agreements promised to maintain maritime peace and pay tribute to Bahrain. The more Bahrain turned to the United Kingdom for support, the more Qatar's Al Thani family turned to the Ottoman Empire for backing, to the point that tribal leaders allowed a Turkish garrison in Doha. Meanwhile, to escape taxes the Na'im tribe living near Zubarah in the north of what is today Qatar appealed to Bahrain's leaders for help. Responding to their pleas, Bahrain claimed control over Zubarah, and the Na'im tribe then immigrated to Bahrain, leaving the territory unoccupied. When Ottoman influence declined in the early

14 See, for example, Tanaka (2003). There is an entire book about this case (Al-Arayed 2003).

15 (Burgis 2005, 561).

1900s, Qatar's tribal leaders signed more agreements with the British (in 1913 and 1916) guaranteeing Qatar's independence and banning Bahraini influence in its territory. Although none of these agreements addressed specific land claims, because of these various agreements Britain became the first arbiter for the Bahrain-Qatar dispute.

In the 1800s, political loyalties were more important than land. The territorial disagreements could thus persist without provoking violence. But in May 1932, the Bahraini Petroleum Company discovered oil, at which point the unoccupied land became valuable. Qatar's leader claimed the Hawar Islands, signing an oil concession in 1934. This agreement led Bahrain to establish a military outpost on the largest Hawar island and to reassert its authority over the deserted town of Zubarah. Qatar fought back, ejecting Bahrain from Zubarah. The skirmish led to British intervention to adjudicate their territorial dispute. In a 1939 decision, Britain found that Bahrain had rights over the Hawar Islands but not over Zubarah. Qatar had agreed in advance to abide by the decision, but it remained unhappy with the outcome. Britain then sent clarifying letters to the leaders of both countries, which left open the question of whether the Janan Islands could be seen as part of the Hawar Islands as well as questions about certain reefs located to the north of Qatar.

In the 1950s and 1960s, leaders in both Qatar and Bahrain sought to develop their regions. British rule over the Persian Gulf kept the peace, but Qatar continued to complain about Bahrain's claims to the disputed lands. In 1971 Britain withdrew its protectorate and new nation-states were created. At this point, the contested land claims once again flared. Over the next twenty years, Saudi Arabia tried to keep the peace. Leaders of Bahrain and Qatar continued to claim interference in each other's affairs, and Qatar continued to question the validity of Britain's 1939 settlement of the territorial dispute. Saudi Arabia succeeded in quelling the periodic violent escalations that occurred as each country sought to assert its authority over contested islands, but it too was unable to resolve the underlying territorial disagreement. Meanwhile, in 1981 the United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar, and Kuwait established the Gulf Cooperation Council to promote mutual interests in the region.

After another skirmish in 1986, Qatar, Bahrain, and Saudi Arabia agreed to let the Gulf Cooperation Council try to resolve the dispute. Qatar by then wanted to bring its territorial claim to the ICJ, but Bahrain continued to insist that the Gulf Cooperation Council handle the issue. Saudi Arabia crafted a compromise; if no "brotherly solution" could be reached by May 1991, the case would go to the ICJ. The compromise defined which aspects of the disagreement would be referred to the ICJ,

an arrangement known as the “Bahraini formula,” to which Qatar at first balked but later reluctantly assented.¹⁶ When the stated deadline to resolve the disagreement passed, Qatar decided to unilaterally pursue the case at the ICJ. Qatar’s application raised only the issues that the Qatari leadership wanted the ICJ to resolve. Bahrain accused Qatar of violating the Bahraini formula. Bahrain’s leaders wanted the Gulf Cooperation Council to continue to mediate the issue, and they insisted that Qatar withdraw its ICJ complaint as a precondition to working with the Gulf Cooperation Council. Qatar refused to withdraw the suit, insisting that it would only work with the Council if an agreement could be promised. Given the stalemate, at first it looked like Qatar’s filing the dispute in front of the ICJ made the conflict even more difficult to resolve.¹⁷

The case arrived at the ICJ in July 1991. Bahrain immediately filed two letters contesting the ICJ’s jurisdiction in the case since it had not agreed to have the dispute adjudicated. After much back and forth, in July 1994 the ICJ ruled that the minutes of the Gulf Cooperation Council meetings constituted an international agreement to bring the controversy to the ICJ if no solution could be reached by the specified date.¹⁸ The ICJ agreed with Bahrain that Qatar’s list of contested issues was incomplete, essentially insisting on the Bahraini formula that allowed it to issue a ruling on the whole of the contested claims.

In 1995, the son of Qatar’s then leader initiated a bloodless coup and seized control from his father. In this way, one of the leaders entrenched in the controversy ended up removed from negotiations. In 1996, Bahrain accepted the ICJ’s jurisdiction in the case although the Bahraini leadership continued to insist that the issue would be best resolved through the Gulf Cooperation Council, and at times Bahraini leaders threatened to boycott ICJ proceedings. Eventually, however, both parties prepared to bring the entire case to the ICJ.

The merits phase of the proceedings took another five years. The specific promises regarding the contested Hawar and Janan Islands, and Bahrain’s claims over Zubarah, were hard to sort out, especially because each side assembled a jumble of historical documents and put on the table every possible claim they could use, invoking at times conflicting legal arguments.¹⁹ Also complicating the litigation were submission of forged documents by Qatari officials. During these five years, the governments of the two countries continued to provoke each other in ways that

16 (Burgis 2005, 563; Evans 1995, 691–92).

17 (Fry 2010, 53).

18 ICJ, “Qatar v. Bahrain territorial dispute.”

19 (Burgis 2005, 572–84).

undermined regional development and greater political cooperation.²⁰ The Gulf Cooperation Council convinced Qatar to withdraw the forged documents, but leaders in both countries repeatedly rejected solutions to the dispute suggested by the Council. As the political mediation process continued without any real progress, the legal suit wound its way through the ICJ.

In 1999, the leader of Bahrain died and his son assumed office. The two regional leaders most entrenched in the dispute were now gone from office. Crown Prince Harnad immediately instituted political reforms, and in December 1999 the new leaders of Qatar and Bahrain established a Joint Higher Committee for Cooperation. The territorial disagreements, however, continued and partisans committed to the conflicting ownership claims still held sway in each country. In mid-May of 2000, only days before the ICJ's oral proceedings were set to convene, negotiations mediated by the United Arab Emirates and Saudi Arabia once again collapsed. Following this failure, the Qatari and Bahraini governments decided to wait for the ICJ ruling before proceeding with greater cooperation.

Public hearings before the ICJ began in May 2000, nearly ten years after Qatar first filed its case. At this point, adjudication proceeded with fewer accusations or efforts to undermine the process. It helped that the legal process has its own rhythm. Where mediators sought compromises that both sides could endorse, judges simply proceeded through each step of the litigation process. The ICJ issued its ruling ten months after oral proceedings. The ruling included a number of split decisions speaking to different aspects of the territorial disagreement. The complicated ruling essentially gave each side part of what it wanted, without deeply upsetting the status quo the British had created in 1939.

Both parties immediately embraced the ruling, declaring the day following the judgment a national holiday to celebrate the end of the dispute and the beginning of better relations between the countries. Bahrain quickly invited foreign companies to begin oil exploration in the Hawar Islands, without the sort of protest from Qatar that would have been expected a few weeks earlier.²¹ The Hawar Islands now has Bahraini tourist resorts, Zubarah's historic fort is now a Qatari tourist site, and Bah-

20 For example, in 1995 the Bahraini government announced its provocative decision to establish a tourist resort on the Hawar Islands, while continuing to criticize Qatar for taking the disagreement outside of the region instead of relying on "brotherly" arbitration. Qatar accused Bahrain of interfering in its internal affairs by encouraging a coup. As the vitriol escalated, Saudi Arabia, the United Arab Emirates, Oman, and Kuwait repeatedly tried to craft compromises via the Gulf Cooperation Council.

21 (Paulson 2004, 454). *The Bahrain-Qatar Border Dispute: The World Court Decision: Part 2, The Estimate*, April 6, 2011. <http://www.theestimate.com/public/032301.html>, last visited December 15, 2011.

rain and Qatar have planned to build the world's largest bridge to connect the two countries. All is not perfect in this relationship. The bridge project is perennially delayed (which may be because of the bridge's high costs). And more recently Qatar has started to use force against Bahraini fishermen in its waters, acting in ways some see as signaling deeper disagreements over policy in the region.²² But the basic territorial dispute appears to be resolved.

Why was the ICJ able to create a resolution of territorial dispute that neither Britain nor regional leaders could resolve? The change in Bahraini and Qatari leadership certainly helped, but the ICJ also was advantaged in that it did not need to rely on political mediation. Britain had been able to impose compromises in the past, but British solutions were always suspect because of historic biases toward the leaders of Bahrain and because of Britain's clear self-interest in regional oil reserves. Because Qatar's leadership never accepted as legitimate the British solution of 1939, the dispute continued. Meanwhile, according to Michelle Burgis, the Gulf Cooperation Council contained leaders with too many historic grievances and crosscutting relationships for any solution offered to be seen as neutral.²³ The first Gulf War, triggered by the Iraqi invasion of Kuwait, only made it harder for the Gulf Cooperation Council to be a helpful mediator. Compromises the Council suggested became tainted by other disagreements, and since both sides needed to agree to any compromise, the Gulf Cooperation Council process could be easily blocked. By contrast, ICJ judges could issue a binding compromise under the guise of a legal solution. And it was likely easier for the new leaders to have a solution imposed.

Some have questioned whether the ICJ could have resolved the dispute if the Court had found that the Hawar Islands belonged to Qatar. The Bahraini government is on record insisting that it would not accept any ruling against its claims to the Hawar Islands.²⁴ But it is also true that there was no clearer competing "legal" solution to choose. The disputed lands lay within both countries' exclusive economic zones, and the British government had the best records of promises made, which made it hard for the ICJ to reach any law-based conclusion that did not heavily favor

22 In May 2010, Qatari coast guards injured a Bahraini fisherman. There have been more arrests, although incidents are sporadic, suggesting that actions are meant to send a signal to Bahrain and other members of the Gulf Cooperation Council. See David B. Roberts, "Rhetoric and Fishermen Belay the Myth of GCC Unity," June 25, 2010, <http://www.thedailynewsegypt.com/global-views/rhetoric-and-fishermen-belay-the-myth-of-gcc-unity-dp3.html>, last visited March 14, 2012.

23 (Burgis 2005, 584).

24 Bahraini dissident Sa'id al-Shihabi argued, "Had the judgment gone the other way, it would have had disastrous consequences" because the islands constitute a third of Bahrain's total land claim, and they justify Bahrain's claim to be an archipelago that includes the islands (Paulson 2004, 545).

the written record Bahrain had built through cooperation with its colonial patron. Thus it is possible that the politically convenient outcome was also the most plausible legal outcome.

5.2. *“Japan v. Russia seizing of vessels”—International Tribunal for the Law of the Sea assures fair treatment of Japanese vessels seized for illegal actions in Russian waters (Tomimaru and Hoshinmaru cases)*

Governments generally support the United Nations Third Law of the Sea Convention (UNCLOS III) as a way to secure access to the sea and end the practice of individual states extending territorial claims. Although UNCLOS III sets clear limits to future territorial claims in the oceans, the agreement leaves many overlapping territorial claims unresolved.²⁵ Countries with extensive coasts were concerned about the International Tribunal for the Law of the Sea (ITLOS) being invoked to challenge territorial claims involving overlapping and historic ocean rights. To overcome disagreement, governments were allowed to designate among four possible means to resolve disputes involving the key provisions of the convention, with arbitration being the default choice when parties have not both selected the same dispute adjudication mechanism.²⁶ This compromise leaves ITLOS, the legal body overseeing the Law of the Sea Convention, with a Swiss cheese jurisdiction. ITLOS has exclusive and mandatory jurisdiction regarding disputes involving the International Seabed Authority, and mandatory jurisdiction with respect to disputes involving the seizing of vessels.²⁷ But governments were able to file objections to the ITLOS jurisdiction for certain disputes, and they can refuse to adjudicate territorial claims.²⁸

This case study concerns two disputes where Japanese fishing vessels were impounded for violating Russian licensing rules. The interaction

25 (Oxman 2001, 285–86).

26 Article 287 of the UNCLOS III Law of the Sea Convention.

27 There is no clear statement indicating state consent to the ITLOS compulsory jurisdiction for such cases, but legal scholars tend to see ITLOS jurisdiction as compulsory (Oxman 2001, 280, n. 14; Seymore 2006, 15–18; Tuerk 2007, 304).

28 Countries may file special “Article 298” statements that explicitly reject adjudication of specified issues. Russia explicitly accepted ITLOS jurisdiction for disputes involving the seizing of vessels, but its Article 298 declaration asserts limits on ITLOS jurisdiction: “The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.”