MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN (QATAR *v.* BAHRAIN) (MERITS)

Judgment of 16 March 2001

In its Judgment on the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), the Court: unanimously found that Qatar has sovereignty over Zubarah; found by twelve votes to five that Bahrain has sovereignty over the Hawar Islands; unanimously recalled that vessels of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law; found by thirteen votes to four that Qatar has sovereignty over Janan Island, including Hadd Janan; found by twelve votes to five that Bahrain has sovereignty over the island of Qit'at Jaradah; unanimously found that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of Qatar; decided by thirteen votes to four that the single maritime boundary that divides the various maritime zones of Qatar and Bahrain shall be drawn as indicated in paragraph 250 of the Judgment.

In this latter paragraph, the Court listed the coordinates of the points that have to be joined, in a specified order, by geodesic lines in order to form the following single maritime boundary:

- in the southern part, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary follows a north-easterly direction, then immediately turns in an easterly direction, after which it passes between Jazirat Hawar and Janan; it subsequently turns to the north and passes between the Hawar Islands and the Qatar peninsula and continues in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge et de Qit'at ash Shajarah on the Qatari side; finally it passes between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side (see paragraph 222 of the Judgment);
- in the northern part, the single maritime boundary is formed by a line which, from a point situated to the north-west of Fasht ad Dibal, meets the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary then follows this adjusted equidistance line until it meets the delimitation between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other (see paragraph 249 of the Judgment).

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Torres Bernárdez, Fortier; Registrar Couvreur.

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The full text of the operative paragraph of the Judgment reads as follows:

"252. For these reasons,

THE COURT,

(1) Unanimously,

Finds that the State of Qatar has sovereignty over Zubarah;

(2) (*a*) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the Hawar Islands;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin; Judge ad hoc Torres Bernárdez;

(*b*) Unanimously,

Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law;

(3) By thirteen votes to four,

Finds that the State of Qatar has sovereignty over Janan Island, including Hadd Janan;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Torres Bernárdez;

AGAINST: Judges Oda, Higgins, Kooijmans; Judge ad hoc Fortier;

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(4) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the island of Qit'at Jaradah;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin; Judge ad hoc Torres Bernárdez;

(5) Unanimously,

Finds that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of the State of Qatar;

(6) By thirteen votes to four,

Decides that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in paragraph 250 of the present Judgment;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma; Judge ad hoc Torres Bernárdez.

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Judge Oda appended a separate opinion to the Judgment. Judges Bedjaoui, Ranjeva and Koroma appended a joint dissenting opinion to the Judgment. Judges Herczegh, Vereshchetin and Higgins appended declarations to the Judgment. Judges Parra-Aranguren, Kooijmans and Al-Khasawneh appended separate opinions to the Judgment. Judge ad hoc Torres Bernárdez appended a dissenting opinion to the Judgment. Judge ad hoc Fortier appended a separate opinion to the Judgment.

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History of the proceedings and submissions of the Parties
(paras. 1-34)

On 8 July 1991 Qatar filed in the Registry of the Court an Application instituting proceedings against 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". In this Application, Qatar contended that the Court had jurisdiction to entertain the dispute by virtue of two "agreements" concluded between the Parties in December 1987 and December 1990 respectively, the subject and scope of the commitment to the Court's 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 (hereinafter referred to as the "Bahraini formula"). By letters of 14 July and 18 August 1991, Bahrain contested the basis of jurisdiction invoked by Qatar.

By a Judgment of 1 July 1994, the Court found that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar of 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain of 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, were international agreements creating rights and obligations for the Parties; and that, by 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. Having noted that it had before it only an Application from Qatar setting out that State's specific claims in connection with that formula, the Court decided to afford the Parties the opportunity to submit to it the whole of the dispute. After each of the Parties had filed a document on the question within the time limit fixed, the Court, by a Judgment of 15 February 1995, found that it had jurisdiction to adjudicate upon the dispute between Qatar and Bahrain which had been submitted to it; that it was now seized of the whole of the dispute; and that the Application of the State of Qatar as formulated on 30 November 1994 was admissible.

In the course of the written proceedings on the merits, Bahrain challenged the authenticity of 82 documents produced by Qatar as annexed to its pleadings. Each of the Parties submitted a number of expert reports on the issue; the Court made several Orders. By its last Order on the issue, of 17 February 1999, the Court, taking into account the concordant views of the Parties on the treatment of the disputed documents and their agreement on the extension of time limits for the filing of Replies, placed on record the decision of Qatar to disregard, for the purposes of the present case, the 82 documents whose authenticity had been challenged by Bahrain, and decided that the Replies would not rely on those documents. Following the filing of those Replies, the Court decided to permit the Parties to file supplemental documents. Public hearings were held from 29 May to 29 June 2000.

The final submissions as presented by each of the Parties at the conclusion of those hearings were as follows:

On behalf of the Government of Qatar,

"The State of Qatar respectfully requests the Court, rejecting all contrary claims and submissions:

I. To adjudge and declare in accordance with international law:

A. (1) That the State of Qatar has sovereignty over the Hawar islands;

(2) That Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty;

B. (1) That the State of Bahrain has no sovereignty over the island of Janan;

(2) That the State of Bahrain has no sovereignty over Zubarah;

(3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

II. To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain on the basis that Zubarah, the Hawar islands and the island of Janan appertain to the State of Qatar and not to the State of Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51°05'54" E and 27°02'47" N), thence proceeding in a southerly direction up to BLV (50°57'30" E and 26°33'35" N), then following the line of the British decision of 23 December 1947 up to NSLB (50°49'48" E and 26°21'24" N) and up to point L (50°43'00" E and 25°47'27" N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50°31'45" E and 25°35'38" N)."

On behalf of the Government of Bahrain,

"*Having regard* to the facts and arguments set forth in Bahrain's Memorial, Counter-Memorial, and Reply, and in the present hearings;

May it please the Court, rejecting all contrary claims and submissions, to adjudge and declare that:

1. Bahrain is sovereign over Zubarah.

2. Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.

3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qit'at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain's Memorial."

[For the delimitation lines proposed by each of the Parties, see sketch-map No. 2 of the Judgment, which is attached.]

Geographical setting
(para. 35)

The Court notes that the State of Qatar and the State of Bahrain are both located in the southern part of the Arabian/Persian Gulf (hereinafter referred to as "the Gulf"), almost halfway between the mouth of the Shatt al Arab, to the north-west, and the Strait of Hormuz, at the Gulf's eastern end, to the north of Oman. The mainland to the west and south of the main island of Bahrain and to the south of the Qatar peninsula is part of the Kingdom of Saudi Arabia. The mainland on the northern shore of the Gulf is part of Iran. The Qatar peninsula projects northward into the Gulf, on the west from the bay called Dawhat Salwah, and on the east from the region lying to the south of Khor al-Udaid. The capital of the State of Qatar, Doha, is situated on the eastern coast of the peninsula.

Bahrain is composed of a number of islands, islets and shoals situated off the eastern and western coasts of its main island, which is also called al-Awal Island. The capital of the State of Bahrain, Manama, is situated in the north-eastern part of al-Awal Island. Zubarah is located on the north-west coast of the Qatar peninsula, opposite the main island of Bahrain.

The Hawar Islands are located in the immediate vicinity of the central part of the west coast of the Qatar peninsula, to the south-east of the main island of Bahrain and at a distance of approximately 10 nautical miles from the latter.

Janan is located off the south-western tip of Hawar Island proper.

Fasht ad Dibal and Qit'at Jaradah are two maritime features located off the north-western coast of the Qatar peninsula and to the north-east of the main island of Bahrain.

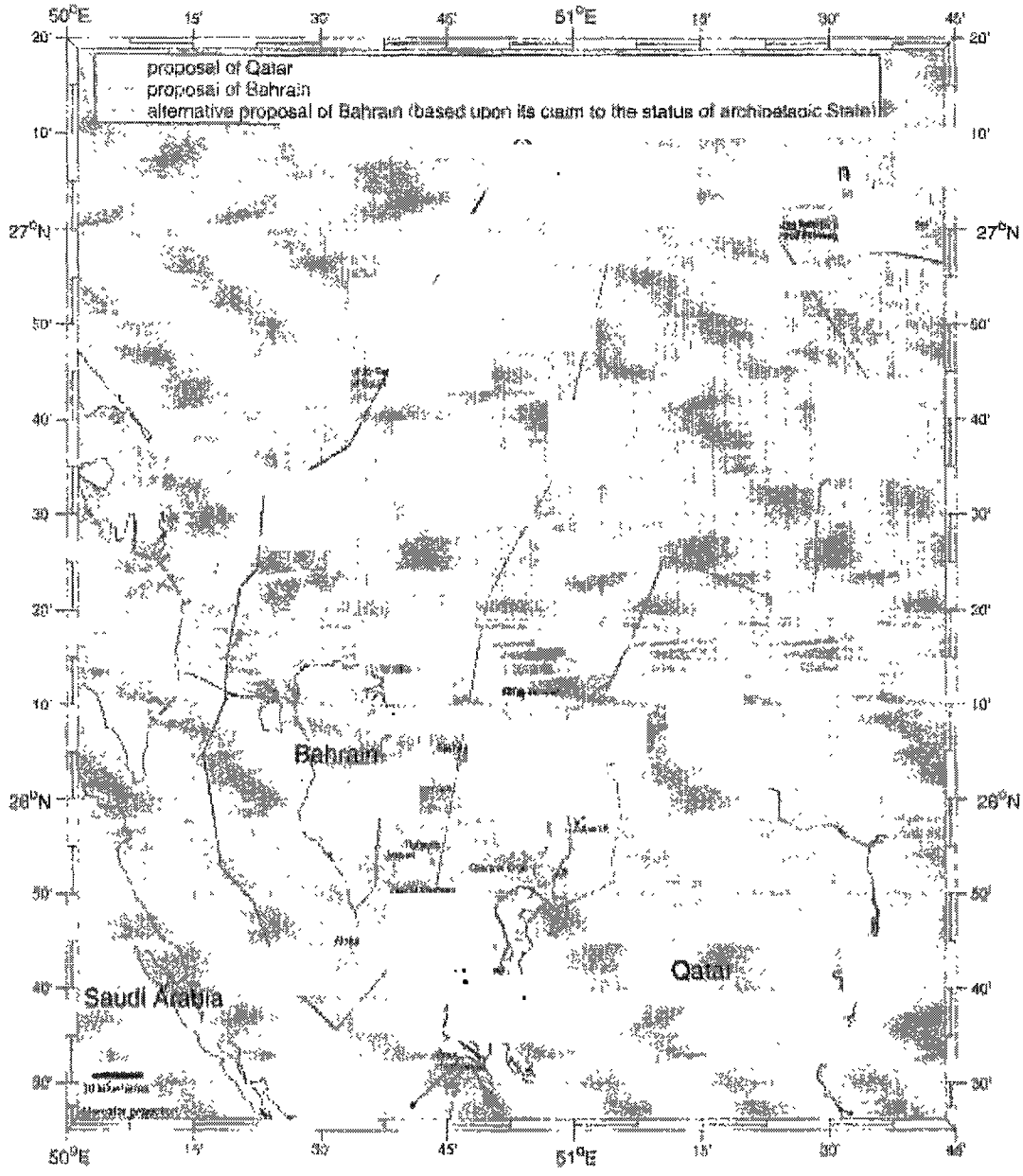
Historical context
(paras. 36-69)

The Court then gives a brief account of the complex history which forms the background to the dispute between the Parties (only parts of which are referred to below).

Navigation in the Gulf was traditionally in the hands of the inhabitants of the region. From the beginning of the sixteenth century, European powers began to show interest in the area, which lay along one of the trading routes with India. Portugal's virtual monopoly of trade was not challenged until the beginning of the seventeenth century. Great Britain was then anxious to consolidate its presence in the Gulf to protect the growing commercial interests of the East India Company.

Between 1797 and 1819 Great Britain despatched numerous punitive expeditions in response to acts of plunder and piracy by Arab tribes led by the Qawasim against British and local ships. In 1819, Great Britain took control of Ras al Khaimah, headquarters of the Qawasim, and signed separate agreements with the various sheikhs of the region. These sheikhs undertook to enter into a General Treaty of Peace. By this Treaty, signed in January 1820, these sheikhs and chiefs undertook on behalf of themselves and their subjects inter alia to abstain for the future from plunder and piracy. It was only towards the end of the nineteenth century that Great Britain would adopt a general policy of protection in the Gulf, concluding "exclusive agreements" with most sheikhdoms, including those of Bahrain, Abu Dhabi, Sharjah and Dubai. Representation of British interests in the region was entrusted to a British Political Resident in the Gulf, installed in Bushire (Persia), to whom British Political Agents were subsequently subordinated in various sheikhdoms with which Great Britain had concluded agreements.

SKETCH-MAP No. 2
Lines proposed by Qatar and Bahrain



This sketch-map, on which maritime features are shown in simplified form, has been prepared for illustrative purposes only.
It is without prejudice to the nature of certain of these features.
Sources: Submissions of the Parties; Exercise of Qatar, Vol. 17, Map 34; Memorial of Bahrain, Vol. 5, Maps 10, 11, 13 and 18.

On 31 May 1861 the British Government signed a "Perpetual treaty of peace and friendship" with Sheikh Mahomed bin Khalifah, referred to in the treaty as independent Ruler of Bahrain. Under this treaty, Bahrain undertook inter alia to refrain from all maritime aggression of every description, while Great Britain undertook to provide Bahrain with the necessary support in the maintenance of security of its possessions against aggression. There was no provision in this treaty defining the extent of these possessions.

Following hostilities on the Qatar peninsula in 1867, the British Political Resident in the Gulf approached Sheikh Ali bin Khalifah, Chief of Bahrain, and Sheikh Mohamed Al-Thani, Chief of Qatar, and, on 6 and 12 September 1868

respectively, occasioned each to sign an agreement with Great Britain. By these agreements, the Chief of Bahrain recognized inter alia that certain acts of piracy had been committed by Mahomed bin Khalifah, his predecessor, and, "[i]n view of preserving the peace at sea, and precluding the occurrence of further disturbance and in order to keep the Political Resident informed of what happens", he promised to appoint an agent with the Political Resident; for his part, the Chief of Qatar undertook inter alia to return to and reside peacefully in Doha, not to put to sea with hostile intention, and, in the event of disputes or misunderstanding arising, invariably to refer to the Political Resident. According to Bahrain, the "events of 1867-1868" demonstrate that Qatar was not independent from Bahrain. According to Qatar, on the contrary, the 1868 Agreements formally recognized for the first time the separate identity of Qatar.

While Great Britain had become the dominant maritime Power in the Gulf by this time, the Ottoman Empire, for its part, had re-established its authority over extensive areas of the land on the southern side of the Gulf. In the years following the arrival of the Ottomans on the Qatar peninsula, Great Britain further increased its influence over Bahrain. On 29 July 1913, an Anglo-Ottoman "Convention relating to the Persian Gulf and surrounding territories" was signed, but it was never ratified. Section II of this Convention dealt with Qatar. Article 11 described the course of the line which, according to the agreement between the parties, was to separate the Ottoman *Sanjak* of Nejd from the "peninsula of al-Qatar". Qatar points out that the Ottomans and the British had also signed, on 9 March 1914, a treaty concerning the frontiers of Aden, which was ratified that same year and whose Article III provided that the line separating Qatar from the *Sanjak* of Nejd would be "in accordance with Article 11 of the Anglo-Ottoman Convention of 29 July 1913 relating to the Persian Gulf and the surrounding territories". Under a treaty concluded on 3 November 1916 between Great Britain and the Sheikh of Qatar, the Sheikh of Qatar bound himself inter alia not to "have relations nor correspond with, nor receive the agent of, any other Power without the consent of the High British Government"; nor, without such consent, to cede to any other Power or its subjects, land; nor, without such consent, to grant any monopolies or concessions. In return, the British Government undertook to protect the Sheikh of Qatar and to grant its "good offices" should the Sheikh or his subjects be assailed by land within the territories of Qatar. There was no provision in this treaty defining the extent of those territories.

On 29 April 1936 the representative of Petroleum Concessions Ltd. wrote to the British India Office, which had responsibility for relations with the protected States in the Gulf, drawing its attention to a Qatar oil concession of 17 May 1935 and observing that the Ruler of Bahrain, in his negotiations with Petroleum Concessions Ltd., had laid claim to Hawar; he accordingly enquired to which of the two Sheikhdoms (Bahrain or Qatar) Hawar belonged. On 14 July 1936, Petroleum Concessions Ltd. was informed by the India Office that it appeared to the British Government that Hawar belonged to the Sheikh of Bahrain. The content of those communications was not conveyed to the Sheikh of Qatar.

In 1937, Qatar attempted to impose taxation on the Naim tribe inhabiting the Zubarah region; Bahrain opposed this as it claimed rights over this region. Relations between Qatar and Bahrain deteriorated. Negotiations between the two States started in spring of 1937 and were broken off in July of that year.

Qatar alleges that Bahrain clandestinely and illegally occupied the Hawar Islands in 1937. Bahrain maintains that its Ruler was simply performing legitimate acts of continuing administration in his own territory. By a letter dated 10 May 1938, the Ruler of Qatar protested to the British Government against what he called "the irregular action taken by Bahrain against Qatar", to which he had already referred in February 1938 in a conversation in Doha with the British Political Agent in Bahrain. On 20 May 1938, the latter wrote to the Ruler of Qatar, inviting him to state his case on Hawar at the earliest possible moment. The Ruler of Qatar responded by a letter dated 27 May 1938. Some months later, on 3 January 1939, Bahrain submitted a counter-claim. In a letter of 30 March 1939, the Ruler of Qatar presented his comments on Bahrain's counter-claim to the British Political Agent in Bahrain. The Rulers of Qatar and Bahrain were informed on 11 July 1939 that the British Government had decided that the Hawar Islands belonged to Bahrain.

In May 1946, the Bahrain Petroleum Company Ltd. sought permission to drill in certain areas of the continental shelf, some of which the British considered might belong to Qatar. The British Government decided that this permission could not be granted until there had been a division of the sea-bed between Bahrain and Qatar. It studied the matter and, on 23 December 1947, the British Political Agent in Bahrain sent the Rulers of Qatar and Bahrain two letters, in the same terms, showing the line which, the British Government considered divided "in accordance with equitable principles the sea-bed aforesaid". The letter indicated further that the Shaik of Bahrain had sovereign rights in the areas of the Dibal and Jaradah shoals (which should not be considered to be islands having territorial waters), as well as over the islands Hawar group while noting that Janan Island was not regarded as being included in the islands of the Hawar group.

In 1971 Qatar and Bahrain ceased to be British protected States. On 21 September 1971, they were both admitted to the United Nations.

Beginning in 1976, mediation, also referred to as "good offices", was conducted by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar. The good offices of King Fahd did not lead to the desired outcome and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain.

Sovereignty over Zubarah
(paras. 70-97)

The Court notes that both Parties agree that the Al-Khalifah occupied Zubarah in the 1760s and that, some years later, they settled in Bahrain, but that they disagree as to the legal situation which prevailed thereafter and which culminated in the events of 1937. In the Court's view, the terms of the 1868 Agreement between Great Britain and the Sheikh of Bahrain (see above) show that any attempt by Bahrain to pursue its claims to Zubarah through military action at sea would not be tolerated by the British. The Court finds that thereafter, the new rulers of Bahrain were never in a position to engage in direct acts of authority in Zubarah. Bahrain maintains, however, that the Al-Khalifah continued to exercise control over Zubarah through a Naim-led tribal confederation loyal to them, notwithstanding that at the end of the eighteenth century they had moved the seat of their government to the islands of Bahrain. The Court does not accept this contention.

The Court considers that, in view of the role played by Great Britain and the Ottoman Empire in the region, it is significant to note Article 11 of the Anglo-Ottoman Convention signed on 29 July 1913, which states inter alia: "it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors". Thus Great Britain and the Ottoman Empire did not recognize Bahrain's sovereignty over the peninsula, including Zubarah. In their opinion the whole Qatar peninsula would continue to be governed by Sheikh Jassim Al-Thani, who had formerly been nominated *kaimakam* by the Ottomans, and by his successors.

Both Parties agree that the 1913 Anglo-Ottoman Convention was never ratified; they differ on the other hand as to its value as evidence of Qatar's sovereignty over the peninsula. The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913. The Court also observes that Article 11 of the 1913 Convention is referred to by Article III of the subsequent Anglo-Ottoman treaty of 9 March 1914, duly ratified that same year. The parties to that treaty therefore did not contemplate any authority over the peninsula other than that of Qatar.

The Court then examines certain events which took place in Zubarah in 1937, after the Sheikh of Qatar had attempted to impose taxation on the Naim. It notes, inter alia, that on 5 May 1937, the Political Resident reported on those incidents to the Secretary of State for India, stating that he was "[p]ersonally, therefore, ... of the opinion that juridically the Bahrain claim to Zubarah must fail". In a telegram of 15 July 1937 to the Political Resident, the British Secretary of State indicated that the Sheikh of Bahrain should be informed that the British Government regretted that it was "not prepared to intervene between Sheikh of Qatar and Naim tribe".

In view of the foregoing, the Court finds that it cannot accept Bahrain's contention that Great Britain had always regarded Zubarah as belonging to Bahrain. The terms of the 1868 agreement between the British Government and the Sheikh of Bahrain, of the 1913 and 1914 conventions and of the letters in 1937 from the British Political Resident to the Secretary of State for India, and from the Secretary of State to the Political Resident, all show otherwise. In effect, in 1937 the British Government did not consider that Bahrain had sovereignty over Zubarah; it is for this reason that it refused to provide Bahrain with the assistance which it requested on the basis of the agreements in force between the two countries. In the period after 1868, the authority of the Sheikh of Qatar over the territory of Zubarah was gradually consolidated; it was acknowledged in the 1913 Anglo-Ottoman Convention and was definitively established in 1937. The actions of the Sheikh of Qatar in Zubarah that year were an exercise of his authority on his territory and, contrary to what Bahrain has alleged, were not an unlawful use of force against Bahrain. For all these reasons, the Court concludes that the first submission made by Bahrain cannot be upheld and that Qatar has sovereignty over Zubarah.

Sovereignty over the Hawar Islands
(paras. 98-148)

The Court then turns to the question of sovereignty over the Hawar Islands, leaving aside the question of Janan for the moment.

The Court observes that the Parties' lengthy arguments on the issue of sovereignty over the Hawar Islands raise several legal issues: the nature and validity of the 1939 decision by Great Britain; the existence of an original title; *effectivités*; and the applicability of the principle of *uti possidetis juris* to the present case. The Court begins by considering the nature and validity of the 1939 British decision. Bahrain maintains that the British decision of 1939 must be considered primarily as an arbitral award, which is *res judicata*.

It claims that the Court does not have jurisdiction to review the award of another tribunal, basing its proposition on decisions of the Permanent Court of International Justice and the present Court. Qatar denies the relevance of the judgments cited by Bahrain. It contends that

> "[N]one of them are in the slightest degree relevant to the issue which the Court has to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties".

The Court first considers the question whether the 1939 British decision must be deemed to constitute an arbitral award. It observes in this respect that the word arbitration, for purposes of public international law, usually refers to "the settlement of differences between States by judges of

their own choice, and on the basis of respect for law" and that this wording was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex æquo et bono*. The Court observes that in the present case no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of law or *ex æquo et bono*. The Parties had only agreed that the issue would be decided by "His Majesty's Government", but left it to the latter to determine how that decision would be arrived at, and by which officials. It follows that the decision whereby, in 1939, the British Government held that the Hawar Islands belonged to Bahrain, did not constitute an international arbitral award. The Court finds that it does not therefore need to consider Bahrain's argument concerning the Court's jurisdiction to examine the validity of arbitral awards.

The Court observes, however, that the fact that a decision is not an arbitral award does not mean that the decision is devoid of legal effect. In order to determine the legal effect of the 1939 British decision, it then recalls the events which preceded and immediately followed its adoption. Having done so, the Court considers Qatar's argument challenging the validity of the 1939 British decision.

Qatar first contends that it never gave its consent to have the question of the Hawar Islands decided by the British Government.

The Court observes, however, that following the Exchange of Letters of 10 and 20 May 1938, the Ruler of Qatar consented on 27 May 1938 to entrust decision of the Hawar Islands question to the British Government. On that day he had submitted his complaint to the British Political Agent. Finally, like the Ruler of Bahrain, he had consented to participate in the proceedings that were to lead to the 1939 decision. The jurisdiction of the British Government to take the decision concerning the Hawar Islands derived from these two consents; the Court therefore has no need to examine whether, in the absence of such consent, the British Government would have had the authority to do so under the treaties making Bahrain and Qatar protected States of Great Britain.

Qatar maintains in the second place that the British officials responsible for the Hawar Islands question were biased and had prejudged the matter. The procedure followed is accordingly alleged to have violated "the rule which prohibits bias in a decision-maker on the international plane". It is also claimed that the parties were not given an equal and fair opportunity to present their arguments and that the decision was not reasoned.

The Court begins by recalling that the 1939 decision is not an arbitral award made upon completion of arbitral proceedings. This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, the pleadings, and in particular the Exchange of Letters referred to above, shows that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States. The Court further observes that while it is true that the competent British officials proceeded on the premise that Bahrain possessed prima facie title to the islands and that the burden of proving the opposite lay on the Ruler of Qatar, Qatar cannot maintain that it was contrary to justice to proceed on the basis of this premise when Qatar had been informed before agreeing to the procedure that this would occur and had consented to the proceedings being conducted on that basis. During those proceedings the two Rulers were able to present their arguments and each of them was afforded an amount of time which the Court considers was sufficient for this purpose; Qatar's contention that it was subjected to unequal treatment therefore cannot be upheld. The Court also notes that, while the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, this lack of reasons has no influence on the validity of the decision taken, because no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter. Therefore, Qatar's contention that the 1939 British decision is invalid for lack of reasons cannot be upheld. Finally, the fact that the Sheikh of Qatar had protested on several occasions against the content of the British decision of 1939 after he had been informed of it is not such as to render the decision unopposable to him, contrary to what Qatar maintains. The Court accordingly concludes that the decision taken by the British Government on 11 July 1939 is binding on the parties. For all of these reasons, the Court concludes that Bahrain has sovereignty over the Hawar Islands, and that the submissions of Qatar on this question cannot be upheld. The Court finally observes that the conclusion thus reached by it on the basis of the British decision of 1939 makes it unnecessary for the Court to rule on the arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case.

Sovereignty over Janan Island
(paras. 149-165)

The Court then considers the Parties' claims to Janan Island. It begins by observing that Qatar and Bahrain have differing ideas of what should be understood by the expression "Janan Island". According to Qatar, "Janan is an island approximately 700 metres long and 175 metres wide situated off the southwestern tip of the main Hawar island ...". For Bahrain, the term covers "two islands, situated between one and two nautical miles off the southern coast of Jazirat Hawar, which merge into a single island at low tide ...". After examination of the arguments of the Parties, the Court considers itself entitled to treat Janan and Hadd Janan as one island.

The Court then, as it has done in regard to the Parties' claims to the Hawar Islands, begins by considering the effects of the British decision of 1939 on the question of

sovereignty over Janan Island. As has already been stated, in that decision the British Government concluded that the Hawar Islands "belong[ed] to the State of Bahrain and not to the State of Qatar". No mention was made of Janan Island. Nor was it specified what was to be understood by the expression "Hawar Islands". The Parties have accordingly debated at length over the issue of whether Janan fell to be regarded as part of the Hawar Islands and whether, as a result, it pertained to Bahrain's sovereignty by virtue of the 1939 decision or whether, on the contrary, it was not covered by that decision.

In support of their respective arguments, Qatar and Bahrain have each cited documents both anterior and posterior to the British decision of 1939. Qatar has in particular relied on a "decision" by the British Government in 1947 relating to the seabed delimitation between the two States. Bahrain recalled that it had submitted four lists to the British Government — in April 1936, August 1937, May 1938 and July 1946 — with regard to the composition of the Hawar Islands.

The Court notes that the three lists submitted prior to 1939 by Bahrain to the British Government with regard to the composition of the Hawar group are not identical. In particular, Janan Island appears by name in only one of those three lists. As to the fourth list, which is different from the three previous ones, it does make express reference to Janan Island, but it was submitted to the British Government only in 1946, several years after the adoption of the 1939 decision. Thus, no definite conclusion may be drawn from these various lists.

The Court then considers the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. By those letters the Political Agent acting on behalf of the British Government informed the two States of the delimitation of their seabeds effected by the British Government. This Government, which had been responsible for the 1939 decision on the Hawar Islands, sought, in the last sentence of subparagraph 4 (ii) of these letters, to make it clear that "Janan Island is not regarded as being included in the islands of the Hawar group". The British Government accordingly did not "recognize" the Sheikh of Bahrain as having "sovereign rights" over that island and, in determining the points fixed in paragraph 5 of those letters, as well as in drawing the map enclosed with those letters, it regarded Janan as belonging to Qatar. The Court considers that the British Government, in thus proceeding, provided an authoritative interpretation of the 1939 decision and of the situation resulting from it. Having regard to all of the foregoing, the Court does not accept Bahrain's argument that in 1939 the British Government recognized "Bahrain's sovereignty over Janan as part of the Hawars". It finds that Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939, as interpreted in 1947.

Maritime Delimitation
(paras. 166-250)

The Court then turns to the question of the maritime delimitation.

It begins by taking note that the Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. The Court indicates that customary international law, therefore, is the applicable law. Both Parties, however, agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law.

- *A single maritime boundary*
  (paras. 168-173)

The Court notes that, under the terms of the "Bahraini formula", the Parties requested the Court, in December 1990, "to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

The Court observes that it should be kept in mind, that the concept of "single maritime boundary" may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas and, consequently, an area over which they enjoy territorial sovereignty.

More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.

The Court further observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various — partially coincident — zones of maritime jurisdiction appertaining to them. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation

> "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these ... objects to the detriment of the other and at the same time is such as to be equally suitable to the division of either of them",

as was stated by the Chamber of the Court in the *Gulf of Maine* case. In that case, the Chamber was asked to draw a

single line which would delimit both the continental shelf and the superjacent water column.

- *Delimitation of the territorial sea*
  (paras. 174-223)

Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the superjacent waters and air column. Therefore, when carrying out that part of its task, the Court has to apply in the present case first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well. The Parties agree that the provisions of Article 15 of the 1982 Convention on the Law of the Sea, headed "Delimitation of the territorial sea between States with opposite or adjacent coasts", are part of customary law. This Article provides:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

The Court notes that Article 15 of the 1982 Convention is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, and is to be regarded as having a customary character. It is often referred to as the "equidistance/special circumstances" rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.

The Court explains that once it has delimited the territorial seas belonging to the Parties, it will determine the rules and principles of customary law to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones. The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.

- *The equidistance line*
  (paras. 177-216)

The Court begins by noting that the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This line can only be drawn when the baselines are known. Neither of the Parties has as yet specified the baselines which are to be used for the determination of the breadth of the territorial sea, nor have they produced official maps or charts which reflect such baselines. Only during the present proceedings have they provided the Court with approximate basepoints which in their view could be used by the Court for the determination of the maritime boundary.

- *The relevant coasts*
  (paras. 178-216)

The Court indicates that it will therefore first determine the relevant coasts of the Parties, from which will be determined the location of the baselines, and the pertinent basepoints from which enable the equidistance line to be measured.

Qatar has argued that, for purposes of this delimitation, it is the mainland-to-mainland method which should be applied in order to construct the equidistance line. It claims that the notion of "mainland" applies both to the Qatar peninsula, which should be understood as including the main Hawar island, and to Bahrain, of which the islands to be taken into consideration are al-Awal (also called Bahrain Island), together with al-Muharraq and Sitrah. For Qatar, application of the mainland-to-mainland method has two main consequences. First, it takes no account of the islands (except for the above-mentioned islands, Hawar on the Qatar side and al-Awal, al-Muharraq and Sitrah on the Bahrain side), islets, rocks, reefs or low-tide elevations lying in the relevant area. Second, in Qatar's view, application of the mainland-to-mainland method of calculation would also mean that the equidistance line has to be constructed by reference to the high-water line.

Bahrain contends that it is a de facto archipelago or multiple-island State, characterized by a variety of maritime features of diverse character and size. All these features are closely interlinked and together they constitute the State of Bahrain; reducing that State to a limited number of so-called "principal" islands would be a distortion of reality and a refashioning of geography. Since it is the land which determines maritime rights, the relevant basepoints are situated on all those maritime features over which Bahrain has sovereignty. Bahrain further contends that, according to conventional and customary international law, it is the low-water line which is determinative for the breadth of the territorial sea and for the delimitation of overlapping territorial waters. Finally, Bahrain has stated that, as a de facto archipelagic State, it is entitled to declare itself an archipelagic State under Part IV of the 1982 Law of the Sea Convention and to draw the permissive baselines of Article 47 of that Convention, i.e., "straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago". Qatar has contested Bahrain's claim that it is entitled to declare itself an archipelagic State under Part IV of the 1982 Convention.

With regard to Bahrain's claim the Court observes that Bahrain has not made this claim one of its formal submissions and that the Court is therefore not requested to take a position on this issue. What the Court, however, is called upon to do is to draw a single maritime boundary in

accordance with international law. The Court can carry out this delimitation only by applying those rules and principles of customary law which are pertinent under the prevailing circumstances. It emphasizes that its decision will have binding force between the Parties, in accordance with Article 59 of the Statute of the Court, and consequently could not be put in issue by the unilateral action of either of the Parties, and in particular, by any decision of Bahrain to declare itself an archipelagic State.

The Court, therefore, turns to the determination of the relevant coasts from which the breadth of the territorial seas of the Parties is measured. In this respect the Court recalls that under the applicable rules of international law the normal baseline for measuring this breadth is the low-water line along the coast (Art. 5, 1982 Convention on the Law of the Sea).

In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea". It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In order to determine what constitutes Bahrain's relevant coasts and what are the relevant baselines on the Bahraini side, the Court must first establish which islands come under Bahraini sovereignty. The Court recalls that it has concluded that the Hawar Islands belong to Bahrain and that Janan belongs to Qatar. It observes that other islands which can be identified in the delimitation area which are relevant for delimitation purposes in the southern sector are Jazirat Mashtan and Umm Jalid, islands which are at high tide very small in size, but at low tide have a surface which is considerably larger. Bahrain claims to have sovereignty over these islands, a claim which is not contested by Qatar.

- *Fasht al Azm*
  (paras. 188-190)

However, the Parties are divided on the issue of whether Fasht al Azm must be deemed to be part of the island of Sitrah or whether it is a low-tide elevation which is not naturally connected to Sitrah Island. In 1982 Bahrain undertook reclamation works for the construction of a petrochemical plant, during which an artificial channel was dredged connecting the waters on both sides of Fasht al Azm. After careful analysis of the various reports, documents and charts submitted by the Parties, the Court has been unable to establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken. For the reasons explained below, the Court is nonetheless able to undertake the requested delimitation in this sector without determining the question whether Fasht al Azm is to be regarded as part of the island of Sitrah or as a low-tide elevation.

- *Qit'at Jaradah*
  (paras. 191-198)

Another issue on which the Parties have totally opposing views is whether Qit'at Jaradah is an island or a low-tide elevation. The Court recalls that the legal definition of an island is "a naturally formed area of land, surrounded by water, which is above water at high tide" (1958 Convention on the Territorial Sea and Contiguous Zone, Art. 10, para. 1; 1982 Convention on the Law of the Sea, Art. 121, para. 1). The Court has carefully analysed the evidence submitted by the Parties and weighed the conclusions of the experts referred to above, in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.

- *Fasht ad Dibal*
  (paras. 199-209)

Both Parties agree that Fasht ad Dibal is a low-tide elevation. Whereas Qatar maintains — just as it did with regard to Qit'at Jaradah — that Fasht ad Dibal as a low-tide elevation cannot be appropriated, Bahrain contends that low-tide elevations by their very nature are territory, and therefore can be appropriated in accordance with the criteria which pertain to the acquisition of territory. "Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and *effectivités*."

The Court observes that according to the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 11, para. 1; 1982 Convention on the Law of the Sea, Art. 13, para. 1). When a low-tide elevation is situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other, or nearer to an island belonging to one party than it is to the mainland coast of the other. For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other. In Bahrain's view, however, it depends upon the *effectivités* presented by the two coastal States which of them has a superior title to the low-tide elevation in question and is therefore entitled to

exercise the right attributed by the relevant provisions of the law of the sea, just as in the case of islands which are situated within the limits of the breadth of the territorial sea of more than one State. In the view of the Court the decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

International treaty law is silent on the question whether low-tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast. The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory. In this respect the Court recalls the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as islands or other territory. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.

- *Method of straight baselines*
  (paras. 210-216)

The Court further observes that the method of straight baselines, which Bahrain applied in its reasoning and in the maps provided to the Court, is an exception to the normal rules for the determination of baselines and may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity. The fact that a State considers itself a multiple-island State or a de facto archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrain's main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that the maritime features off the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland. The Court does not deny that the maritime features east of Bahrain's main islands are part of the overall geographical configuration; it would be going too far, however, to qualify them as a fringe of islands along the coast. The Court, therefore, concludes that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn. The Court notes, however, that Fasht al Azm requires special mention. If this feature were to be regarded as part of the island of Sitrah, the basepoints for the purposes of determining the equidistance line would be situated on Fasht al Azm's eastern low-water line. If it were not to be regarded as part of the island of Sitrah, Fasht al Azm could not provide such basepoints. As the Court has not determined whether this feature does form part of the island of Sitrah, it has drawn two equidistance lines reflecting each of these hypotheses.

- *Special circumstances*
  (paras. 217-223)

The Court then turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed.

With regard to the question of Fasht al Azm, the Court considers that on either of the above-mentioned hypotheses there are special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah. With regard to the question of Qit'at Jaradah, the Court observes that it is a very small island, uninhabited and without any vegetation. This tiny island, which — as the Court has determined — comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature. The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.

The Court observed earlier that, since it did not determine whether Fasht al Azm is part of Sitrah island or a separate low-tide elevation, it is necessary to draw provisionally two equidistance lines. If no effect is given to Qit'at Jaradah and in the event that Fasht al Azm is considered to be part of Sitrah island, the equidistance line thus adjusted cuts through Fasht ad Dibal leaving the greater part of it on the Qatari side. If, however, Fasht al Azm is seen as a low-tide elevation, the adjusted equidistance line runs west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal is largely or totally on the

Qatari side of the adjusted equidistance line, the Court considers it appropriate to draw the boundary line between Qit'at Jaradah and Fasht ad Dibal. As Fasht ad Dibal thus is situated in the territorial sea of Qatar, it falls under the sovereignty of that State.

On these considerations the Court finds that it is in a position to determine the course of that part of the single maritime boundary which will delimit the territorial seas of the Parties. Before doing so the Court notes, however, that it cannot fix the boundary's southern-most point, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia and of the Parties. The Court also considers it appropriate, in accordance with common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands.

Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita 'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it will pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

With reference to the question of navigation, the Court notes that the channel connecting Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands, is narrow and shallow, and little suited to navigation. It emphasizes that the waters lying between the Hawar Islands and the other Bahraini islands are not internal waters of Bahrain, but the territorial sea of that State. Consequently, Qatari vessels, like those of all other States, shall enjoy in these waters the right of innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy the same right of innocent passage in the territorial sea of Qatar.

- *Delimitation of the continental shelf and exclusive economic zone*
  (paras. 224-249)

The Court then deals with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone. Referring to its earlier case-law on the drawing of a single maritime boundary the Court observes that it will follow the same approach in the present case. For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.

The Court then examines whether there are circumstances which might make it necessary to adjust the equidistance line in order to achieve an equitable result. With regard to Bahrain's claim concerning the pearling industry, the Court first takes note of the fact that that industry effectively ceased to exist a considerable time ago. It further observes that, from the evidence submitted to it, it is clear that pearl diving in the Gulf area traditionally was considered as a right which was common to the coastal population. The Court, therefore, does not consider the existence of pearling banks, though predominantly exploited in the past by Bahraini fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain. The Court also considers that it does not need to determine the legal character of the "decision" contained in the letters of 23 December 1947 of the British Political Agent to the Rulers of Bahrain and Qatar with respect to the division of the sea-bed, which Qatar claims as a special circumstance. It suffices for it to note that neither of the Parties has accepted it as a binding decision and that they have invoked only parts of it to support their arguments.

Taking into account the fact that it has decided that Bahrain has sovereignty over the Hawar Islands, the Court finds that the disparity in length of the coastal fronts of the Parties cannot, as Qatar claims, be considered such as to necessitate an adjustment of the equidistance line.

The Court finally recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim 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". In the view of the Court such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

The Court accordingly decides that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary shall then follow this adjusted equidistance line until it meets the delimitation line between the respective

maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

*

The Court concludes from all of the foregoing that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be formed by a series of geodesic lines joining, in the order specified, the points with the following coordinates:

(World Geodetic System, 1984)

Point	*Latitude North*	*Longitude East*
1	25° 34' 34"	50° 34' 3"
2	25° 35' 10"	50° 34' 48"
3	25° 34' 53"	50° 41' 22"
4	25° 34' 50"	50° 41' 35"
5	25° 34' 21"	50° 44' 5"
6	25° 33' 29"	50° 45' 49"
7	25° 32' 49"	50° 46' 11"
8	25° 32' 55"	50° 46' 48"
9	25° 32' 43"	50° 47' 46"
10	25° 32' 6"	50° 48' 36"
11	25° 32' 40"	50° 48' 54"
12	25° 32' 55"	50° 48' 48"
13	25° 33' 44"	50° 49' 4"
14	25° 33' 49"	50° 48' 32"
15	25° 34' 33"	50° 47' 37"
16	25° 35' 33"	50° 46' 49"
17	25° 37' 21"	50° 47' 54"
18	25° 37' 45"	50° 49' 44"
19	25° 38' 19"	50° 50' 22"
20	25° 38' 43"	50° 50' 26"
21	25° 39' 31"	50° 50' 6"
22	25° 40' 10"	50° 50' 30"
23	25° 41' 27"	50° 51' 43"
24	25° 42' 27"	50° 51' 9"
25	25° 44' 7"	50° 51' 58"
26	25° 44' 58"	50° 52' 5"
27	25° 45' 35"	50° 51' 53"
28	25° 46' 0"	50° 51' 40"
29	25° 46' 57"	50° 51' 23"
30	25° 48' 43"	50° 50' 32"
31	25° 51' 40"	50° 49' 53"
32	25° 52' 26"	50° 49' 12"
33	25° 53' 42"	50° 48' 57"
34	26° 0' 40"	50° 51' 00"
35	26° 4' 38"	50° 54' 27"
36	26° 11' 2"	50° 55' 3"
37	26° 15' 55"	50° 55' 22"
38	26° 17' 58"	50° 55' 58"
39	26° 20' 2"	50° 57' 16"
40	26° 26' 11"	50° 59' 12"
41	26° 43' 58"	51° 3' 16"
42	27° 2' 0"	51° 7' 11"

Below point 1, the single maritime boundary shall follow, in a south-westerly direction, a loxodrome having an azimuth of 234°16'53", until it meets the delimitation line between the respective maritime zones of Saudi Arabia on the one hand and of Bahrain and Qatar on the other. Beyond point 42, the single maritime boundary shall follow, in a north-north-easterly direction, a loxodrome having an azimuth of 12°15'12", until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

The course of this boundary has been indicated, for illustrative purposes only, on sketch-map No. 7 attached to the Judgment.

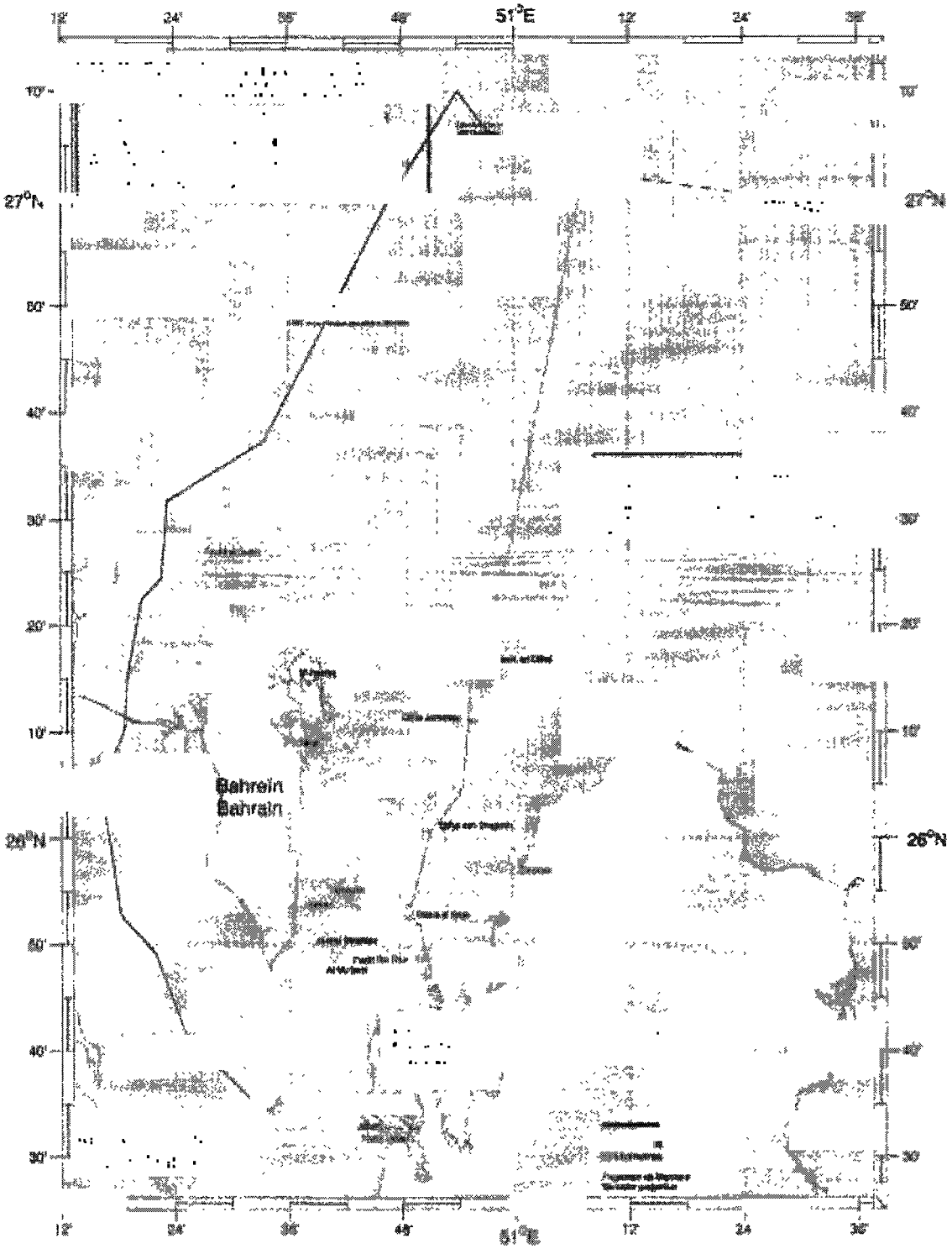
Separate opinion of Judge Oda

Judge Oda voted in favour of the Court's delimitation of a maritime boundary between the Parties in the hope that they — in the spirit of co-operation between friendly, neighbouring States — will find it mutually acceptable. Judge Oda disagrees, however, with the Court's methods for determination of the maritime boundary and, further, with the Court's decision to demarcate the boundary's precise geographic coordinates. Accordingly, he sets out his views in a separate opinion.

Judge Oda first notes that the region of Zubarah occupies a procedurally distinct place in the present proceedings. He expresses his pleasure that the Court reaches a unanimous decision as to the sovereignty of Qatar over this territory. Further, Judge Oda remarks upon the relevance of the exploitation of oil reserves to many aspects of the dispute, including the Parties' joint decision (via their Special Agreement) to place certain land masses and maritime features within the Court's jurisdiction and the expectations of the Parties with regard to the types of boundary they expect the Court to delimit.

Judge Oda makes special mention of the Court's treatment of low-tide elevations and islets. He revisits at length the negotiating history of the law of the sea in order to demonstrate nuances of the issue not fully dealt with by the Court. In particular, Judge Oda notes the incongruity between the expansion of the territorial sea from 3 to 12 miles and the régime under which low-tide elevations and islets are accorded territorial seas of their own; he further expresses the view that such a régime, addressed only indirectly by the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, might not be considered customary international law.

Judge Oda disagrees with the Court's use of the phrase "single maritime boundary" and notes the distinction between the régimes governing the exclusive economic zone (EEZ) and the continental shelf on the one hand and the territorial sea on the other. Accordingly, the Court's use of a "single maritime boundary" is inappropriate. Judge Oda also objects to the Court's decision to delimit the southern sector as a territorial sea. He states further that, even if the Court's


51°E
27°N
26°N
Bahrein
Bahrain

approach to the southern sector is appropriate, the Court nonetheless misinterprets and misapplies the rules and principles governing the territorial sea. In this regard, Judge Oda notes that the "equidistance/special circumstances" rule mistakenly employed by the Court for purposes of territorial sea delimitation instead pertains to the continental shelf régime. Judge Oda approves of the Court's attempt to determine a continental shelf boundary in the northern sector, but he feels that the Court does not adequately explain the methods by which it arrives at its final line of demarcation in this sector. He concludes his criticism of the Court's approach to this case by noting that the Court should have indicated principles to guide the drawing of a maritime boundary without actually indicating the precise contours of the boundary itself. Judge Oda recalls in this regard his separate opinion in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen* (1993), wherein he noted that the application of equitable principles affords an infinite variety of possible boundaries; the Court should exercise moderation and self-restraint and avoid unjustifiable precision in its decisions on maritime boundaries. Precise demarcation of the boundary can be left to a panel of experts to be appointed jointly by the parties for such purpose.

Having identified the flaws in the Court's approach, Judge Oda then presents his own views. Noting the region's political history and the importance therein of oil exploitation, Judge Oda opines that this case should concern demarcation only of continental shelf boundaries and not those of territorial seas. After an extensive review of the development of the régime of the continental shelf (by reference to the negotiating history of the relevant provisions of the 1958 and 1982 treaties on the law of the sea and their attendant United Nations conferences), Judge Oda reiterates his preference for an equitable solution to the dispute. Judge Oda notes that his stance accords with positions taken consistently throughout his judicial career, as evidenced for example in his argument as counsel for the Federal Republic of Germany before this Court in the *North Sea Continental Shelf* cases (1969). He prefers modesty in the face of a geographically complex situation and suggests principles to guide delimitation based on a *macrogeographical* approach. In order to make clear the direction of his thinking, Judge Oda appends two sketch maps representing "one line from among the many lines that may reasonably be proposed".

Joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma

In the introduction to their opinion, Judges Bedjaoui, Ranjeva and Koroma, who regret that they had no other choice than to distance themselves from the majority, point out that the dispute is a recurring one of long standing and that the case involves special difficulties. They call on the Parties to draw upon the infinite resources offered by their common genius to find the will to transcend their frustrations through cooperation.

Judges Bedjaoui, Ranjeva and Koroma hope in this connection that the judicial settlement will have met all the conditions necessary to make the solutions it has arrived at socially acceptable, and that it will thus be capable of performing to the full its calming, peace-making function.

Turning to the question of the respective judicial strategies adopted by the Parties before the Court, Judges Bedjaoui, Ranjeva and Koroma set out the whole range of legal grounds put forward by the Parties and regret that the Court applied itself to considering only one of those grounds, the British decision of 1939, which served as virtually the sole basis of the Court's Judgment. Judges Bedjaoui, Ranjeva and Koroma fear that the Court is thus today handing down only an *infra petita* ruling, as it has ignored all of the other grounds relied on by the Parties. Moreover, the Court's analysis of the formal validity of the 1939 British decision is incomplete and questionable. However, Judges Bedjaoui, Ranjeva and Koroma do agree with the Court that that 1939 decision was a political decision and not an arbitral award having the authority of *res judicata*. They agree also that the first condition for the validity of the 1939 decision is the consent of the Parties. But they are of the opinion that the circumstances of the case and the historical context clearly demonstrate that the consent given by one of the Parties, which should have been express, informed and freely given, as in the case of any territorial dispute, was tainted here with elements of fraud. Thus, restricting themselves to an examination of the purely formal validity of the British decision of 1939, Judges Bedjaoui, Ranjeva and Koroma find that that decision cannot properly serve as a valid legal title for an award of the Hawar Islands.

Further, that decision was not binding upon the Parties, for the consent of one of them, which was moreover fundamentally flawed, was only a consent to the proceedings and in no sense a consent to the decision on the merits.

The co-authors of the opinion regret, moreover, that the Court failed to examine the substantive validity of the British decision of 1939, which, in their view, prevented the Court from taking its consideration of the case to its logical conclusion and reaching a compromise, or "*a minima*" solution, consisting in sharing the Hawar Islands on the basis of Bahrain's *effectivités*. The true signification and construction of the Bahraini formula need to be determined, so that its internal coherence may be restored. In passing, the co-authors note that there is a manifest incompatibility between the application of the Bahraini formula to the case and the application of the principle of *uti possidetis juris*, which the Court correctly did not apply in this case. But the question of *effectivités*, which the Court sought to avoid examining, was inevitably bound to come up again by reason of the very fact that the Court chose to base itself on a legal ground deriving from the 1939 decision. Thus any examination of the substantive validity of that decision would have impelled the Court to undertake an examination of the *effectivités*, for the Weightman Report — which underlay the British decision — justifies the award of the main Hawar Island ("Jazirat Hawar") on the basis of *effectivités*, while the award of the remaining Hawar Islands

is based on a simple presumption of *effectivités*. In this regard, the co-authors of the dissenting opinion note an internal contradiction in the Weightman Report and the application of a double standard as regards the principle of proximity. In sum, the Court's Judgment is notable for the fact that it rules "*ultra petita*", on the basis of *effectivités* limited to "Jazirat Hawar" and totally absent in the other islands and islets of the Hawar archipelago.

The co-authors note that, subsequently to its 1939 decision, the United Kingdom showed some hesitation and expressed doubts as to the correctness of that decision, going so far as to agree in the 1960s that the decision be re-examined by some "neutral" authority, no doubt in the form of an arbitration. Added to this were the persistent protests by Qatar and its refusal to acquiesce either in the said British decision of 1939 or in the successive acts of occupation of Jazirat Hawar by Bahrain. This permanent attitude of non-renunciation by Qatar, combined with the weakness of the *effectivités* on the islands other than Jazirat Hawar, are, in the co-authors' view, such as to prevent the creation of a title in favour of Bahrain over the Hawars. The Judgment should also have taken account of the failure to observe the territorial status quo, both during the period 1936-1939 when the final British decision was being prepared, and in the course of the Saudi mediation from 1983, and since 1991 when the case has been *sub judice* before the International Court of Justice.

According to the co-authors, there is no choice but to return to the crucial ground which the two Parties argued at length and which the Court unfortunately disregarded: identifying the historical title to the Hawars. Given the major importance taken on by historical facts in the dynamics of legal disputes over territory, the adjudicating forum bears a compelling duty: to meet the challenge with which history confronts it, even though it is not experienced in that discipline. Contemporary international law provides standards for the legal assessment of historical facts. Yet the Court's Judgment offers a purely descriptive, factual narrative of the historical context of the case, without applying the legal rules and principles which provide a framework for historical facts. The only occasion on which the Court sought to identify the historical title was, in the co-authors' view, in connection with the attribution of Zubarah, and this makes it even more unjustified that the same was not done with respect to the issue of the Hawars, where such historical research was more imperative.

A legal consequence of the British presence in the Gulf in the nineteenth and twentieth centuries was the creation of two separate entities, Bahrain and Qatar, beginning in the last third of the nineteenth century. The historical title of the Al-Thanis to the peninsula of Qatar and its adjacent natural features was thus gradually formed and consolidated.

Thereafter, the Ottoman presence in Qatar, from 1871 to 1914, had legal consequences which definitively established the historical title of the Al-Thani dynasty to Qatar. The United Kingdom's conduct constituted explicit recognition of Bahrain's loss of any title to any part of Qatar, including the Hawar Islands. This conduct on the part of the British was combined with that of Bahrain, whose long tacit acquiescence marked the loss of its title, and with the diametrically opposite conduct of the successive Sheikhs of Qatar, who extended their authority throughout the peninsula of Qatar. This was all reflected in treaties. The Anglo-Ottoman Conventions of 1913 and 1914, the Anglo-Saudi Treaties of 1915 and 1927 and, most importantly, the 1916 Agreement between Great Britain and Qatar show most clearly that Qatar had since 1868 gradually established a historical title to the entire peninsula, including its adjacent features, which was definitively consolidated through the Anglo-Qatari Agreement.

According to the co-authors, the convergence of history and law, as interpreted in accordance with law, is also matched in this case by the convergence of geography and law, which serves as a countercheck to confirm the existence of a valid, certain title held by Qatar to the Hawars. The question of geographical proximity has given birth to a legal concept which we ignore at our peril. The notion of "distance" has been given legal expression in various ways in the modern international law of the sea. These include the establishment of a strong legal presumption that all islands lying in a coastal State's territorial sea belong to that State. The co-authors believe that the issue of the territorial integrity of a coastal State deserved closer attention from the Court. From this perspective, the solution for a legally unassailable award of the Hawar Islands was obvious, and the law would have been in perfect harmony with both history and geography.

Judges Bedjaoui, Ranjeva and Koroma also regret the silence of the Judgment on the subject of the map evidence. Though it is true that the evidentiary importance of cartographic material is only relative, it nevertheless remains the case that maps are the expression or reflection of general public opinion and of repute. In this respect the voluminous map file submitted by Qatar, buttressed by the fact that those maps were produced in a wide variety of countries and at widely varying dates, together with the British War Office maps, which are particularly credible, confirms Qatar's historical title to the Hawars, as do the many historical documents establishing the respective territorial extent of each Party.

As far as the maritime delimitation is concerned, the co-authors have focused their critical remarks on four points. *First*, the Judgment rules *infra petita*, in the view of Judges Bedjaoui, Ranjeva and Koroma, having regard to the Bahraini formula as applied to the course of the single maritime boundary, which the Judgment describes as a single multifunctional line. Recourse to the technique of enumerating the areas to be delimited has a dual aim: to specify individually the areas for delimitation and to emphasize the distinct nature of each area in relation to the others, since each possesses its own coherent character in law; it was therefore incumbent upon the Court to ensure that the result it achieved was coherent over the entire maritime area delimited.

This test of coherence was necessary, given the impact of the award of the Hawar Islands to Bahrain: confirmation

in the operative part of the Judgment of the right of innocent passage through Bahrain's territorial waters is not enough. The co-authors of this dissenting opinion consider that it would be wrong to underestimate the risk of conflicts arising in connection with the implementation of the right of innocent passage. Although it had not been specifically seized of this issue, the Court, as it did in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, should also have regarded as part and parcel of the settlement of the merits of the dispute the conclusion of an agreement between the two Parties providing for the legal enclavement of the Hawar Islands under a regime of international easement".

Secondly, the method adopted to draw the provisional median line was also criticized by the three judges as contrary to the basic principles of delimitation. Under the adage "the land dominates the sea", it is essentially *terra firma* that has to be taken into account, and special circumstances must not be allowed to influence prematurely the course of the theoretical provisional median line. The law does not require that the baselines and points used for delimitation have to be the same as those used to fix the external seaward boundaries of maritime areas. It is this interpretation of the law that prevailed in the work of the conferences on the law of the sea, contrary to the position of the International Law Commission. Case-law has failed to espouse the trend towards an interpretation favouring a duality of function. The Court, contrary to the present decision, has always favoured the choice of equitable points, so that both the method for drawing the line and its result should be fair. "The equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections." (*I.C.J. Reports 1985*, p. 48, para. 64) This is a general rule which applies equally to the calculation of the equidistance line in a delimitation of the territorial sea. It is thus surprising to find the sea dominated not by *terra firma* but by quite insignificant maritime features (such as Umm Jalid, for example), precisely lacking in any solid base.

Thirdly, the legal characterization of Qit'at Jaradah is not supported by the co-authors, because of its geophysical characteristics. The issue of islands hinges upon considerations of hydrography (high tide) and geomorphology (natural area of land). According to an old decision, the *Anna* case, the origin of the land is immaterial for purposes of characterization of a feature as an island. However, since the inclusion in the 1958 Geneva Convention of the adjective "natural", the approach has changed: a feature appearing above the waterline must be an area composed otherwise than of rocks or atolls, the unstable land composing such features being specifically mentioned in the Montego Bay Convention in the provision on deltas. Thus Qit'at Jaradah does not meet the requirements of Article 121 of the 1982 Convention on the Law of the Sea. Moreover, the authors dispute the award to Bahrain of this island, which is closer to the coast of Qatar than of Bahrain, according to the calculations of the Court-appointed hydrographer.

This anomaly is aggravated by the fact that Qit'at Jaradah is accorded an effect of 500 metres, even though the Court had decided not to give it any effect at all and to draw the delimitation line at a strict tangent to Qit'at Jaradah. This has distorting consequences for the northern part of the line.

The position is further aggravated by the fact that the Court has established a single maritime boundary on the basis of two contradictory maps, an American one for the southern sector and a British one for the northern sector. This duality in the Court's approach is somewhat puzzling, since it would have been more normal for it to rely on a single map for the entire course of the line and to choose the most recent one, providing the most up-to-date data. This was the British map, prepared in 1994 by the Admiralty of the country that had for many years been the protecting power in the region and was thus quite well informed of the true situation. This British bathymetric chart clearly demonstrates the geographical continuity between the Hawars and Qatar, which form a single entity and together constitute the Qatari peninsula. But in choosing to rely rather on the American map for this southern sector of the single boundary, the Court could represent the low-water line in that southern sector in an arbitrary manner only, thus raising fears as to the legibility of the decision and above all creating *a real risk of amputation of the territory of Qatar proper*. Thus the choice of the less suitable map for the southern sector leaves serious doubts, not only as to the fairness, but also as to the simple accuracy, of the line obtained. Having failed to choose the British map, it would have been better if the Judgment had not assumed responsibility for errors in the course of the line and had instead invited the Parties to negotiate that course on the basis of indications from the Court.

For all of the reasons set out above, Judges Bedjaoui, Ranjeva and Koroma regret that they cannot accept responsibility for any amputation of Qatar's territory.

Finally, Judges Bedjaoui, Ranjeva and Koroma regret that the vote by Members of the Court was not made on the basis of a division of the final single maritime line into two parts, given the Parties' positions and the award of the Hawar Islands to Bahrain, which the authors could not accept. The northern part, on the other hand, appeared overall to be acceptable to them, even if its course could have been improved by being shifted slightly to the west.

In conclusion, Judges Bedjaoui, Ranjeva and Koroma share the Court's analyses of the inapplicability of the principle of *uti possidetis juris*, to which they are committed as representatives of the various legal systems of the continent of Africa. But they note that it cannot be said that there was State succession in the present case, given that no new subject of international law was created. Also, simple reasons of legal ethics required them to deny application of that principle owing to the real motives for the 1939 decision: it would seem to them that "oil dominates the land and the sea" was the watchword of that decision. Any legal edifice founded on that notion was therefore bound to have been coloured by artifice and deception, to the detriment of

the rights of the peoples. Finally, the principle of uti *possidetis juris* applies to two States' boundaries taken "as a whole", while here the Court's examination focused on a single text. Thus, Judges Bedjaoui, Ranjeva and Koroma were led to conduct a critical examination of the validity of the 1939 decision, as measured by the yardstick of contemporary international norms and modern methods of interpretation.

Declaration of Judge Herczegh

In his declaration, Judge Herczegh stressed the importance of paragraph 2 (*b*) of the operative part of the Judgment, in which the Court stated that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage. This statement in paragraph 2 (*b*) has enabled him to vote in favour of paragraph 6 of the operative part of the Judgment, which defines the single maritime boundary that divides the maritime areas of the two States party to the dispute.

Declaration of Judge Vereshchetin

In his declaration Judge Vereshchetin briefly expounds the reasons which prevented him from concurring in the Court's findings on the legal position of the Hawar Islands and the maritime feature Qit'at Jaradah. The Court's finding on the Hawar Islands rests exclusively on the 1939 decision by the former "protecting Power". This implies that the 1939 British decision is viewed by the Court as a sort of legally binding third-party settlement of a territorial dispute between two sovereign States. It also implies that the two States under British protection at the relevant time could — and actually did — freely express their sovereign will to be legally bound by the British decision. In turn, the deciding "third party" must be presumed neutral and impartial. In the opinion of Judge Vereshchetin, none of the above prerequisites necessary for the affirmation by the Court of the formal validity of the 1939 decision existed in the context of the "special relationship" between the "protected" and "protecting" States obtaining at the relevant time.

The inevitable uncertainty as to the formal validity of the 1939 decision, especially in an absolutely new political and legal setting, required the Court to revert to the legal grounds lying at the basis of the 1939 decision. By abstaining from analysing whether the 1939 decision was well founded in law and rectifying it if appropriate, the Court failed in its duty to take into account all the elements necessary for determining the legal position of the Hawar Islands.

As to the legal position of Qit'at Jaradah, Judge Vereshchetin takes the view that this tiny maritime feature, constantly changing its physical condition, cannot be considered an island within the meaning of the 1982 Convention on the Law of the Sea. Rather, it is a low-tide elevation whose appurtenance depends on its location in the territorial sea of one State or the other. Therefore, the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa.

Declaration of Judge Rosalyn Higgins

Judge Higgins considers that sovereignty over Janan lies with Bahrain, for reasons that have been elaborated by Judges Kooijmans and Fortier. She therefore voted in the negative on paragraph 3 of the *dispositif*. But as the Court found that sovereignty over Janan lies with Qatar, and as she agrees generally with the delimitation line drawn in the Judgment, she voted in favour of paragraph 6.

Had it so chosen, the Court could also have grounded Bahraini title in the Hawars on the law of territorial acquisition. Among acts occurring in the Hawars were some that did have relevance for legal title. These *effectivités* were no sparser than those on which title has been founded in other cases.

Even if Qatar had, by the time of these early *effectivités*, extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable *effectivités* in the Hawars of its own.

These elements are sufficient to displace any presumption of title by the coastal State.

Separate opinion of Judge Parra-Aranguren

Even though voting in favour of the operative part of the Judgment, Judge Parra-Aranguren states that his favourable vote does not mean that he shares all and every part of the reasoning followed by the Court in reaching its conclusion. In particular he considers paragraph 2 (*b*) of the operative part to be unnecessary and makes it clear, to avoid misunderstandings, that in his opinion Qatar enjoys the right of innocent passage accorded by customary international law in all the territorial sea under the sovereignty of Bahrain. Furthermore, Judge Parra-Aranguren explains that his vote for paragraph 4 of the operative part is the consequence of his agreement with the maritime delimitation line between Qatar and Bahrain drawn in its paragraph 6. In his opinion, the drilling of an artesian well, advanced by Bahrain to demonstrate its sovereignty over Qit'at Jaradah, cannot be characterized as an act of sovereignty. Nor can the acts of sovereignty alleged in respect of the low-tide elevation of Fasht ad Dibal, i.e., the construction of navigational aids and the drilling of an artesian well, be characterized as such. Therefore, in his opinion, it is not necessary to take a stand, as the Judgment does, on the question whether, from the point of view of establishing sovereignty, low-tide elevations can be fully assimilated with islands or other land territory.

Separate opinion of Judge Kooijmans

In his separate opinion Judge Kooijmans takes issue with the Court with regard to that part of the Judgment which deals with the territorial issues which divided the Parties (Zubarah, the Hawar Islands, Janan), although he voted in favour of the Court's findings on sovereignty over

Zubarah and the Hawars, dissenting only with regard to Janan.

He disassociates himself, however, from the Court's reasoning on all three issues, since in his view the Court has taken an unduly formalistic approach by basing itself mainly on the position taken by the former Protecting Power (Great Britain) and not on substantive rules and principles of international law, in particular those on the acquisition of territory.

Judge Kooijmans starts by giving a picture of the political and legal situation in the Gulf region in the nineteenth and early twentieth century. At that time the formation of States as territorially based sovereign entities had not yet taken place. It was only the discovery of oil in the 1920s which led to the need for clearly defined boundaries and to the notion of exclusive spatial jurisdiction.

It is noteworthy that the legal character of the relations between the main Western Power in the region, Great Britain, and the local rulers, which was laid down in a number of treaties concluded in that early period, did not change after the exploitability of natural resources had become a dominant factor. The local sheikhdoms were not colonized but kept their character as independent legal entities, even if political control by the Protecting Power may have tightened.

Judge Kooijmans thus is of the view that the principle or rule of *uti possidetis juris.* invoked by Bahrain, is not applicable. Crucial in this respect is whether there is (*a*) a transfer of sovereignty from one State to another State as a result of which (*b*) administrative boundaries are transformed into international boundaries.

In the present case neither of these criteria is met. When the Protecting Power settled territorial issues it did so by determining international boundaries between two entities with which it had treaty relations.

Under those treaties the Protecting Power had no right to determine unilaterally the boundaries of the sheikhdoms or to decide upon matters of territorial sovereignty. It could do so only with the consent of the local rulers.

Judge Kooijmans fundamentally disagrees with the Court that, when in 1939 the British Government attributed the Hawar Islands to Bahrain, this decision was the result of a dispute settlement procedure to which the Ruler of Qatar had freely agreed at the appropriate time. There was no consent from his part, nor was there subsequent acceptance or acquiescence. The British decision consequently has no legal validity *in se*. All territorial issues, and not only that of Zubarah, where the Protecting Power did not take a formal decision, must be resolved in the light of the general principles of international law.

As for Zubarah, this part of the dispute dates back to the nineteenth century when tribal loyalties played a more important role than territorial claims. Bahrain bases its claim mainly on historic rights and ties of allegiance with (a branch of) the Naim tribe.

Such ties of allegiance as may have existed between the Ruler of Bahrain and certain tribes in the area were insufficient to establish any tie of territorial sovereignty (*Western Sahara* case). On the other hand it can be observed that Qatar gradually succeeded in consolidating its authority over the area.

Moreover, there is evidence of acquiescence by conduct on the part of Bahrain in the period before it revitalized the dispute in the second half of the twentieth century. Judge Kooijmans therefore agrees with the finding of the Court that Zubarah appertains to Qatar, although in his view the Court relied too much on the position taken by Great Britain and the Ottoman Empire.

With regard to the Hawar Islands Qatar bases its claim on original title as recognized by Great Britain (and the Ottomans) in conjunction with the principle of proximity or contiguity, since the islands are situated close to the coast of the peninsula and geographically are part of it. According to Judge Kooijmans it would be an anachronism to construe the 1868 Agreement concluded by Great Britain with the chief in Doha as providing him with title to the whole of the Qatar peninsula; as to the principle of contiguity, this is in international law no more than a rebuttable presumption which must yield to a better claim.

Bahrain invokes long-standing ties of allegiance with the Dowasir of Hawar, a tribe which has its principal domicile on Bahrain's main island, and a number of *effectivités* which allegedly evidence a genuine display of authority.

Although it is plausible that links have existed between the inhabitants of the Hawar Islands and Bahrain, it is less certain that these links translated themselves into ties of "allegiance" with the Ruler of Bahrain. Nor can the *effectivités*, presented by Bahrain, be interpreted as evidence of continuous display of authority. In view of the fact, however, that Qatar has not presented any *effectivités* at all, the observation of the Permanent Court of International Justice in the *Eastern Greenland* case that tribunals often had to be satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim, holds true for the present case also.

The Hawars must therefore be considered to appertain to Bahrain, and the 1939 British decision as being intrinsically correct.

Sovereignty over Janan is a separate issue only because it was excluded from the Hawar group by the British Government in its decision of 1947 on the division of the sea-bed between the Parties. It is clear from the facts however that, when the dispute about the Hawars arose, Janan was considered part of the Hawar group by both Parties as well as by the Protecting Power. Nor was it given separate mention in the 1939 decision. Since the 1947 decision is ambiguous as to its legal character and cannot be seen as attributing sovereign rights, Janan must be considered part of the Hawars over which Bahrain already had sovereignty at the time of the 1947 decision. For this reason, Judge Kooijmans voted against the operative provision in which the Court found that Qatar has

sovereignty over Janan. The single maritime boundary should consequently run between Janan and the Qatar peninsula and not between Hawar Island and Janan.

Separate opinion of Judge Al-Khasawneh

While Judge Al-Khasawneh concurred with the majority decision regarding the territorial issues, i.e., Zubarah and Hawars, with regard to the latter he criticized the Court's exclusive reliance on the 1939 British decision "as a valid political decision that binds the Parties". He felt that approach was too restrictive and unduly formalistic. Moreover, he believed that reasonable doubts linger regarding the reality of Qatari consent when set contextually within the facts of almost total British control over Bahrain and Qatar. Moreover, he thought that accusations by Qatar that there was "bias and prejudgment" by some British officials were not adequately answered in the Judgment. The absence of any reference to substantive law in the part of the Judgment dealing with Hawars was also unwarranted.

Instead, alternative lines of reasoning should have been explored by the Court if the decision is to stand on firmer ground. These are *uti possidetis*, historic or original title, *effectivités*, and the concept of geographic proximity.

With respect to *uti possidetis juris* he concluded that it was inapplicable because the British Government, unlike the Spanish Crown in Latin America, had not acquired title. Moreover, he thought that the doctrine of intertemporal law argued against it. In general he felt that too ready a reliance on the principle is inimical to other legal principles, e.g., the right of self-determination, and can detract from the proper function of international courts, which is to correct illegalities where they occur and not simply to declare pre-existing territorial situations legal — in the interest of averting conflicts — without regard to title and other legally relevant criteria.

Acknowledging the difficulty of determining original titles, which stems partly from the inherent limitation of historical enquiries and partly from the paucity of information on the crucial question of Qatar's territorial extent, he thought that nevertheless some historical facts emerge with relative clarity. Among these is that Bahraini sheikhs exercised considerable control over the affairs of the Qatar peninsula until 1868. Notions of Qatari independence as of that date (when Mohammad Al-Khalifah was punished by the British) are however greatly exaggerated, for the fact that the British dealt directly with the Sheikhs of Qatar does not in itself create title. Moreover Qatar was an Ottoman territory. The real date for Qatari independence was 1913, when the Ottomans concluded a treaty with Great Britain. However, even then the territorial expanse of Al-Thani rule remained unclear. Bahrain has claimed a number of *effectivités* on the Hawars; some are modest and do not carry much probative value. However the *effectivités* carried out from 1872 to 1913 are important, for no one could doubt the authority of the Ottoman rule over the whole peninsula. The fact that the Ottomans acquiesced to such *effectivités* shows that the Ottomans, while they did not recognize any Bahraini territorial sovereignty on the Qatari mainland, nevertheless considered the Ruler of Bahrain to have ownership rights on the islands on the western coast of Qatar. Additional *effectivités* were demonstrated by Bahrain until 1936. When the spatial expanse of title is not clear, such *effectivités* play an essential role in interpreting that expanse. Notwithstanding their small number, Qatar could show no comparable *effectivités*, indeed none at all over the islands. On this basis Judge Al-Khasawneh joins the majority view.

Dissenting opinion of Judge ad hoc Torres Bernárdez

1. Judge Torres Bernárdez voted in favour of subparagraphs (1), (2) (*b*), (3) and (5) of the operative part of the Judgment. In these subparagraphs, the Court finds that the State of Qatar has sovereignty over Zubarah and Janan Island, including Hadd Janan, and that the low-tide elevation of Fasht ad Dibal also falls under the sovereignty of the State of Qatar. Moreover, the adopted course of the single maritime boundary: (i) likewise places under the sovereignty of the State of Qatar the low-tide elevations of Qit'at ash Shajarah and Qita'a el Erge; and (ii) leaves to the State of Qatar most of the continental shelf and superjacent waters of the Parties' northern sector of the maritime delimitation area in dispute with its living and non-living resources. Lastly, the operative part of the Judgment recalls us that the vessels of the State of Qatar enjoy in the territorial sea of the State of Bahrain separating the Hawar Islands from other Bahraini islands the right of innocent passage accorded by customary international law, thus placing this right of the State of Qatar within the *res judicata* of the present Judgment.

2. However, Judge Torres Bernárdez regrets being unable to support the findings of the majority with regard to sovereignty over the Hawar Islands and Qit'at Jaradah, namely subparagraphs 2 (*a*) and (4) of the operative part, for reasons set out in his opinion. The conclusions of Judge Torres Bernárdez on these two territorial questions are exactly the opposite of those of the majority.

3. Judge Torres Bernárdez also voted against the whole of subparagraph (6) of the operative part of the Judgment concerning the single maritime boundary, but for procedural reasons because a vote by division was not allowed. This is his second regret. His position on the matter had nothing to do with the findings in the Judgment on territorial questions. In fact, Judge Torres Bernárdez accepts as falling within the parameters of an equitable solution the course of the single maritime dividing line as from Qita'a el Erge up to the very last point of the line in the Parties' northern sector, precisely because the findings in the Judgment on territorial questions. But, he cannot accept that the delimitation in the Hawar Islands maritime area — those islands becoming *foreign* coastal islands by virtue of the Judgment — be effected through the application of the "semi-enclave method" in favour of the distant sovereign and not by most equitable methods applied in such kind of situations, namely by the application of the "enclave method" in favour of the coastal sovereign or other alternative means capable of

achieving an equitable maritime delimitation in the area concerned.

4. In the view of Judge Torres Bernárdez, the conclusions of the majority on the issues referred to in paragraphs 2 and 3 above: (1) fail to acknowledge the scope of the original title of the State of Qatar to the entire peninsula and its adjoining islands fully established by 1913-1915 through a process of historical consolidation and general recognition; (2) make of the 1939 British "decision" on the Hawar Islands the source of a Bahraini derivative title prevailing over the original title of Qatar, notwithstanding the formal and essential invalidity of that "decision" in international law and the fact that the Hawar Islands — geographically part of the western coast of the peninsula of Qatar — fall within the scope of the original title of the State of Qatar and are located in the territorial sea generated by the west coast of Qatar; (3) characterize a maritime feature as Qit'at Jaradah as an island and accept that such a maritime feature may be the object of appropriation as land territory (*terra firma*) through alleged Bahraini "activities" not amounting to acts performed by the State of Bahrain *à titre de souverain*; and (4) disregard in the maritime delimitation the resulting geographical/political situation arising from the attribution of the Hawar Islands to the State of Bahrain; this *superviniens* "special circumstance" should have been taken into account to achieve an equitable solution in the delimitation of the Hawar Islands area by applying a balance of equities approach through the said enclave method, by defining an area of common territorial sea or by other measures territorial in character.

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5. As to the *territorial aspect of the case*, Judge Torres Bernárdez recalls in his opinion that political and physical geography do not necessarily coincide. The opinion then goes on to review the respective merits of the Parties' claims to be the holder of an *original title* in the disputed territorial questions. In this connection, the opinion first analyses the original title to territory of each of the Parties as a whole and then the scope of such a title with respect to the particular disputed territorial questions, namely Zubarah, the Hawar Islands and Janan Island. As the two States parties are the result of an historical evolution, Judge Torres Bernárdez underlines *historical consolidation and general recognition* as a mode of acquiring original title to a given land territory.

6. The opinion recalls the origins of the ruling families of Qatar and of Bahrain, the settlement of the Al-Khalifah on Bahrain Island in 1783 and the legal effects on title to territory consequential on that settlement after 17 years at Zubarah, namely the absence of *corpus possesionis* by the Al-Khalifah in the Qatar peninsula and its adjoining islands, as well as the consequential effects of Al-Thani settlement in the Doha area on the establishment and consolidation of their original title to the entire Qatar peninsula and its adjoining islands.

7. The opinion points out that the Al-Thani and Al-Khalifah families were not the only protagonists in the shaping of their respective original title to territory. There were also other protagonists in the political scene of the Gulf from the last decades of the eighteenth century onwards such as Persia, Muscat, Oman and, in particular, the Wahhabis. But the most important historically related events occurred during the nineteenth century. First, Great Britain's presence in the Gulf in connection with its role in maintaining peace at sea became paramount and, secondly, the establishment of the former Ottoman Empire on the mainland of the Arabian peninsula, including in Qatar from 1871 to 1915. For Judge Torres Bernárdez the *termination* of the historical connection between Bahrain and Qatar occurred in about 1868-1871. In any case, Qatari tribes ceased paying the common tribute (*zakat*) due from Bahrainis and Qataris to the Wahhabi Amir in 1872.

8. The opinion also underlines Great Britain's protection of Bahrain *in the Bahrain islands* and the importance in this respect of, inter alia, the 1861 Agreement between Great Britain and Bahrain; and also the 1867 acts of war across the sea by the Ruler of Bahrain against the Qataris (Doha was destroyed) and British intervention to stop the subsequent Bahraini/Qatari hostilities described in some contemporary British documents as a "war". The outcome of those events was the agreements concluded in 1868 by Great Britain with the new Al-Khalifah Ruler of Bahrain and with the Al-Thani Chief of Gutter. The arrival of the Ottomans in Qatar three years later, in 1871, is the second historical event which together with the 1868 Agreements would, according to the opinion, determine, the future scope of the original title to the territory of Qatar and of Bahrain.

9. In fact, for Judge Torres Bernárdez, the *process* of consolidation and recognition of the Al-Thani Rulers' original title to the territory of the entire peninsula of Qatar and its adjoining islands *began* precisely some years before 1868. The respective conduct of Great Britain and Bahrain concerning the arrival of the Ottomans in Qatar is very revealing in this respect. The Ottomans organized Qatar as a *kaza* or administrative unit of the Ottoman Empire and appointed the Al-Thani Chief of Qatar as *kaimakam*. Thus, during the Ottoman period, the Chiefs of Qatar progressively developed their effective authority over Qatari tribes and territory taking advantage of their dual capacity as Chiefs of Qatar and kaimakams of the Ottoman *kaza* of Qatar. The conduct of Great Britain vis-à-vis the Al-Thani Chief of Qatar during the Ottoman period enhanced the development of that effective authority. Great Britain did not challenge the presence of the Ottoman Empire in the Qatar peninsula and continued to deal with the Al-Thani Chief of Qatar particularly in matters relating to the maintenance of peace at sea. On the other hand, the territorial scope of the effective authority of the Al-Khalifah Rulers of Bahrain was limited by treaty obligations assumed by them with Great Britain to the Bahrain islands proper. In any case, the Al-Khalifah did not exercise any kind of effective authority, directly or indirectly, over the peninsula of Qatar and its adjoining islands during the whole Ottoman

period of Qatar which lasted until 1915, namely about 44 years.

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10. In 1873, Bahrain submitted its first claim to *Zubarah* to the British alleging ill-defined rights in the area and invoking ties of allegiance between the Al-Khalifah and the Naim tribe. The British rejected this claim as unfounded and continued to reject subsequent Bahraini claims on Zubarah, including in 1937. In fact, Zubarah was part of the *kaza* of Qatar where the Chief of Qatar and the Ottomans exercised effective authority as shown by the documentary evidence in the case file. Britain recognized that situation which was also acknowledged on certain occasions by the Rulers of Bahrain themselves. The preoccupation of the British with the maintenance of peace at sea and ensuring the security of the Bahraini islands explains that the sea between Qatar and Bahrain peninsula was seen by the British as a buffer zone between the two countries from the 1868 Agreements onwards.

11. Somewhat at odds with Bahrain's above-mentioned claims on Zubarah, the Al-Khalifah Rulers waited until 1936 to submit their first written claim over the *Hawar Islands* and *Janan Island* to the British. This first claim is dated April 1936. Bahrain's prolonged silence on the Hawar Islands and Janan Island including at the very moment when the original title of the Al-Thani Chief of Qatar had been historically consolidated and generally recognized cannot be without legal effects in international law. Bahrain had occasion to claim the islands referred to. For example, at the time of Major Prideaux's visit to Zakhnuniyah and Jazirat Hawar in 1909, Bahrain claimed Zakhnuniyah but not Jazirat Hawar (*qui taceret consentire videtur*). This means that for Judge Torres Bernárdez the 1936 Bahraini claim on the islands concerned is a somewhat belated one by international law standards and, in any case, could not have retroactive effect against the historical consolidation and general recognition of the original title of Qatar already firmly established before 1936.

12. Bent's 1889 definition as well as other British descriptions of "Bahrain" and the 1908 authoritative testimony of Lorimer approved by the British Political Resident Prideaux, merely reflect the territorial realities in the area, namely Qatar's original title over the entire peninsula and adjoining Hawar Islands and Janan Island. This results also from the presumption of international law concerning islands in the territorial sea of a given State (see the first Award of the *Eritrea/Yemen* Arbitration Tribunal), and from the role of proximity or contiguity in the establishment of title to coastal islands, including the "portico doctrine" formulated by Lord Stowell in 1805. The jurisprudence of the Permanent Court in the *Eastern Greenland* case and the *Island of Palmas* Arbitration. Articles 11, 12 and 13 of the 1913 Anglo/Ottoman Convention and annexed maps — the 1914 Anglo/Ottoman Convention — the 1915 Anglo/Saudi Treaty, and the 1916 Anglo/Qatari Treaty are conventional instruments which reflect the scope of the respective original titles of Qatar and of Bahrain recognized by the Powers at the beginning of the twentieth century. The original title to territory of the State of Qatar is confirmed furthermore by general opinion or repute as expressed in the copious collection of official and unofficial map evidence before the Court, including the map in Annex V of the 1913 Anglo-Ottoman Convention and British official maps such as the one of 1920 relating to the negotiation of the Peace Treaty of Lausanne. There is also the 1923 map signed by Holmes acting on behalf of BAPCO, etc.

13. Moreover, between 1916 and 1936, British representatives acted as though and indeed proclaimed that the Al-Thani Ruler was the Chief of *the whole of Qatar* for example, during the negotiations leading to the first 1935 Qatari oil concession. Furthermore, during that period the Ruler of Qatar continued the normal exercise of his effective authority over the whole territory of Qatar including the Hawar Islands, as proved by the consent requested by the British and granted by the Ruler of Qatar to an RAF aerial survey of Qatar's territory. All the relevant British official reports, documents and cartographic evidence concerning the period 1916-1936 confirm the conclusion that the Hawar Islands and Janan Island were part of the territory of Qatar and were therefore islands under the sovereignty of the State of Qatar.

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14. Great Britain's conduct during the Ottoman period vis-à-vis the presence of the Ottoman Empire in the Qatar peninsula, as well as the conduct of the Al-Khalifah Rulers of Bahrain themselves during the same period, helped to consolidate the original title of the Al-Thani Chief of Qatar to the whole of the peninsula. At that time Bahrain's territory was defined by all the main Powers in the area (Great Britain, Ottoman Empire, Persia) as exclusively composed by the Bahrain islands archipelago proper, namely without any Bahraini dependency in the Qatar peninsula and adjoining islands. The fact that, in sharp contrast to the Zubarah case, Bahrain's first claim to *Hawar Islands* dates from 1936 speaks for itself. In international law this can only mean acquiescence by the Rulers of Bahrain to the existing territorial situation in the area. Territorial sovereignty also signifies obligations and, in the first place, the obligation to observe vigilant conduct towards possible inroads by other States in the holder's own territory or in what it considered or claimed to be its own territory. Ottoman and Qatari authority over the entire peninsula is, in any case, recognized by the contemporary documentary records before the Court and confirmed by the cartographic evidence referred to above.

15. Until 1937 Bahrain was not present in the *Hawar Islands* and until 1936 did not even claim those islands as part of its territory. As islands adjoining the peninsula of Qatar, the Hawar Islands fell within the scope of the Chief of Qatar's title to the whole peninsula. Lorimer's 1907-1908 articles on the principality of Bahrain and on Qatar, revised and endorsed by Prideaux, British Political Resident in the Gulf, are clear evidence that, at the beginning of the

twentieth century, the Hawar Islands were considered by all those most directly concerned to be a part of the territory of the Chief of Qatar, in other words Qatari territory. The case file contains no protest or claim by the Ruler of Bahrain against the territorial situation existing in the Hawar Islands until 1936-1939.

16. Furthermore, the 1913 and 1914 Anglo-Ottoman Conventions expressed in treaty form the understanding of Great Britain and the Ottoman Empire that the extent of the territorial title of the Chief of Qatar encompassed the "peninsula of Qatar" as a whole. The Chief of Qatar was to govern the whole of the said peninsula *as in the past* and Great Britain said it should be understood *that it will not allow the interference of the Sheikh of Bahrain in the internal affairs of Qatar, his endangering of the autonomy of that area or his annexing it*. It is difficult to express more clearly that Bahrain did not have title to territory over the peninsula of Qatar and, therefore, over its adjoining islands and territorial waters. Moreover, the 1913 Anglo-Ottoman Convention did not recognize any right in favour of Bahraini subjects in the Hawar Islands, as it did in the case of Zakhnuniyah Island. The 1916 Anglo-Qatari Treaty contains nothing which could be construed as a change in Great Britain's position on the extent of the title to territory of the Al-Thani Chief of Ruler of Qatar. Conventional evidence therefore confirms the pre-existing territorial state of affairs and also counters Bahrain's thesis of being the holder of an original title to the Hawar Islands.

17. The general opinion or repute reflected in the voluminous map evidence before the Court corroborates Qatar's original title to the Hawar Islands beyond any reasonable doubt. Qatar's conduct after the 1916 Anglo-Qatari Treaty also confirms the effective authority exercised by the Chief of Qatar over the entire peninsula and its adjoining islands, the Hawars and Janan included. The same applies to the conduct of Great Britain and Bahrain until 1936-1939. There were no Bahraini *State effectivités* of any kind in the Hawar Islands before the clandestine occupation of the main Hawar Island in 1937. By then, however, Qatar's original title to the Hawar Islands was already fully consolidated and generally recognized according to the standards applied by international courts and tribunals relating to disputes on the attribution of sovereignty.

18. Furthermore, beyond the conduct of the Parties and Great Britain, international law naturally also has to be considered. In the case of islands, international law has a general rule formulated in terms of a presumption according to which sovereignty over the islands wholly or partly in the territorial sea of a given State belongs to that State *unless a full case to the contrary is established by another State*. This rule has recently been applied by an arbitral tribunal to groups of islands in the Red Sea (*Eritrea/Yemen*) case. Most of the Hawar Islands were in the 1930s wholly or partly within the 3-mile territorial sea of Qatar and today all are wholly within the 12-mile territorial sea of Qatar. As a presumption *juris tantum*, the norm is also an element of interpretation of the text of certain relevant treaty undertakings, such as the 1868 Pelly Agreements, the 1913 and 1914 Anglo-Ottoman Conventions and the 1916 Treaty between Britain and Qatar.

19. In the circumstances of the present case, this contributes to a more precise definition of the territorial scope of Qatar's original title, as established by historical consolidation and general recognition. The norm based upon criteria such as proximity and security was in force long before the 1930s and has continued to be in force since. Moreover, as a presumption which creates a right, the norm is subject to the intertemporal law principle, according to which the continued manifestation of the right concerned follows the conditions required by the evolution of the law. Thus, authorization by international law for an extension of the territorial sea up to a 12-mile coastal belt extends the scope of the presumption to the islands lying off the 12-mile territorial sea of the coastal State concerned. This was how the 1998 Arbitral Award in the *Eritrea/Yemen* case understood and applied the said presumption.

20. This presumption is a logical and reasonable norm intended, like others, to facilitate the application in practice of the principle of effective possession (in the form of presumed possession) to particular concrete situations by reference to an objective geographical criterion, while preserving a fully established case to the contrary that another State may have. In other words, and with reference to the present case, the norm presumes that the Hawar Islands and Janan Island are in the possession of Qatar, unless Bahrain is able to prove a fully established case to the contrary. This is precisely what Bahrain failed to prove in the current proceedings with respect to the Hawar Islands and Janan Island.

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21. The opinion ends its consideration of the original title matter by concluding that *Qatar is the holder of the original title to the territorial questions in dispute, namely Zubarah, the Hawar Islands and Janan Island*, and that, consequently, in the absence of a better or prevailing *derivative title* of Bahrain, Qatar has sovereignty over Zubarah, the Hawar Islands and Janan Island. The findings of the present Judgment on *Zubarah* and *Janan Island* coincide with the conclusions of Judge Torres Bernárdez. However, they do not coincide with respect to the *Hawar Islands*, the finding of the majority being that Bahrain has sovereignty over the Hawar Islands. The opinion therefore wonders whether it may be said that Bahrain has a better or prevailing *derivative title to the Hawar Islands*, and begins by considering *the 1939 British "decision"* on the Hawar Islands invoked by Bahrain because such a "decision" is indeed the basis of the finding relevant of the majority. While agreeing with the Judgment that the British "decision" is *not* an international arbitral award with *the force of res judicata*, Judge Torres Bernárdez dissents from the conclusion of the majority that the 1939 British "decision" is *nevertheless* a decision which had in 1939 and still has binding legal effects in the relations between the Parties to the present case.

22. For Judge Torres Bernárdez the conclusion of the majority is wholly erroneous in law, difficult to explain in the light of the evidence submitted by the Parties and rather flimsy in its motivating reasons. As the legal question at issue is *consent* to the 1938-1939 British procedure on the Hawar Islands, the opinion begins by underlining that consent to a given procedure is not consent which might or should be ascertained *in abstracto*. It must be considered in the specific context where the alleged consent was given. In this respect, Judge Torres Bernárdez notes that, in determining the alleged legal effects of the 1939 British "decision", the corresponding reasoning in the Judgment fails to take into account some closely related events prior to 1938, particularly the 1936 British "provisional decision" and the clandestine and unlawful occupation by Bahrain in 1937 of the northern part of Jazirat Hawar made under the umbrella of that "provisional decision".

23. The reasoning also fails — according to the opinion — to explain the scope of the authority or power of the British Government to make a "decision" on the Hawar Islands with *legally binding effects in international law* for Qatar and Bahrain on the basis of consent allegedly given to the 1938-1939 British procedure. The Judgment likewise fails to analyse the question whether the determined consent of the Ruler of Qatar to the 1938-1939 British procedure implied acceptance by him of the outcome of the procedure as a decision with legally binding effects in international law on the questions of title or sovereignty over the Hawar Islands. For Judge Torres Bernárdez all these matters would have deserved full treatment in the Judgment because what is at the stake here is the *principle of consensuality* which in international law governs consent to any kind of peaceful settlement with binding or non-binding outcome.

24. The two main reasons why Judge Torres Bernárdez cannot accept the conclusion of the majority on the 1939 British "decision" are even more fundamental. They relate to both the validity of the consent which has been determined of the Ruler of Qatar to the 1938-1939 British procedure and the validity in international law of the actual 1939 British "decision" itself. On the first question, the consent of the Ruler of Qatar which has been determined was not an informed consent to a meaningful procedure freely given. Judge Torres Bernárdez considers it proven by the evidence before the Court that such consent was vitiated by induced error, fraudulent conduct and coercion. The bad faith of the British Political Agent, Weightman, involved in the negotiations with the Ruler of Qatar is quite obvious and his promise that the decision would be given by the British Government "*in the light of truth and justice*" was not intended to be fulfilled and was not fulfilled. As to the second question, namely the validity of the 1939 British decision itself, Judge Torres Bernárdez finds that, for reasons explained in his opinion, the "decision" is an invalid decision in international law from the standpoint of both formal validity and essential validity. It follows that the opinion considers it wholly unjustified, in the circumstances of the case, that the 1939 British "decision" could be the source of a *derivative title* of Bahrain to the Hawar Islands.

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25. Having concluded as to the invalidity of the 1938 consent by the Ruler of Qatar and of the 1939 British "decision", the opinion considers the two other derivative titles invoked by Bahrain, namely *effectivités* and *uti possidetis juris*. As regards *uti possidetis juris*, Judge Torres Bernárdez concludes that, *qua norm* of general international law, this principle is inapplicable to the present case. As to the *effectivités* in the Hawar Islands alleged by Bahrain, they are *voluminous in quantity but sparse in useful content*. Most of them are not admissible because they are subsequent to the clandestine and unlawful occupation of Jazirat Hawar by Bahrain in 1937. Others are in clear contradiction with the status quo accepted by the Parties in the context of the Saudi Arabian mediation. Furthermore, the admissible *effectivités* do not constitute an international display of power and authority over territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The Dowasir activities are not acts performed by Bahrain *à titre de souverain*. Thus, Judge Torres Bernárdez cannot uphold the Bahraini *effectivités* plea either. Moreover, in the past as today the *effectivités* alleged by Bahrain relate to Jazirat Hawar island alone. No Bahraini *effectivités* of any kind existed or exist in the other islands of the Hawars group.

26. It follows from the above that since Bahrain's three pleas based upon alleged derivative titles to the Hawar Islands are rejected by Judge Torres Bernárdez, *sovereignty over the Hawar Islands belongs for him to the State of Qatar by virtue of its original title to those islands.The original title of Qatar over the Hawar Islands has not been displaced by any better derivative title of Bahrain.*

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27. Regarding the *maritime delimitation aspect* of the case, the opinion rejects the "archipelagic State", the "historic title or rights" and the "*de facto* archipelago or multiple-island State" arguments of Bahrain. The Judgment also rejects the "archipelagic State" and "historic title or rights" arguments of Bahrain, but according to Judge Torres Bernárdez is not immune to the "*de facto* archipelago or multiple-island State" argument.

28. This explains in the view of Judge Torres Bernárdez the peculiar way in which the Judgment interprets the relevant principles and rules of general international law applicable to the maritime delimitation in the present case. The Court's task was to draw a *single* maritime boundary between the relevant *coasts* of the States parties and this means, inter alia, that the result of the delimitation should be "*equitable*" all along the course of the line, independently of the maritime jurisdiction divided by the line in a given sector. In this respect, Judge Torres Bernárdez considers that the majority gave excessive and unjustified weight to the fact that in part of its course the line divides territorial seas of the Parties.

29. Judge Torres Bernárdez emphasizes that the Judgment avoids defining the "area of delimitation" and

artificially identifies the "*Bahraini relevant coasts*" which it defines by reference to "basepoints" located in tiny islands and low-tide elevations. The result is that while the relevant coast of Qatar is a geographical and continuous coast or coastal front (namely the relevant western coast of the Qatar peninsula), the "Bahraini relevant coasts" is composed of a series of "basepoints" on the said minor maritime features distant from each other as well as from the Bahraini mainland coast or coastal front. It follows that the "Bahraini relevant coasts" of the Judgment are formed ultimately by some isolated "basepoints" on minor maritime features and by *water in between*! It is certainly a peculiar and extraordinary conclusion of the majority on the definition of the relevant coasts in order to effect a maritime delimitation.

30. The "*equidistance line*" constructed by the Judgment is therefore not a line between two coastal lines but something else. Judge Torres Bernárdez rejects that "equidistance line" as artificial and without legal justification. In fact *la mer domine la terre* in the reasoning of the Judgment. The non-application by the Judgment of the mainland-to-mainland method means that the "equidistance line" of the Judgment is *not* an "equidistance line" as normally understood in maritime delimitations. For all practical purposes it represents the outer limit of the claims of Bahrain and sometimes even more than that. It is true that the "equidistance line" constructed by the Judgment is subsequently corrected in favour of Qatar in some segments of the line. Nevertheless, the "equidistance line" of the Judgment gives an *unjustified* initial *plus* to Bahrain and, in fact, Bahrain obtains at the end of the delimitation operation more maritime spaces than through previous sea-bed dividing lines external to the Parties (the 1947 British line and the Boggs-Kennedy line), particularly in the central and southern sectors of the maritime delimitation area.

31. With respect to the "*special circumstances*" justifying adjustment of the "equidistance line" of the Judgment, the latter does not take account of the length of the relevant coasts of the Parties either. Moreover, the majority considers that Qit'at Jaradah is an island (supposedly without territorial sea effects in the definition of the single maritime boundary) and attributes sovereignty over that particular maritime feature to Bahrain by occupation! This finding is quite unfounded in law. However, Fasht ad Dibal falls under the sovereignty of Qatar. In effect, this low-tide elevation which lies in the territorial sea of the State of Qatar is on the Qatari side of the single maritime boundary. For Judge Torres Bernárdez the same conclusions should have been applied to the low-tide elevation of Qit'at Jaradah. Regarding the question whether Fasht al Azm is part of Sitrah Island as alleged by Bahrain, the Judgment decides *not* to determine the question. For Judge Torres Bernárdez it is clear, in the light of unsuspected technical evidence before the Court, that Fasht al Azm was separated from Sitrah Island by a natural channel used in the past by fishermen and, consequently, Fasht al Azm is a low-tide elevation and not part of Sitrah Island.

32. For Judge Torres Bernárdez the most legally unjustified decision of the majority concerning the "special circumstances" relates to the Hawar Islands maritime area. The Hawar Islands should have been enclaved because they form part of the western coast of the Qatar peninsula and are, therefore, located in the territorial sea of the State of Qatar. By applying the semi-enclave method to *foreign* coastal islands in favour of Bahrain, the result cannot be more *inequitable* because the western coast of Qatar is divided into two separate parts by the Hawar Islands themselves and by Bahraini territorial waters. The precedent of the British Channel Islands (*Iles Anglo-Normandes*) case was disregarded, *although* subparagraph (2) (*b*) of the operative part of the Judgment recalls the right of innocent passage of Qatari vessels in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands as accorded by customary international law.

33. In the light of the above considerations, Judge Torres Bernárdez is of the opinion that the single maritime boundary is not "equitable" in the Hawar Islands maritime area and rejects it in that area. On the other hand, Judge Torres Bernárdez finds that, as from Quita'a el Erge to its last point in the northern sector of the delimitation area, the course of the single maritime boundary is acceptable, although Bu Thur and Qit'at Jaradah should have been placed on the Qatari side of the single maritime boundary.

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34. In conclusion, the dissent of Judge Torres Bernárdez relates essentially to the finding of the majority of the Court on the Hawar Islands dispute, the legal basis of that finding, and the consequences it entails for the maritime delimitation. In effect, this finding fails, according to the opinion, to acknowledge (1) the *original title* and corresponding sovereignty of the State of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition; and (2) the absence of any superior *derivative title* of the State of Bahrain over the Hawar Islands. To this it should be added that the resulting *superviniens* maritime "special circumstance" is not treated as such in the definition of the course of the single maritime boundary in the Hawar Islands maritime area.

35. The opinion considers the conclusion of the majority on the Hawar Islands dispute quite erroneous in international law and states, with regret, that as a result of that conclusion the State of Qatar — which came to the Court in order inter alia to remedy a breach of its territorial integrity in the Hawar Islands through the peaceful means of judicial settlement — did not in that respect obtain from the Court the judicial answer which the merits of its case on the Hawar Islands dispute deserved. This example makes Judge Torres Bernárdez wonder whether judicial settlement is in fact a means of redressing notorious territorial usurpations by effecting the peaceful change that the re-establishment of international law may require in a given situation. In any case, *quieta non movere* does not provide an explanation in the present case because the Judgment *non movere* in the

Hawar Islands dispute does not apply to the definition of the single maritime boundary. In the maritime delimitation aspect of the case, the Judgment is *movère*. But, the *non movere* like the *movere* of the majority always seems to be in one direction, in a manner which, in the view of Judge Torres Bernárdez, does not coincide with the normative requirements of the applicable general international law and/or the relative weight of the arguments and evidence submitted by the Parties. Last but not least, the considerations in the reasoning of the Judgment concerning the finding on the Hawar Islands dispute are quite inadequate. The reasoning is unable, according to the opinion, to duly justify the finding of the majority on the Hawar Islands dispute.

36. How is it possible to explain a finding on the basis of a vitiated consent to a 1938-1939 British procedure and whose outcome, the 1939 British "decision", was clearly and obviously an invalid decision in international law, both formally and essentially, at the time of its adoption and remains so? The resurrection in the year 2001 of an invalid colonially minded decision linked to oil interests to resolve a territorial question in dispute between two States is more than amazing and for Judge Torres Bernárdez a quite unacceptable legal proposition. The Judgment's reasoning on consent is to all practical purposes exclusively focused on Qatar. But the 1938-1939 British procedure was a procedure with three participants. Where in the reasoning is the analysis of consent and its conditions with respect to the other two participants? It seems it has also been forgotten that the British representatives in the Gulf involved in dealing with Qatar and Bahrain, Fowle, Weightman and others, and the British officials in London, such as those of the India Office, were agents of the British Government acting in that capacity. Thus, their acts, to the extent that they are proven as vitiated, are vitiated acts of the British Government or imputable to the British Government in international law, namely to the very Government which made the 1939 "decision". Moreover, the reasoning of the Judgment does not even explicitly consider the question of whether the 1939 British "decision" was valid at that time from the standpoint of the essential validity requirements of the law.

37. Furthermore, intertemporal validity is quite alien to the reasoning of the Judgment. How may it be affirmed that the 1939 British "decision" has legally binding effects today between the Parties without analysing whether the so-called "consent" to the 1938-1939 British procedure may be considered a valid consent in the international law in force at the time of the adoption of the present Judgment? To conclude that this is so, it would have been necessary to bring into the picture such as, for example, the possible existence of *jus cogens superviniens* rules or of *erga omnes* imperative obligations, as well as the fundamental principles of the Charter of the United Nations and of the present international legal order.

38. It follows that Judge Torres Bernárdez is unable to accept the conclusion that the State of Bahrain is the holder of a derivative title to the Hawar Islands on the basis of consent to the British procedure as determined by the Judgment. The reality and validity of that consent — as well as the permanency of its affirming legally binding effects for the Parties — is ***not*** adequately and convincingly explained in the reasoning of the Judgment. At the same time, as he has found no other relevant derivative title or titles of Bahrain, the original title of Qatar to the Hawar Islands cannot for Judge Torres Bernárdez but prevail as between the Parties in the Hawar Islands dispute of the present case.

Separate opinion of Judge ad hoc Fortier

In his separate opinion Judge Fortier makes the following observations:

Preliminary issue

The only reference in the Judgment to the Qatari documents whose authenticity was challenged by Bahrain is a narrative found in the section setting out the history of the proceedings before the Court. These documents played an essential role in Qatar's Memorial, serving as almost the only basis for Qatar's claim to the Hawar Islands. Once the authenticity of these documents was challenged by Bahrain, Qatar did not abandon its claim to the Hawar Islands. It adduced a new argument which was not even developed in its original Memorial as an alternative argument. Qatar's case cannot be considered without having in mind the damage that would have been done to the administration of international justice, indeed to the very position of this Court, if the challenge by Bahrain of the authenticity of these documents, had not led Qatar, eventually, to inform the Court that it had decided to disregard all the challenged documents.

Zubarah

The documents originating between 1869 and 1916 on which Qatar relies in support of its claim to Zubarah, and which the Court found dispositive, does no such thing. By 1916, Bahrain had not lost its title to Zubarah on the Qatar peninsula. The allegiance of the Naim tribes that inhabited the north-west of the Qatar peninsula and who remained loyal to Bahrain and the Al-Khalifah until 1937 confirm Bahrain's title over the Zubarah region. International law recognizes that, in certain territories that are possessed of exceptional circumstances such as low habitability, a ruler can establish and maintain title to his territory by manifestation of dominion or control through tribes who gave him their allegiance and looked to him for assistance.

In 1937, the Naim tribesmen who lived in Zubarah were attacked by the Al-Thani and forcibly evicted from the region. The events of July 1937 must be characterized as acts of conquest by Qatar. If the seizure of Zubarah, in 1937, by an act of force were to occur today it would be unlawful and ineffective to deprive Bahrain of its title. However, forcible taking of territories in the pre-United Nations Charter days cannot be protested today. The principle of stability is a significant factor in questions

concerning territorial sovereignty. The Court is not competent to judge and declare today, more than 60 years after the forcible taking, that Bahrain at all material times has remained sovereign over Zubarah.

Janan Island

The critical issue in relation to Janan is whether, by the normal canons of interpretation, the 1939 British decision is to be understood as having, at the time, included Janan. The Court's sole task is to interpret the 1939 decision. The 1939 British decision can only be understood as including Janan.

The Court has attached a great deal of importance to the letters sent on 23 December 1947 by the British Government to the Rulers of Qatar and Bahrain. These letters purported only to express the policy of the United Kingdom and had no legal significance whatsoever regarding ownership of Janan Island. Janan, including Hadd Janan, must be considered to be part of the Hawars over which Bahrain has sovereignty.

Maritime delimitation

Judge Fortier has serious reservations with the Court's reasoning in respect of certain aspects of the maritime delimitation. He does not agree with that part of the single maritime boundary that runs westward between Jazirat Hawar and Janan. He does not, however, express his reservations or disagreement by casting a negative vote.