

Tensions Between Iraq and Kuwait over the Khor Abdullah Channel

Written by Jamie Trinidad

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JAMIE TRINIDAD, FEB 20 2024

The fate of a bilateral agreement on maritime navigation rights in the Khor Abdullah channel, which separates southern Iraq from northern Kuwait, has been cast into doubt by a decision of the Federal Supreme Court of Iraq (see here for an English summary). The Court ruled in September 2023 that the Iraqi national law ratifying the 2012 agreement with Kuwait was unconstitutional because it did not receive the necessary support of a two-thirds majority in Iraq's Council of Representatives. The decision represents a setback for relations between Iraq and Kuwait, with potentially broader geopolitical ramifications.

The Khor Abdullah channel is a narrow, shallow estuary that serves as the gateway for most of Iraq's trade (including its substantial oil exports). It has long been the focal point for Iraqi grievances over the country's severely restricted access to the Persian Gulf – a geographic predicament that has been likened to a 'big garage with a very small door.' The mouth of the estuary is the site of two major infrastructural projects. On the southern side, on Kuwait's Bubiyan Island, is the Mubarak Al Kabeer port development, a Kuwaiti-Chinese project which is part of the Belt and Road Initiative. On the northern side of the channel lies Iraq's Grand Faw Port development, planned to be the largest port in the Middle East.

The 2012 agreement was a significant step forward for Iraq-Kuwait relations, which had already warmed considerably since the 1990-91 Gulf War. A report of the UN Iraq-Kuwait Boundary Demarcation Commission, endorsed by the UN Security Council when settling the border between the two countries in 1993, recommended that the waters of the Khor Abdullah be divided along a median line up to a point in the mouth of the estuary (point 162 on the UN map), but it failed to deal adequately with the contentious issue of navigation rights. By establishing a predictable regulatory regime based on cooperation in this constrained and geopolitically sensitive waterway, the Khor Abdullah agreement has undoubtedly helped to preserve peaceful relations between Iraq and Kuwait. However, it is unpopular with many Iraqis, especially in the south of the country, where there is substantial support for the idea that the whole of the Khor Abdullah channel should be under Iraqi sovereignty.

Faced with accusations that Iraq has made excessive concessions to Kuwait, the Iraqi government has become increasingly assertive when responding to Kuwaiti activities in the channel, even when they are confined to Kuwait's territorial waters. This has resulted, for instance, in a tense exchange of letters to the UN Security Council in 2019, regarding the construction by Kuwait of a platform on Fisht Al Eij, a natural formation near the mouth of the channel on the Kuwaiti side of the median line.

Despite such difficulties, neither government has openly questioned the validity of the Khor Abdullah agreement since it entered into force. Early in 2023 it even seemed like the parties were making political and technical progress towards a complete delimitation of their maritime boundaries beyond point 162 on the UN map.

The stalling of these talks in the wake of the Iraqi Supreme Court's decision suits Iran, whose own entitlements in the Persian Gulf depend, in part, on the location of its (still undelimited) maritime boundaries with Iraq and Kuwait. For example, Iran's claim over the eastern section of the lucrative Durra/Arash gas field rests on an expansive projection of its maritime boundary with Kuwait. The Iranian government objected strongly when Kuwait entered into a

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memorandum of understanding with Saudi Arabia in 2022 for the joint and exclusive exploitation of the gas field. Iran will therefore be pleased that the decision of the Iraqi Supreme Court has helped to amplify voices calling for a revival of Iraq's maximalist sovereignty claim in the Khor Abdullah. A westward shift in the Iraq-Kuwait boundary would reduce Kuwait's entitlement in the rest of the Gulf, including vis-à-vis Iran.

One prominent figure opposed to the existing boundary was a plaintiff in the court case, Saud al-Saadi, who sits in the Council of Representatives as part of the Hoquq bloc, a movement affiliated with the Iran-backed militia Kata'ib Hezbollah. Hoquq parliamentarians have argued that the Iraqi government should now place the court decision before the UN. Al-Saadi has even called for further legal action that would result in a rejection of the Iraq-Kuwait boundary established by UN Security Council resolution 833 in 1993. Such comments align conveniently with Tehran's wider agenda.

Reacting cautiously to the Supreme Court's decision, Iraqi Prime Minister Mohammed Shia' al-Sudani said his country wants a solution that is compatible with its constitution and with international law. The obvious way to square this circle would be to lay a new ratification law before the Iraqi Council of Representatives, but the lack of action in this respect indicates that the Iraqi government believes it would fall short of the two-thirds majority needed for the adoption of such legislation.

Kuwait, together with its Gulf Cooperation Council allies and the US have called on the Iraqi government 'to expeditiously resolve the domestic legal status of the [Khor Abdullah agreement]' and 'to ensure that it remains in force.' There is strong political pressure on Iraq to heed such calls, which are supported by well-established principles of international law.

The Khor Abdullah agreement is a binding treaty, which has been deposited with the UN Secretariat in accordance with Article 102 of the UN Charter. As a matter of international treaty law, the declared unconstitutionality of the Iraqi ratification law does not invalidate the 2012 agreement, contrary to what al-Saadi and the other plaintiff in the proceedings, Raed Hamdan al-Maliki, have suggested (here and here). It is also noteworthy that, for the time being, the Iraqi government has not said or done anything to undermine the agreement's validity and continuance in force.

Even if Iraq wanted to evade its existing treaty obligations by arguing that its consent was obtained in violation of a provision of its internal law, this is not normally allowed under international law. The only exception is when the violation 'was manifest and concerned a rule of its internal law of fundamental importance' (Article 46(1) Vienna Convention on the Law of Treaties (VCLT)). A constitutional rule stipulating that international agreements must be approved by a two-thirds majority in the legislature could be described as a 'law of fundamental importance.' However, for a violation to be 'manifest' it needs to be 'objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith' (Article 46(2) VCLT).

It was not objectively evident that there was a constitutional defect with Iraq's ratification when the Khor Abdullah agreement was concluded. On the contrary, the trigger for the agreement's entry into force on 5 December 2013 was an 'exchange of written notifications confirming completion by each party of its internal legal requirements' (under Article 16 of the agreement).

When Nigeria argued that it was not bound by an international agreement with Cameroon because it had not been properly ratified under Nigerian law, the International Court of Justice (ICJ) held that the violation of internal law had not been 'manifest' in the sense of Article 46(2) of the VCLT, in part because it had not been 'properly publicized' (*Cameroon v. Nigeria* ICJ Rep [2002] para 265). The ICJ added (at para 266) that 'there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States'. It follows that, when Iraq notified Kuwait in 2013 that it had completed its internal legal requirements for bringing the Khor Abdullah agreement into effect, Kuwait was entitled to take this notification at face value and in good faith.

In *Cameroon v. Nigeria* it was particularly difficult for Nigeria to show that the violation of its internal law had been 'manifest' because the agreement was signed by its Head of State. Holders of that office are among the small group

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of officials considered to represent the state '[i]n virtue of their functions and without having to produce full powers' (Article 7[2] VCLT). The Iraqi Transport Minister who signed the Khor Abdullah agreement was not in this exclusive category, but it would be wrong to suggest (as one former Iraqi Minister has done) that this undermines the validity of the agreement. The then Transport Minister, Hadi al-Amiri, was authorised to sign the agreement on Iraq's behalf. In any event, the constitutional validity of his signature was not questioned by the Iraqi Supreme Court in its decision – only the ratification process was deemed to be unconstitutional.

Article 14 of the Khor Abdullah agreement requires the parties to settle any dispute regarding the 'interpretation or application' of the agreement 'amicably between them by consultation', failing which 'the dispute shall be referred to the International Tribunal for the Law of the Sea.' However, when examining the public statements of Iraqi and Kuwaiti government officials since the Supreme Court decision was handed down, it is difficult to discern the existence of a dispute, let alone one regarding the 'interpretation or application' of the agreement.

It appears that neither party wishes to see the agreement collapse. The Iraqi government has adopted an ambiguous stance regarding the possible legal effects of the Supreme Court's decision, but this is understandable. It cannot dismiss the ruling as irrelevant for fear of sparking a domestic crisis, and it cannot seek to abrogate the Khor Abdullah agreement for fear of igniting an international one. It is stuck between a rock and a hard place.

The Iraqi Foreign Minister, Fuad Hussein, has committed to 'dialogue' and 'negotiation' as a means of resolving the 'problems' generated by the Supreme Court's decision. This is an essential starting point, but given Iraq's current dilemma it is difficult to see how a negotiation focused specifically on the question of the Khor Abdullah agreement could lead to a mutually acceptable outcome. It would be sensible for the parties to wrap the issue into the broader negotiation regarding the delimitation of the Iraq-Kuwait maritime boundary (beyond point 162) and ancillary matters.

The situation is ripe for the appointment of an independent mediator, ideally a third state with whom both parties maintain good relations. Apart from helping to frame the issues and steer the negotiations, the involvement of a mediator could provide the parties with valuable political cover. For instance, if the Iraqi government can be persuaded to uphold the fragile status quo in the Khor Abdullah channel, it will have to deal with internal criticism that it is running roughshod over the Iraqi constitution and caving into Kuwaiti and American demands. A tough compromise may be an easier sell if it is presented as an endorsement of the recommendation of a trusted third party.

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