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1. Introduction

The *Qatar v. Bahrain Maritime Delimitation and Territorial Questions* case is the first major maritime delimitation dispute settled by the International Court of Justice (ICJ) since the 1993 *Denmark v. Norway Maritime Delimitation in the Area Between Greenland and Jan Mayen Judgment*.[1] The latter was followed by the 1998 *Territorial Sovereignty and Scope of the Dispute Award* and the 1999 *Maritime Delimitation Award* rendered by the *Eritrea/Yemen* Arbitral Tribunal.[2] All those three landmark cases provided instances of application of the modern law of maritime boundary delimitation, as developed in the "*notably successful*" equitable jurisprudence of the ICJ and arbitral tribunals.[3] Similarly as the *Eritrea/Yemen*

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1 ICJ Reports 1993, 38, President Sir Robert Jennings. See also Denmark/Norway Oslo Agreement on Delimitation of the Continental Shelf in the Area Between Jan Mayen and Greenland and on the Boundary Between the Fishery Zones in the Area of 18 December 1995 [in force: upon signature, UN Law of the Sea Bulletin 59 (1996 No.31)] and Additional Protocol of 11 November 1997 [id. 37 (1999 No.39) and id. 111 (2000 No.43)], which fully implemented the Court's Judgment.

2 The Eritrea/Yemen Arbitral Tribunal comprised: Sir Robert Jennings (President), Judges Stephen M. Schwebel and Rosalyn Higgins, as well as Keith Highet and Ahmed S. El Kosheri. For the texts of the 1998 and 1999 Awards, see the PCA's Internet address <http://www.pca-cpa.org>; 114 ILR 1 and 119 ILR 417 (2001); 40 ILM 900, 983 (2001). Cf. UN Law of the Sea Bulletin 77-79 (2001 No.44); B. Kwiatkowska, The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation, 32 Ocean Development and International Law 1-25 (2001); B. Kwiatkowska, The Law-of-the-Sea Related Cases in the International Court of Justice During the Presidency of Judge Stephen M. Schwebel (1997-2000), 16 International Journal of Marine and Coastal Law (IJMCL) 1, 10, 29-36 (2001) www.wkap.nl/oasis.htm/335941 and www.law.uu.nl/english/isep/nilos/paper.asp.

Three preceding arbitrations in the Persian Gulf led to the 1951 Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi Award of Lord Asquith of Bishopstone [ILR 144 (1951); Stuyt/No.A 1.28], the 1981 Dubai/Sharjah Boundary Award [91 ILR 543; Stuyt/No.438], and the 1993 UN Iraq/Kuwait Boundary Report and S/RES/833 of 27 May [32 ILM 1425 (1993)]. In the neighbouring Red Sea region, the Eritrea/Yemen Awards (PCA) were preceded by the 1988 Egypt/Israel Taba Beachfront Boundary Award [80 ILR 226; Stuyt/No.449], and were followed by the 2002 UN Eritrea/Ethiopia Boundary Decision (PCA), rendered by Commission comprising Sir Elihu Lauterpacht (President), Judges Stephen M. Schwebel and Bola Ajibola, Sir Arthur Watts and W. Michael Reisman <http://www.pca-cpa.org>; infra notes 55, 153, 210. Cf. UN Doc. S/RES/1320 of 15 September 2000; 40 ILM 260 (2001); UN Docs A/56/1, para.53 (2001); S/2001/45 and 1194; S/2002/205, S/2002/245 and S/RES/1398 of 15 March 2002; S/RES/1430 and 1434 of 14 August and 6 September 2002; A/57/1, para.39 (2002); S/2002/744 and S/2002/977.

For repeated appeals of the Gulf of Cooperation Council (GFC) to bring Iran/UAE dispute over Abu Musa, and the Greater and Lesser Tunbs before the ICJ, see UN Docs S/1998/2, S/1999/305 and 802, S/2000/281, S/2001/309 and 319.

3 Cf. Statement of Judge Stephen M. Schwebel, President of the International Court of Justice, to the 54th United Nations General Assembly, UN Doc. A.54/PV.39, 26 October 1999, at 1, 3, noting that the General List included at that time four cases of boundary delimitation, "*a more traditional area in which the Court has been notably successful*"; reprinted in the ICJ Yearbook 1999-2000 282-288, 285 (No.54). The Statement and all other ICJ items are available online at <http://www.icj-cij.org>; infra notes 249-251.
For recent appraisal, see Plenary Address by President Stephen M. Schwebel, The Contribution of the ICJ to the Development of International Law, in International Law and The Hague's 750 Anniversary 405, 409-411 (1999); B. Kwiatkowska, The International Court of Justice and Equitable Maritime Boundary Delimitation, id., at 61-72.

arbitration and the pending *Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea Intervening)* proceedings,[4] the *Qatar v. Bahrain* case involved the issues of maritime delimitation in combination with those of territorial sovereignty[5] and belonged to cases of particularly pronounced procedural and substantial importance.

The *Qatar v. Bahrain* case consisted of the phase of jurisdiction and admissibility and that of the merits. The two *Qatar v. Bahrain (Jurisdiction and Admissibility) Judgments*, which involved controversial issues of treaty interpretation, were delivered by the Court in 1994 and 1995, during the Presidency of Judge Mohamed Bedjaoui (Algeria) and Vice-Presidency of Judge Stephen M. Schwebel (United States).[6] In the next triennium (1997-2000) of Presidency of Judge Schwebel and Vice-Presidency of Judge Christopher G. Weeramantry (Sri Lanka), the written proceedings on the merits continued, including resolution of procedural difficulty raised by 82 Qatar's documents that were challenged by Bahrain.[7] The Oral Hearings were held and the *Qatar v. Bahrain* (Merits) Judgment was rendered during the current triennium (2000-2003) of Presidency of Judge Gilbert Guillaume (France) and Vice-Presidency of Judge Shi Jiuyong (China).[8]

An important stage in the history of the dispute was that after Bahrain frustrated in 1965 Qatar's attempt to settle their dispute by arbitration, and following termination of the British presence in Bahrain and Qatar in 1971, when both states were admitted to the United Nations, mediation of the dispute was attempted in 1976 by King Fahd of Saudi Arabia. As a result of that mediation (or "*good offices*" a set of "*Principles for the Framework for Reaching a Settlement*" was approved during a tripartite meeting in March 1983. The first of these Principles specified that "[a]*ll issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together.*"[9] In April 1986, Qatar sent a security force to put an end to the violation of these Principles by some construction work undertaken by Bahrain on Fasht ad Dibal in an attempt to transform it into an artificial island. In December 1987, King Fahd, pursuant to the Principles of Framework, made certain proposals for the settlement of the dispute between the two states, including the recommendation that "[a]*ll the disputed matters shall be referred to the International Court of Justice at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms.*"[10]

After the mediation by the King of Saudi Arabia had failed to lead to the desired outcome, Qatar, by means of its application filed in the ICJ Registry on 8 July 1991, under Article 36(1) of the Court's Statute, instituted proceedings against Bahrain in the Maritime Delimitation and Territorial Questions Between Qatar and Bahrain case (General List No.87). The Application

4 ICJ Reports 1996, 13 (Provisional Measures), President Bedjaoui; ICJ Reports 1998, 275 (Preliminary Objections), President Schwebel; 1999, 31 (Interpretation), (Counter-Claims, in press) and (Intervention, in press), President Schwebel <http://www.icj-cij.org>. Cf. infra notes 148, 182, 197 and 232; Kwiatkowska, The Law-of-the-Sea Related Cases, supra note 2, at 9, 13-14, 31-33.

5 Issues of territorial sovereignty and/or maritime boundary delimitation are also involved in the pending Indonesia/Malaysia, Nicaragua v. Honduras and Nicaragua v. Colombia cases <http://www.icj-cij.org>. Cf. infra notes 148, 197, 219 and 247; Kwiatkowska, The Law-of-the-Sea Related Cases, supra note 2, at 29-30.

6 See main text accompanying infra notes 12-45 and 225-229.

7 See main text accompanying infra notes 46-49.

8 See main text accompanying infra notes 50-60.

9 ICJ Reports 1994, 112, 116.

10 Id., at 117.

specified that the dispute related 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 the Arabian/Persian Gulf (hereinafter referred to as "*the Gulf*").[11]

2. The 1994 and 1995 *Qatar v. Bahrain (Jurisdiction and Admissibility)* Judgments, including their Opinions

The 1991 Application of Qatar founded the jurisdiction of the Court upon two Qatar/Bahrain Agreements stated to have been concluded in December 1987 and December 1990, with the subject and scope of the commitment to jurisdiction having been determined, according to Qatar, by a formula proposed by Bahrain to Qatar on 26 October 1988, and accepted by Qatar in December 1990. Bahrain contested the basis of jurisdiction invoked by Qatar, maintaining that the Minutes signed at Doha on 25 December 1990 by the Foreign Ministers of Bahrain, Qatar, and Saudi Arabia, which Qatar considered to be an agreement, did not constitute a legally binding instrument. In Bahrain's view, the combined provisions of the Minutes and the Letters exchanged by each state with the King of Saudi Arabia accepting the Court's jurisdiction did not enable Qatar to seize the Court unilaterally. The text proposed by Bahrain on 26 October 1988, and referred to in the 1990 Doha Minutes as the "*Bahraini formula*", read as follow:

> *The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters*.[12]

In its first, almost unanimous *Qatar v. Bahrain (Jurisdiction and Admissibility) Judgment*, delivered on 1 July 1994, the Court handed down five decisions, all of them by the same 15 votes to 1, with the vote against being that of Judge Shigeru Oda.[13] The Court found that Qatar and Bahrain had entered into international agreements by which they had undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the "*Bahraini formula*" quoted above. The agreements, which the Court found as conferring jurisdiction upon it, included 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 Minutes signed at Doha on 25 December 1990.[14] The Court therefore decided to afford Qatar and Bahrain the opportunity to submit the

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11 Id., at 114; and ICJ Reports 2001 (in press), infra note 51, para.1. Note that Bahrain is a key ally of the United States in the Persian Gulf and is the administrative headquarters for the U.S. Navy's Fifth Fleet. After his death, Sheikh Isa bin Sulman al-Khalifa, ruler of Bahrain since 1961, was succeeded by his son, Sheikh Hamad. See The Emir of Bahrain, The Times of 8 March 1999, at 14 and 23, and International Herald Tribune of 8 March 1999, at 1 and 13. Cf. infra note 93. On support of Bahrain and other Gulf states for the U.S.-led international anti-terrorism campaign, see General Praises Anti-Terror Effort and Arab Nations Defend Islam's Image, Washington Post of 24 October 2001 <http://www.washingtonpost.com>.

12 ICJ Reports 1994, 117-118; and ICJ Reports 2001 (in press), infra note 51, paras 67, 115-116 and 168.

13 ICJ Reports 1994, 112, 126-127, decided by 15 votes to 1. In favour (of all five decisions): President Bedjaoui, Vice-President Schwebel, Judges Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, and Judges ad hoc Valticos (designated by Bahrain), Ruda (designated by Qatar); Against: Judge Oda; Registrar Valencia-Ospina.

14 According to S. Rosenne, The Qatar v. Bahrain Case: What Is a Treaty? A Framework Agreement and the Seising of the Court, 8 Leiden Journal of International Law (LJIL) 161, 171-176 (1995), the Qatar v. Bahrain

whole of the dispute to the Court and fixed 30 November 1994, as the time-limit by which the parties could, jointly or separately, take action to that end. Any other matters were reserved by the Court for subsequent decision.

Vice-President Stephen M. Schwebel - who voted with the majority in favour of all five holdings whose content, in his view, was "*unobjectionable*" - also found, in his illuminating Separate Opinion, the Court's Judgment to be "*novel - and disquieting*".[15] This is because, contrary to the previous jurisprudence of the Court, the 1994 *Qatar v. Bahrain* Judgment failed to dispose of the submissions of the parties. Instead of resorting to one of the three options afforded by Article 79(7) of its Rules (i.e., upholding the objection, rejecting it, or declaring that the objection does not possess an exclusively preliminary character), the Court reserved for a future time its entire decision as to whether it had jurisdiction. It was questionable, in his view, whether the judicial function was served by such an innovation, however desirable it was that Qatar and Bahrain realized their commitment to submit their dispute to the Court. According to Ambassador Shabtai Rosenne, the Court apparently took the view that at that stage of the case, it was not acting within the context of Article 79 of the Rules of Court, which was not mentioned anywhere in the 1994 Judgment or in any of the Opinions except that of Vice-President Schwebel.[16]

Whereas President Mohammed Bedjaoui did not append any Opinion to the *Qatar v. Bahrain* Judgment, he expressly referred thereto in his Statement made subsequently to the 49th United Nations General Assembly on 13 October 1994. He stressed that the Court, by the nature of the law it applies, by the role it fulfils and by its composition, is "*able to withstand blind applications of the law*" and that international law remains, "in essence, a flexible and open law", including due regard for equity infra legem.[17] The President went on to ascertain that: "*As a body integrated into the system for the maintenance of peace that was established under the Charter, the Court never loses sight of that ultimate objective. It follows that the important approach recently made by the Court to the Parties in the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain provides indisputable evidence of the dynamic and responsible judicial policy applied by the Court, and prompted by its constant concern to hear and determine cases in the interest of peace*".[18]

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case exemplifies reliance, under Article 36(1) of the ICJ Statute, on the "*framework agreement*" as a method of conferring jurisdiction on the Court distinct from a special agreement (compromis). See also S. Rosenne, The Law and Practice of the International Court, 1920-1996 672-677, 939-940 (Third Edition 1997).

15 Separate Opinion of Vice-President Schwebel, ICJ Reports 1994, at 130-131. Cf. infra note 42.

16 Rosenne, The Qatar v. Bahrain Case, supra note 14, at 178. For agreement with Vice-President Schwebel's views, see also I. Pingel-Lenuzza, Remarques sur la procédure dans l'affaire de la Délimitation maritime et des questions territoriales entre Qatar et Bahreïn, 100 Revue Générale de Droit International Public (RGDIP) 179, 192-193 ns 57, 59 and 69 (1996).

17 Statement of Judge Mohammed Bedjaoui, President of the International Court of Justice, to the 49th United Nations General Assembly, UN Doc. A/49/PV.29, 13 October 1994, at 1, 4, reprinted in the ICJ Yearbook 1994-1995 211-212 (No.49).

18 Id. It is in this context that President Bedjaoui went on to comment upon the composition of the Court as a "*World Court*", and to state that: "*The Court takes its decisions on the basis of law, following a most meticulous examination of each case, without failing to take account of the "meta-juridical factors" ("données méta-juridiques"), the expectations of the Parties and the imperative requirements of justice and peace*" (emphasis added). Cf. also Qatar v. Bahrain (Jurisdiction and Admissibility) Dissenting Opinion of Judge Shahabuddeen, ICJ Reports 1995, 51-2; infra notes 25 and 43-45. On Dissenting Opinion appended by Judge Bedjaoui - jointly with Judges Ranjeva and Koroma - to the 2001 Qatar v. Bahrain (Merits) Judgment, see infra notes 59, 96-100, 135, 177 and 215.

Although the remark made in the 1994 *Qatar v. Bahrain* Dissenting Opinion of Judge Shigeru Oda that the Court had "*opted for the role of conciliator*"[19] seemed, in Rosenne's view, to be a fair characterization of the Court's action, he also thought that by so acting the Court did not go beyond its powers as set out in the Statute.[20] The 1994 Qatar v Bahrain Judgment was, according to Ambassador Rosenne, a timely innovation, especially as regards cases where the jurisdiction rests on a "*framework agreement*" as distinct from a compromis. But Rosenne's cautious conclusion on that Judgment merits special attention, namely that it "*is justified by the long history of the attempts to reach an agreed solution of the differences between two neighbouring countries, or an agreed form of reference to the Court. It is not a precedent for other types of disputes as to whether the Court has jurisdiction*".[21] The wisdom of this view was confirmed when in the 1995 *New Zealand v France Nuclear Tests (Request for an Examination of the Situation) Order*,[22] the Court did not respond to New Zealand's appeal to its inherent powers as used for the purposes of the unusual decision taken in its 1994 *Qatar v. Bahrain* Judgment.

In accordance with *Qatar v. Bahrain* Judgment, Qatar filed in the ICJ Registry on 30 November 1994 a document entitled "*Act to comply with paragraphs (3) and (4) of the 1994 Judgment's operative Paragraph 41*".[23] In the document, Qatar referred to "*the absence of an agreement between the Parties to act jointly*" and stated that it was thereby submitting to the Court the whole of the dispute between Qatar and Bahrain, as circumscribed by the "*Bahraini formula*" quoted above. In Qatar's view, the following subjects fell within the Court's jurisdiction: "*1. The Hawar Islands, including the island of Janan; 2. Fasht al Dibal and Qit'at Jaradah; 3. The archipelagic baselines; 4. Zubarah; 5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries*." In furtherance of its Application, Qatar requested the Court to adjudge and declare that Bahrain had no sovereignty or other territorial right over the island of Janan or over Zubarah, and 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 case under consideration.

On 30 November 1994, Bahrain submitted to the Court a "*Report*" on the attempt by the parties to implement the 1994 *Qatar v. Bahrain* Judgment. In that Report, Bahrain understood this Judgment as confirming that the submission to the Court of "*the whole of the dispute*" must be "*consensual in character, that is, a matter of agreement between the Parties*". On 5 December 1994, Bahrain further submitted "*Observations*" on the Qatari "*Act*", stating that the Act, even when considered in the light of the Judgment, could not create that jurisdiction or effect a valid submission in the absence of Bahrain's consent.[24]

In its second *Qatar v. Bahrain (Jurisdiction and Admissibility) Judgment*, delivered on 15 February 1995, the Court found by 10 votes (including that of President Bedjaoui[25]) to 5

19 Dissenting Opinion of Judge Oda, ICJ Reports 1994, 133, 149. Cf. E. Lauterpacht, "*Partial*" Judgments and the Inherent Jurisdiction of the ICJ, in Fifty Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings 465-483 (1996).

20 Rosenne, The Qatar v. Bahrain Case, supra note 14, at 178-179.

21 Id., 182.

22 ICJ Reports 1995, 228.

23 ICJ Reports 1995, 6, 9.

24 Id., at 11.

25 Cf. President Bedjaoui's view quoted in main text accompanying supra notes 17-18. Note that upon ratification on 11 June 1996 of the LOS Convention, Algeria stated in its Declaration 1 (Article 287) that, "*in*

(including those of Vice-President Schwebel and Judge Oda) that it had jurisdiction to adjudicate upon the dispute submitted to it between Qatar and Bahrain, and that the Application of Qatar as formulated on 30 November 1994 was admissible.[26] Bahrain chose not to be represented at the reading of this Judgment.

In the context of the manner in which the Court was to be seised of the *Qatar v. Bahrain* case, the critical issue was that of interpretation of the 1990 Doha Minutes, as already reflected in the 1994 Judgment. While contesting the Court's jurisdiction to deal with the 1991 Application of Qatar, Bahrain emphasized that a preliminary version of the Doha Minutes provided that "*either of the two parties*" should be entitled to seise the Court, and that, on the insistence of Bahrain, this text was modified to permit of such seisin only by "*the two parties*" (in Arabic "*al-tarafan*").[27] In his insightful comment on the 1994 *Qatar v. Bahrain* Judgment, Ambassador Rosenne remarked: "The point at issue was whether the Arabic word translated parties, in the Arabic dual and not the plural form, means either party, or both parties jointly. The word in question, al-tarafan, certainly means the two parties, but that does not answer the legal question of interpretation which, as is normal, depends on the intention of the parties and not on pure grammar. "*Grammatici certant et adhuc sub iudice est*!"[28] The implication of the whole 1994 Judgment was, in Rosenne's view, that "*the proper seising of the Court required action by both parties, even if not necessarily joint action*".[29] Significantly, Vice-President Stephen M. Schwebel opened his masterly 1995 *Qatar v. Bahrain* Dissenting Opinion by remarking that in the law of treaties: "*the primary object of interpretation, namely, the revealing of the intention of the parties*", is in the words of that late, great Judge and authority on the law of treaties, Sir Hersch Lauterpacht, paramount:

> "*The intention of the parties - express or implied - is the law. Any considerations - of effectiveness or otherwise - which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation*". (H. Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law 73 (1949).

"*The intention of the parties*", in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of "*the*" intention of "*the parties*" as meaning the diverse intentions of each party would be oxymoronic.[30]

Vice-President Schwebel considered that since the terms of the treaty at issue, the 1990 Doha Minutes, in particular its expression of "*al-tarafan*" was "*quintessentially unclear*" and "inherently ambiguous", the Court instead of concluding that the travaux préparatoires did not change the ordinary meaning of the Minutes as allowing unilateral seisin of the Court, should

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order to submit a dispute to the ICJ, prior agreement between all the parties concerned is necessary in each case" (emphasis added). See UN Law of the Sea Bulletin 7 (1996 No.31).

26 ICJ Reports 1995, 6, 26, decided by 10 votes to 5. In favour: President Bedjaoui, Judges Sir Robert Jennings, Guillaume, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, and Judge ad hoc Torres Bernárdez (designated by Qatar); Against: Vice-President Schwebel, Judges Oda, Shahabuddeen, Koroma, and Judge ad hoc Valticos (designated by Bahrain); Registrar Valencia-Ospina.

27 ICJ Reports 1994, 120.

28 Rosenne, The Qatar v. Bahrain Case, supra note 14, at 167-168 n.13.

29 Id., at 167; and Rosenne, The Law and Practice, supra note 14, at 939-940.

30 Dissenting Opinion of Vice-President Schwebel, ICJ Reports 1995, 27.

have weighed closer these travaux, which in fact had been the principal focus of the argument of the parties.[31] The Vice-President was the only member of the Court to analyze closer in his Dissenting Opinion preparatory work in the perspective of Articles 31 and 32 of the 1969 UN *Vienna Convention on the Law of Treaties*, and to raise the question whether "*confirmation*" by supplementary means of interpretation (the travaux) under Article 32 may permit the "*undermining*" of the "*ordinary*" or "*clear*" meaning of the text of a treaty arrived at by the application of Article 31.[32] He devoted subsequently to this critical question his essay entitled "*May Preparatory Work Be Used to Correct Rather Than Confirm the 'Clear' Meaning of a Treaty Provision*?", pointing out that if, as Article 31 itself prescribes, a treaty is to be interpreted "*in good faith*", surely the provision of Article 32 respecting recourse to preparatory work must be understood to be meaningful rather than meaningless.[33] In Vice-President Schwebel's view, if the travaux préparatoires may be invoked to correct the ordinary meaning otherwise deduced (if not to inform and influence the interpretation of the treaty from the outset), it and the provision of Article 32 are accorded a meaningful place. He notes, in both his Dissenting Opinion and his essay, that what little there is in the preparatory work of the Vienna Convention itself (including the views of the ILC Special Rapporteur, Sir Humphrey Waldock) supports approach which he adheres to.

In his *Qatar v. Bahrain Dissenting Opinion*, Vice-President Schwebel found persuasive Bahrain's interpretation that alteration in the text of the phrase "*either party*" into that of "*the two parties*" ("*al-tarafan*") demonstrated that its intention was to exclude unilateral recourse to the Court.[34] In his view, an explanation as the Court offered in support of its position that the travaux préparatoires did not provide it with conclusive supplementary elements for interpretation of the Doha Minutes was unconvincing.[35] The Court, despite the compelling character of the travaux, gave it inconclusive weight. In effect it set aside the preparatory work, either because it vitiated rather than confirmed the Court's interpretation, or because its construction of the treaty's text was in the Court's view so clear that reliance upon the preparatory work was unnecessary.

In Vice-President Schwebel's view, the Court's construction of the Doha Minutes for such

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31 Id. (Schwebel), at 37; and Judgment, at 21-22.

32 Id. (Schwebel), at 28-32. Cf. El Salvador/Honduras; Nicargua Intervening Land, Island and Maritime Frontier Dispute (Merits) Separate Opinion of Judge ad hoc Torres Bernardez (designated by Honduras), ICJ Reports 1992, 718-720; and Iran v. USA Oil Platforms (Preliminary Objection) Separate Opinion of Judge ad hoc Rigaux (designated by Iran), ICJ Reports 1996, 864-865, who characterizes the 1995 Qatar v. Bahrain Dissenting Opinion of Vice-President Schwebel as "*enlightening analysis*".
For reaffirmation of the rule of the ordinary meaning, see Botswana/Namibia Kasikili/Sedudu Judgment, para.20, ICJ Reports 1999 (in press), reprinted in 39 International Legal Materials (ILM) 310 (2000), and the 2000 Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award, para.57, available online at <http://www.worldbank.org/icsid>, reprinted in 39 ILM 1359 (2000), both rendered by the Court and Arbitral Tribunal presided over by President Stephen M. Schwebel. Cf. Oceans and the Law of the Sea - Report of the UN Secretary-General, UN Doc. A/56/58, 80-81 (2001), available online at <http://www.un.org/Depts/los/>; B. Kwiatkowska, The Southern Bluefin Tuna Award, 95 AJIL 162, 166 (2001).

33 S.M. Schwebel, May Preparatory Work Be Used to Correct Rather Than Confirm the "*Clear*" Meaning of a Treaty Provision?, in Theory of International Law at the Threshold of the 21st Century - Essays in Honour of Krzysztof Skubiszewski at 541-547 (1996). See also S.M. Schwebel, The Inter-Active Influence of the International Court of Justice and the International Law Commission, in Liber Amicorum In Memoriam of Judge Jose Maria Ruda 479, 490 (2000).

34 Dissenting Opinion of Vice-President Schwebel, ICJ Reports 1995, 34-35.

35 Id. (Schwebel), at 35, citing Judgment, at 21-22. See also id. (Shahabuddeen), at 56-58, (Koroma), 69-73, and (Valticos), 75-76.

reasons was at odds with the rules of interpretation prescribed by the Vienna Convention on the Law of Treaties. It did not comport with a good faith interpretation of the treaty's terms "*in the light of its object and purpose*" because the object and purpose of both parties to the treaty was not to authorize unilateral recourse to the Court. It did not implement the Vienna Convention's provisions for recourse to the preparatory work because, far from confirming the meaning arrived at by the Court's interpretation, the preparatory work vitatited it. Moreover, the Court's failure to determine the meaning of the treaty in the light of its travaux prépratoires resulted, if not in an unreasonable interpretation of the treaty itself, at an interpretation of the preparatory work which was "*manifestly ... unreasonable*".[36] What the text and context of the 1990 Doha Minutes left so unclear was, however, according to Vice-President Schwebel, crystal clear when those Minutes were analyzed with the assistance of the travaux prépratoires, which "*of itself is not ambiguous; on the contrary, a reasonable evaluation of it sustains only the position of Bahrain*".[37] Vice-President Schwebel concluded that these considerations have special force where the treaty at issue is one that is construed to confer jurisdiction on the Court. Where the preparatory work of a treaty demonstrates - as it does in the *Qatar v. Bahrain* case - the lack of a common intention of the parties to confer jurisdiction on the Court, the Court is not entitled to base its jurisdiction on that treaty.[38]

For the reasons already set out in his 1994 Dissenting Opinion and partly repeated in his present 1995 Dissenting Opinion, Judge Shigeru Oda was of the view that neither the 1987 Exchanges of Letters nor the 1990 Doha Minutes fell within the category of "*treaties and conventions in force*" specially providing for certain matters to be referred to the Court for a decision by means of a unilateral Application under Article 36(1) of the ICJ Statute.[39] In his opinion, the Court was not empowered to exercise jurisdiction unless the relevant Qatar/Bahrain disputes were jointly referred to the Court by a compromis, which has not been done in this case. And even if the Doha Minutes could constitute a basis on which the Court could be seised of the dispute, Judge Oda believed that there seemed to be nothing in the 1995 *Qatar v. Bahrain* Judgment to show that the amended or additional submissions of Qatar filed on 30 November 1994 in fact comprised "*the whole of the dispute*", as compared to the opposite position apparently taken by Bahrain (which has not had an opportunity to give any official expression to its views on this point).[40]

While sharing, in his perceptive Dissenting Opinion, conclusions of other dissenters that the Court lacked jurisdiction to entertain the Application of Qatar and that this Application was inadmissible, Judge ad hoc Nicolas Valticos (designated by Bahrain) found the 1995 Judgment debatable also on the ground that, with undeniable skill, the Court has circumvented the obstacle constituted by the lack of real consent of the parties. He admitted that in so doing, the Court "*may well have provided an opportunity for the prevention of a conflict in danger of breaking out in an already very sensitive region*",[41] and that the Court's decision satisfied not only Qatar but also Bahrain (at least as regards the subject of the dispute). But Judge ad hoc

36 Dissenting Opinion of Vice-President Schwebel, id., at 36.

37 Id. (Schwebel), at 38-39. For agreement with Vice-President Schwebel's views, see M.D. Evans, Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, 44 International and Comparative Law Quarterly 691, 696 (1995).

38 Dissenting Opinion of Vice-President Schwebel, ICJ Reports 1995, 39. See also statements of Judge Schwebel at the ICJ Panel, in International Law in Ferment: A New Vision for Theory and Practice, 94th ASIL Annual Proceedings, 5-8 April 2000 172-181, esp. 175 (2000).

39 Dissenting Opinion of Judge Oda, id., at 40, 43-49.

40 Id. (Oda), at 49-50.

41 Dissenting Opinion of Judge ad hoc Valticos (designated by Bahrain), id., at 77-78.

Valticos wondered whether these advantages were enough to offset what he considered to be the weakness, legally speaking, of the absence of actual consent by one of the parties and the inadequacy of the seisin.

On the whole, one could support the view of Malcolm D. Evans, who found it difficult to avoid agreeing with Vice-President Stephen M. Schwebel when, in his 1994 Separate Opinion, he described the first Court's Judgment as "*novel - and disquieting*", and noted that the Vice-President's description might also perhaps be extended to the 1995 *Qatar v. Bahrain* Judgment.[42] It may be that it is the majority's position which will shape the future attitudes as to various aspects of the jurisdiction of the Court and the law of treaties, and which might retain the value of "*the dynamic and responsible judicial policy*" ascribed to it by then President Mohammed Bedjaoui.[43] While the criticism that the Court's approach to jurisdictional issues may be seen as falling within the scope of the President's concept of being "*meta-juridical*" should be viewed with caution,[44] the most important controversy might centre on the Court's treatment of travaux préparatoires of the 1990 Doha Minutes. In this context, it might likewise be that the constructive approach adhered to in the 1995 *Qatar v. Bahrain* Dissenting Opinion of then Vice-President Schwebel in support of the travaux permitting under Article 32 of the Vienna Convention to correct rather than confirm the text of (especially bilateral) treaty,[45] might yet obtain a due attention in the future jurisprudence of the Court.

3. The 2001 *Qatar v. Bahrain (Merits)* Judgment, including its Opinions

3.1 The Course of the Proceedings

In accordance with the Court's Order of 1 February 1996,[46] Qatar and Bahrain each filed a Memorial by 30 September 1996. By an Order of 30 October 1996, President Bedjaoui fixed 31 December 1997 as the time-limit for the filing by each of the parties of a Counter-Memorial.[47] One week prior to the latter time-limit, Bahrain informed the Court that it challenged the authenticity of as many as 81 documents produced by Qatar as annexes to its Memorial and that it would disregard these documents in its Counter-Memorial. Since on 8 October 1997 Qatar stated that these objections came too late and could not be answered in its Counter-Memorial, Bahrain expressed the view that the use of the challenged documents gave rise to procedural difficulties that could affect the orderly development of the case. After filing of the Counter-Memorials, Bahrain, noting that Qatar continued to rely on these documents, again emphasized the need for the Court to decide the question of their authenticity as a preliminary issue to the determination of its substantive effect.

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42 Evans, supra note 37, at 697, citing ICJ Reports 1994, 130 (Schwebel); supra note 15.

43 See main text accompanying supra notes 17-18.

44 For such criticism, see especially that by two then Counsel of Bahrain, E. Lauterpacht, The Juridical and the Meta-Juridical in International Law, in Theory of International Law, supra note 33, at 215-223, 233-234, who perhaps reads more into President Bedjaoui's Statement (supra notes 17-18) than it contains; Lauterpacht, supra note 19, at 483-486; and P. Weil, Compétence et saisine: un nouvel aspect du principe de la juridiction consensuelle, in Theory of International Law, supra note 33, at 833-845.

45 See views of Vice-President Schwebel discussed in the main text accompanying supra notes 30-38.

46 ICJ Reports 1996, 6. Present: President Bedjaoui, Vice-President Schwebel, and Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

47 ICJ Reports 1996, 800.

By an Order of 30 March 1998, the Court Presided over by Judge Stephen M. Schwebel directed that each of the parties submit a Reply on the merits by 30 March 1999 and that Qatar should file by 30 September 1998 a comprehensive "*Interim Report*".[48] In that "*Report*", Qatar stated that, on the question of the material authenticity of the documents, there were differing views not only between the respective experts of the parties, but also between its own experts. As regards the historical consistency of the content of those documents, the experts whom it had consulted considered that Bahrain's assertions showed exaggerations and distortion. Qatar announced that it would not rely on the 82 disputed documents so as to enable the Court to address the merits of the case without further procedural complications. By the *Qatar v. Bahrain* Order of 17 February 1999, the Court has placed on record Qatar's decision, extended the time-limit for the filing of Replies until 30 May 1999 and decided that these Replies would not rely on the 82 documents concerned.[49]

After filing their Replies, the parties have submitted certain additional expert reports and historical documents, while the *Qatar v. Bahrain (Merits) Hearings* were held on 29 May-29 June 2000.[50]

3.2 The Delivery and Components of the Judgment

The *Qatar v. Bahrain Maritime Delimitation and Territorial Questions (Merits) Judgment* was delivered on 16 March 2001[51] and was accompanied by concise Statement of President Gilbert

48 ICJ Reports 1998, 243. Present: President Schwebel, Vice-President Weeramantry, and Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, and Judges ad hoc Torres Bernardez (designated by Qatar) and Fortier (designated by Bahrain); Registrar Valencia-Ospina. See also ICJ Communiqué No.98/12, 1 April 1998.

49 ICJ Reports 1999, 3. Present: President Schwebel, Vice-President Weeramantry, and Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, and Judge ad hoc Torres Bernardez (designated by Qatar); Registrar Valencia-Ospina See also ICJ Communiqué No.99/5, 18 February 1999. Cf. Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/12, 45 [Counsel Reisman, 9 June 2000]; Judgment, ICJ Reports 2001 (in press), infra note 51, paras 15-25, and Separate Opinion of Judge ad hoc Fortier (designated by Bahrain), paras 1-11.

50 See ICJ Communiqués Nos 2000/13 and 22, 14 April and 29 June 2000; CR 2000/5-25, 29 May-29 June 2000; Judgment, ICJ Reports 2001 (in press), infra note 51, paras 24-30. The Hearings were referred to in Statement of Judge Gilbert Guillaume, President of the International Court of Justice, to the 55th United Nations General Assembly, 26 October 2000, at 3 <http://www.icj-cij.org>. Note that during the course of deliberations on the Qatar v. Bahrain Judgment, the Court - in continuation of measures undertaken during the preceding triennium - further adapted its internal judicial practice as the principal judicial organ of the UN to the significant increase of its workload. See ICJ Press Releases No.98/14, 6 April 1998, and No.2001/1, 12 January 2001; Statements of Judge Stephen M. Schwebel, President of the International Court of Justice, to the 53rd United Nations General Assembly, UN Doc. A/53/PV.44, 27 October 1998, at 1, 4-5, reprinted in the ICJ Yearbook 1998-1999 316-323 (No.53), and to the 54th United Nations General Assembly, supra note 3, at 4-5; Statement of President Guillaume to the 55th United Nations General Assembly, supra, at 3-4. See also Statement of President Guillaume to the 56th United Nations General Assembly, UN Doc. A/56/PV.32, 30 October 2001, at 3-4; and ICJ Press Releases Nos 2001/31-32, 31 October 2001 <http://www.icj-cij.org>; J.R. Crook, 95 AJIL 685, 691 (2001). Cf. infra notes 228 and 250.

51 ICJ Reports 2001 (in press), reprinted in 40 ILM 847 (2001). Present: President Guillaume, Vice-President Shi, and Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, and Judges ad hoc Torres Bernardez (designated by Qatar) and Fortier (designated by Bahrain); Registrar Couvreur. See also ICJ Press Release No.2001/9 and 9bis, 16 March 2001. Cf. UN Doc. A/56/58, supra note 32, at 77; Ph. Weckel, CIJ: Arret du 16 mars 2001 (fond), 105 RGDIP 443-447 (2001); B.H. Oxman, The Qatar v. Bahrain (Merits) Judgment, 96 AJIL 198-210 (2002).

Guillaume commenced by his pointing out that: "*This Judgment is binding, final and without appeal. It brings to an end a long-standing dispute between these two sister-States, thereby inaugurating a new stage in their relations*".[52]

The substantial, 252-paragraph *Qatar v. Bahrain* Judgment has the format and composition typical for ICJ Judgments, with "*the total comprising a unity*".[53] It commences with a title and a head-note indicating the main issues discussed in the judgment, followed by the introductory qualités comprising the formal history of the proceedings, including the submissions of the parties and a brief narrative of the facts (paras 1-69).[54] The subsequent, 181-paragraph legal reasoning of the Court (paras 70-251) deals in approximately equal length:

- with the disputed territorial questions, including sovereignty over Zubarah, the Hawar Islands and Janan Island, including Hadd Janan (paras 70-165), and

- with the equitable maritime boundary delimitation (paras 166-251). In that latter part of its legal reasoning, the Court, while determining the relevant coasts from which the breadth of the territorial seas of the parties is measured and while adjusting its provisional equidistant boundary line, also decided the territorial disputes between the two states over two maritime features of Qit'at Jaradah and Fasht ad Dibal (paras 191-209 and 220). Thereby, the *Qatar v. Bahrain* Judgment illustrated the applicability of equity to the issues of territorial sovereignty, as recently appraised by the 1998 *Eritrea/Yemen* Award.[55]

The Judgment ends with the operative clause (dispositif), comprising six decisions concerning territorial questions and one decision related to maritime delimitation (para.252), and it is signed for purposes of authentication by President Guillaume and Registrar Couvreur.[56] Two Separate Opinions and one Declaration of the concurring Judges,[57] as well as three Separate

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52 Statement by Judge Gilbert Guillaume, President of the International Court of Justice, 16 March 2001, ended by his remarking that: "*The States of Qatar and Bahrain have been wise enough to submit their dispute to judicial settlement. Responding to their wishes and at the end of lengthy proceedings, the Court has carried out its task, and we are particularly happy thus to have brought final closure to a long-standing dispute*" <http://www.icj-cij.org>. Cf. Statement of President Guillaume to the 56th United Nations General Assembly, supra note 50, at 2.

53 Rosenne, The Law and Practice of the International Court, supra note 14, at 1585-1590.

54 See id., at 1585, noting with respect to the qualités that: "*Frequently overlooked, this is an essential element, since it places what follows in context*".

55 1998 Eritrea/Yemen Award, supra note 2, paras 108-113. Cf. Burkina Faso/Mali Frontier Dispute Judgment, Chamber's President M. Bedjaoui, ICJ Reports 1986, 567-568, 631-633, Separate Opinion of Judge Abi-Saab, id., at 662; as relied upon in El Salvador/Honduras; Nicaragua Intervening Land, Island and Maritime Frontier Dispute Judgment, Chamber's President J. Sette-Camara, ICJ Reports 1992, 351, 396, 514; the 1993 Denmark v. Norway Separate Opinions of Judges Shahabuddeen and Ajibola, supra note 1, at 188 and 296-297; Botswana/Namibia Oral Hearings, CR 99/5 [trans.], 30 [Counsel Cot, 18 February 1999]. Cf. also Libya/Chad Territorial Dispute Separate Opinion of Judge Ajibola, ICJ Reports 1994, 59; 1997 Inter-Entity Boundary in Brcko Area Award, President R.B. Owen, paras 87-94, 36 ILM 369 (1997) [1999 Final Award, 38 ILM 534 (1999) and 39 ILM 879 (2000)]; and the 2002 UN Eritrea/Ethiopia Boundary Decision, supra note 2, paras 3.14-3.15.

56 See Rosenne, The Law and Practice of the International Court, supra note 14, at 1586, noting that one signed and sealed copy of every Judgment is placed in the archives of the Court, and one forwarded to each party, and that a copy of Judgment also is sent to every member of the United Nations and every state entitled to appear before the Court. This publicity is, in Rosenne's view, "*an essential feature of the Court's procedure*".

57 See Separate Opinions of Judges Parra-Aranguren and Al-Khasawneh, and Declaration of Judge Herczegh.

Opinions and two Declarations[58] and two Dissenting Opinions[59] of the minority Judges, each of whom dissented from various specific decisions while concurring in other, follow.[60]

3.3 Geographical Setting

While highlighting geographical setting of the dispute, the Judgment specifies that Qatar and Bahrain are located in the southern part of the Arabian/Persian 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.[61] By contrast to the 1999 *Eritrea/Yemen* Award which involved maritime boundary in the immediate neighbourhood of a main international shipping line connecting to the strategically critical Bab el-Mandeb Strait and the southern approaches to the Suez Canal,[62] the boundary determined in the *Qatar v. Bahrain* Judgment did not thus parallel shipping line leading to no less critical Hormuz Strait (providing the sole entrance and exit of the Gulf), but was located to the south of that line.[63] The mainland to the west and south of the main island of Bahrain and to the south of the Qatar peninsula is part of Saudi Arabia, while the mainland on the northern shore of the Gulf is part of Iran.[64]

Both the Red Sea and the Gulf qualify as semi-enclosed seas under Article 123 of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the LOS Convention).[65] Qatar only signed the Convention on 10 December 1982, while Bahrain ratified it on 30 May 1985.[66] The Judgment notes that customary international law is, therefore, the applicable law, and that both parties agreed that most of the provisions of the LOS Convention which are relevant for the present case reflect customary law.[67] This

58 See Separate Opinions of Judges Oda, Kooijmans, and Judge ad hoc Fortier (designated by Bahrain), and Declarations of Judges Higgins and Vershchetin.

59 See Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, and Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar). Note that the three co-authors of Joint Opinion headed their respective delegations of Algeria, Madagascar and Sierra Leone to the UNCLOS III. For their Biographies, see the Court's website <http://www.icj-cij.org> and ICJ Yearbook, supra note 50.

60 On the role of Opinions generally, see Schwebel, The Inter-Active Influence, supra note 33, at 482, 485-488, 504-505; Rosenne, The Law and Practice of the International Court, supra note 14, at 1579-1585; and Sir Robert Jennings, The Role of the International Court of Justice, 68 British Yearbook of International Law 1-63 (1997).

61 Judgment, para.35, and Sketch-Map No.1 (reproduced here as Figure 1).

62 See 1998 Eritrea/Yemen Award, supra note 2, paras 77, 93, 125, 478, and 1999 Eritrea/Yemen Award, paras 26, 45-46, 107-109, 124-125, 128 and 155. On strategic importance of Bab-el Mandeb Strait, see J.A. Roach and R.W. Smith, United States Responses to Excessive Maritime Claims 298-299 and Map 28 at 295 (1996); and on US protests against Yemen's navigational claims, see id., at 20, 24, 26, 168 n.9, 260-267 and 272-274. On proposal made by Yemen in a follow-up to the Eritrea/Yemen arbitration and endorsed by Eritrea and Djibouti, to establish new and amended traffic separation schemes in the southern Red Sea, see UN Doc. IMO NAV 46/16, 11 August 2000, at 8. See also infra note 211.

63 On strategic importance of Hormuz Strait bordered by Iran and Oman, see Iran's Maritime Claims, Limits in the Seas No.114 (US Department of State 1994); Roach and Smith, supra note 62, at 287, 309-312. See also supra note 11, and infra notes 214, 222-224 and 252.

64 Judgment, para.35. See also infra notes 173-174 and 198-201 (Saudi Arabia), 196 and 202-203 (Iran). On interests of Saudi Arabia in the Red Sea, see 1999 Eritrea/Yemen Award, supra note 2, para.44; A. Al-Enazy, 96 AJIL 161-173 (2002).

65 1833 UNTS 397, reprinted in 21 ILM 1261 (1982). For the LOS Convention's status as at 31 March 2001, see UN Law of the Sea Bulletin 1 (2001 No.46).

66 For Declaration of Qatar and objection raised thereto by Israel, see The Law of the Sea - Declarations and Statements 14 (UN 1997).

67 Judgment, para.167, also noting that neither Bahrain nor Qatar is party to either of the four the UN Geneva

appreciable effect is similar to that in the *Eritrea/Yemen* arbitration, in which Eritrea accepted the application of the provisions of the LOS Convention (not ratified by it), including those which incorporate the elements of customary law being relevant to delimitation of its maritime boundary with Yemen.[68]

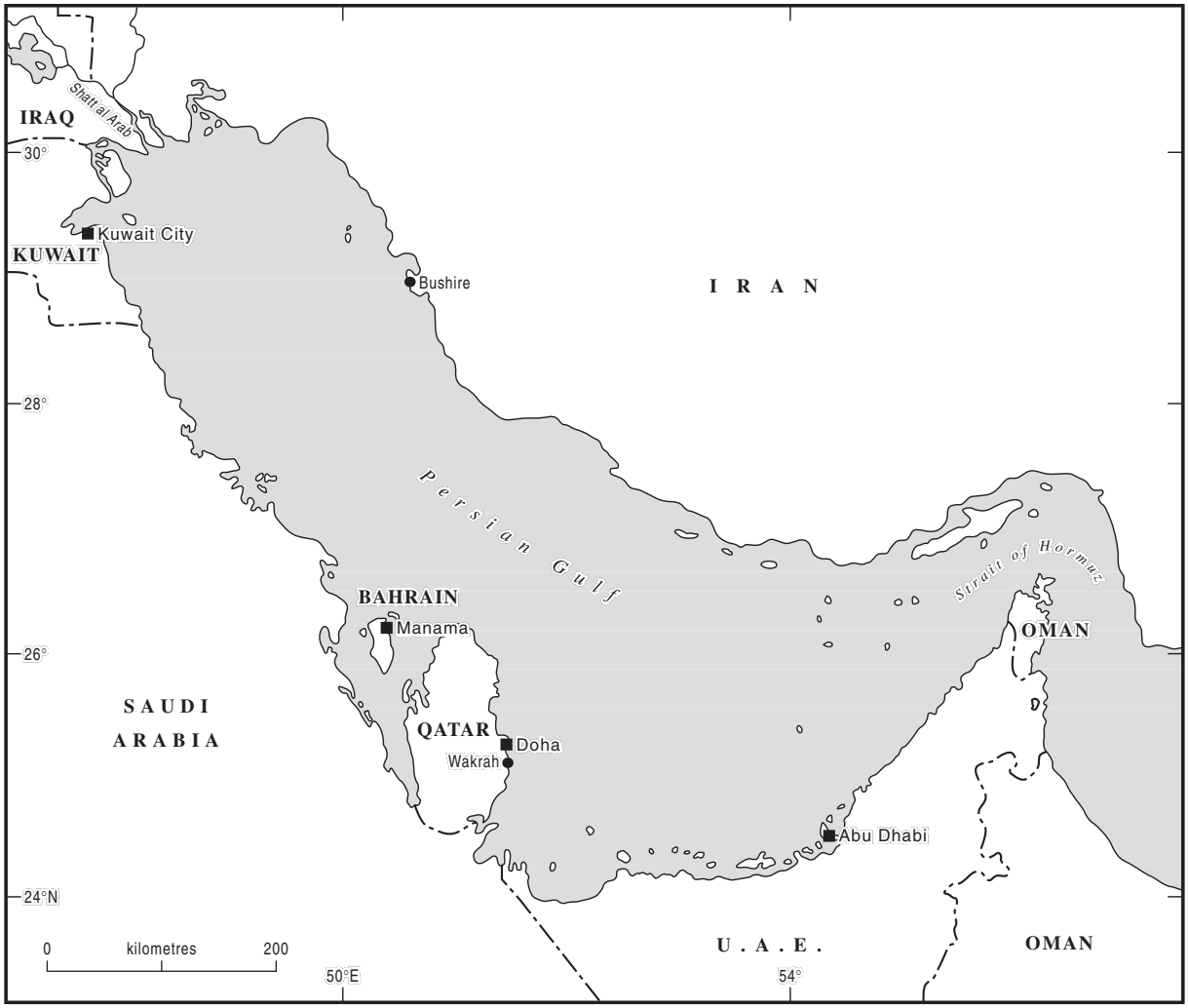

Figure 1: General Geographic context

By virtue of Decree No.40 of 16 April 1992 and Decree-Law No.8 of 20 April 1993, Qatar and Bahrain each proclaimed a 12-mile territorial sea and a 24-mile contiguous zone, respectively.[69] Bahrain has been classified as an archipelagic state whose archipelagic baselines, had it claimed archipelagic status under Part IV of the LOS Convention, would produce the acceptable water-to-land ratio of 1.2:1 (the required ratio under Article 47(1) of the Convention being between 1:1 and 9:1), assuming that the Hawar Islands were part of Bahrain.[70]

Conventions on the Law of the Sea of 29 April 1958.

68 1999 Eritrea/Yemen Award, supra note 2, para.130.

69 Judgment, para.172; UN Law of the Sea Bulletin 22 [Qatar's Decree No.40] (1993 No.23); and 5 [Bahrain's Decree-Law No.8] (1993 No.24). See also Table of Claims, id., at 40 and 45 (1999 No.39).

70 See B. Kwiatkowska, Archipelagic Waters: An Assessment of National Legislation, in Law of the Sea at the Crossroads 107, 109-110 (1991). See also infra notes 218-224 and 251.

3.4 The Acquistition of Territorial Sovereignty

3.4.1 Zubarah

With respect to Zubarah, the 17 Members of the Court unanimously decided that sovereignty over this area, which is situated in the north-western part of the Qatar peninsula, opposite to the main island of and claimed by Bahrain, lies with Qatar.[71] Both parties agreed that the Al-Khalifah dynasty (which came from the present-day Kuwait) occupied the historic town of Zubarah in the 1760s and that, some years later, they settled in Bahrain, but they disagreed 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 showed that any attempt by Bahrain to pursue its claims to Zubarah through military action at sea would not be tolerated by the British.[72] Nor did the Court accept Bahrain's contention concerning the continuing control of Al-Khalifah over Zubarah through a Naim-led tribal confederation loyal to them.

After the Ottoman Empire had re-established its authority in the region, the *Anglo-Ottoman Convention Relating to the Persian Gulf and Surrounding Territories* of 29 July 1913 did not - according to the Court - recognize Bahrain's sovereignty over the whole Qatar peninsula, including Zubarah (Article 11), which continued to be governed by Sheikh Jassim Al-Thani. With respect to the fact that the Anglo-Ottoman Convention was never ratified, the Court observed that "*signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature*",[73] and concluded that this Convention did 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. At the same time, since this Convention's Article 11 was referred to by the subsequent *Anglo-Ottoman Treaty on the Frontiers of Aden* of 9 March 1914 (Article III), duly ratified that same year, the Court considered that the parties to that treaty did not contemplate any authority over the peninsula other than that of Qatar.

The Court also rejected Bahrain's contention that the letters in 1937 (after the Sheikh of Qatar had attempted to impose taxation on the Naim tribe inhabiting the Zubarah region) from the British Political Resident to the Secretary of State for India, and from the Secretary of State to the Political Resident testified that Great Britain regarded Zubarah as belonging to Bahrain. It was due to the contrary position of the British Government in 1937 that it refused to provide

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71 Judgment, operative para. 252(1), adopted unanimously by 17 Members, supra note 51, and paras 70-97. See also main text accompanying supra notes 23-24. Cf. V.L. Forbes, Disputed Sovereignty in the Gulf: The Hawar Group, 7 Indian Ocean Review 18, 21 (1994 No.2).

72 The town of Zubarah was destroyed in 1878 after Sheikh Jassim bin Thani of Qatar had taken steps to punish acts of piracy and attacks on other tribes by its inhabitants.

73 Judgment, para.89, as reaffirmed in, Joint Legal Opinion on Guatemala's Territorial Claim to Belize by Sir Elihu Lauterpacht, Judge Stephen M. Schwebel, Shabtai Rosenne and Francisco Orrego, paras 200, 204 (29 September 2001) <http://www.belize-guatemala.gov.bz/>. For interesting contentions on signed but unratified agreements, in the context of Canada/USA Agreement on East Coast Fisheries Resources of 29 March 1979, signed jointly with their Maritime Boundary Settlement Treaty (in force: 20 November 1981, 20 ILM 1371 (1981)) and rejected by the United States, see Canada/USA Delimitation of the Maritime Boundary in the Gulf of Maine Area Judgment, Chamber's President R. Ago, ICJ Reports 1984, 246, 286-287; Pleadings, Vol.I, 223-259 [Agreement's text], Vol.IV, 97-100, 137-140 [US Counter-Memorial], Vol.V, 33, 98-99 [Canada's Reply]. See also Libya/Chad Territorial Dispute Judgment, President Sir Robert Jennings, ICJ Reports 1994, 28, para.57; 2001 Newfoundland and Labrador/Nova Scotia (Phase I) Award, Chairman G.V. La Forest, paras 3.13/15, 6.3 <http://www.bissettmatheson.com/arbitration> and 2002 (Phase II) Award, para.3.3 <http://www.boundary-dispute.ca>.

Bahrain with the assistance which it required 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 - in the Court's view - gradually consolidated; it was acknowledged in the 1913 Anglo-Ottoman Convention and was definitively established in 1937, when the actions of the Sheikh of Qatar in Zubarah were an exercise of his authority, and not (as Bahrain alleged) an unlawful use of force against Bahrain. For all these reasons, the Court rejected Bahrain's submission and unanimously upheld Qatar's sovereignty over Zubarah.

Judge Peter H. Kooijmans believed in his Separate Opinion that the Court has perhaps given (though to lesser extent than in the case of the Hawar and Janan Islands discussed below) more weight to the position taken with respect to Zubarah by third states, in particular Great Britain as the (former) Protecting Power and the Ottoman Empire than to considerations of substantive law concerning the acquisition of territory.[74] He noted a peculiar character of the dispute over Zubarah which even at present still carries the nature of contested hegemonic spheres or disputed entitlements to ties of allegiance rather than that of conflicting claims to exclusive spatial authority over a certain piece of land.[75] Basing himself on the 1975 Western Sahara holdings, Judge Kooijmans observed that such ties of allegiance as may have existed between the Ruler of Bahrain and certain (Naim) tribes in the area were insufficient to establish any tie of territorial sovereignty.[76] On the other hand, as he noted, Qatar gradually succeeded in consolidating its authority over Zubarah (even before 1937) and there was evidence of acquiescence by conduct on the part of Bahrain in the period before it revitalized the dispute in the second half of the 20th century. According to Judge ad hoc L.Yves Fortier (designated by Bahrain), the allegiance of the Naim tribes, who remained loyal to Bahrain and the Al-Khalifah until 1937, confirmed Bahraini title over Zubarah.[77] But this title was lost as a result of the seizure of Zubarah by Qatar in July 1937, which forcible seizure from the pre-United Nations Charter period could not be judged today as an unlawful use of force.[78]

3.4.2 Hawar Islands

With respect to the Hawar Islands (excluding Janan Island), which are located in the immediate vicinity of the central part of the west coast of Qatar peninsula, to the south-east of the main island of Bahrain and at a distance of approximately 10 miles from the latter, the Court found by the 12:5 majority vote that sovereignty over the Islands lies with Bahrain.[79] The dispute over the Hawars arose during the 1930s against the background of exploration for oil in the Gulf, with Qatar continuously asserting invalidity of the British decision (by means of the letters from the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain) of 11 July 1939 that the Islands belonged to Bahrain and not to Qatar. The dispute was revived in 1978 following an incident in which Qatar authorities apprehended Bahraini fishermen allegedly operating in the vicinity of the Islands. In retaliation, Bahrain held military exercise

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74 Separate Opinion of Judge Kooijmans, paras 1 and 33-43.

75 Id., para.33.

76 Id., paras 39-41, quoting Western Sahara Advisory Opinion, ICJ Reports 1975, 42, para.88, and 68, para.162. See also Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 177-215 and 284.

77 Separate Opinion of Judge ad hoc Fortier (designated by Bahrain), paras 12-33.

78 Id., paras 34-41.

79 Judgment, operative para.252(2)(a), and paras 98-148. In favour: President Guillaume, Vice-President Shi, Judges Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, and Judge ad hoc Fortier (designated by Bahrain); Against: Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin, and Judge ad hoc Torres Bernardez (designated by Qatar). On operative para.252(2)(b), see infra note 208.

in the Islands. Basing itself on the 1998 *Eritrea/Yemen* Award,[80] Qatar maintained that the Hawar Islands (including Janan Island) were an integral part of its mainland coast, because they lay wholly or partly within a 3-mile territorial sea limit from that coast and all of them lay within the 12-mile territorial sea limit,[81] and that its sovereignty over these Islands was well-funded on the basis of customary international law and applicable local practices and customs. Having carefully examined the lengthy legal arguments made by each party and based on both history and geography as well as a large number of maps, the Court observed that the question of sovereignty over the Hawar Islands raised several issues[82]:

- the nature and validity of the 1939 decision by Great Britain which according to Bahrain had to be considered primarily as an arbitral award, being res judicata, or at the very least as a binding political decision, while in Qatar's view, it was null and void;
- the existence of an original territorial title, regarded by Qatar as prevailing over the effectivités claimed by Bahrain;
- the demonstration of use, presence, display of governmental authority and other ways of showing possession (effectivités);[83] and
- the applicability - contended by Bahrain and contested by Qatar - of the principle of uti possidetis juris to the present case.

Turning to the first of these issues, the Court based itself on definition of arbitration as "*the settlement of differences between States by judges of their own choice, and on the basis of respect for law*",[84] and found that the 1939 Britain's decision that the Hawars belonged to

80 1998 Eritrea/Yemen Award, supra note 2, para.472, citing D.W. Bowett, The Legal Regime of Islands in International Law 48 (1978) in favour of presumption that islands within territorial sea are under the same sovereignty as the mainland nearby, unless superior title can be established; paras 473-474, and operative para.527(i). On critical role of this presumption of proximity in 1870 UK/Portugal Bulama Award of the US President [Stuyt/No.85], see G. Gidel, Le Droit International Public de la Mer, Tome III, 691-692 (1934). Implication to this effect in the Anglo/Norwegian Fisheries Judgment, ICJ Reports 1951, 128, was relied upon in Minquiers and Ecrehos Pleadings, Vol.I, 424 (UK Reply). Cf. Anglo/Norwegian Fisheries Pleadings, Vol.I, 73 [UK Memorial, para.100] and Vol.II, 508-509 [UK Reply, para.209]; the 1977 Beagle Channel Award, para.6 [17 ILM 632, 644 (1978)], which recognized Chile's sovereignty over the islands of Picton, Lennox and Nueva, as subsequently also assumed by the 1984 Argentina/Chile Treaty. For appraisal of the important role played by a presumption of proximity in the Eritrea/Yemen Award with respect to both islands and [sic] low-tide elevations within and [sic] beyond the TS, see W.M. Reisman, Case Report on the 1998 Eritrea/Yemen Award, 93 AJIL 668, 674, 677 and 679 (1999); and for reliance on this Eritrea/Yemen presumption, see Joint Legal Opinion, supra note 73, paras 3, 13, 109, 113, 179-186 and 224-225.

81 Judgment, paras 99-100 (Hawar Islands) and 151-152 (Janan Island); infra notes 126-128 and 240-241. For Qatar's reliance on the 1998 Eritrea/Yemen holdings in this respect, as contested by Bahrain in reliance on the 1929 USA/Netherlands Island of Palmas (Miangas) Award [RIAA II, 869; No.366/Stuyt], see Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/6, 47-48 [Counsel Sir Ian Sinclair, 30 May 2000], CR 2000/11, 19, 29-30 [Counsel Sir Elihu Lauterpacht, 8 June], CR 2000/15, 45-46 [Counsel Weil, 14 June], CR 2000/18, 20-22 [Sinclair, 21 June], CR 2000/22, 17 [Lauterpacht, 28 June 2000].

82 Judgment, para.110.

83 In view of the 1998 Eritrea/Yemen Award, supra note 2, para.450, quoting the Minquiers and Ecrehos Judgment, ICJ Reports 1953, 47, Bahrain relied on the relatively recent history of use and possession, including the creation of a wildlife preserve in 1996 on part of the main island of Hawar. See Judgment, para.104, and Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/11, 23-25 [Counsel Sir Elihu Lauterpacht, 8 June 2000]. For reaffirmation of the Minquiers and Ecrehos holding, see also the 1975 Western Sahara Advisory Opinion, supra note 76, at 43, para.93; 1992 El Salvador/Honduras Judgment, supra note 55, at 564-565. For reliance by Botswana on its establishment of the Chobe National Park on the disputed Kasikili/Sedudu Island, see the 1999 Botswana/Namibia Judgment, supra note 32, paras 12, 76 and 102-103.

84 Judgment, para.112, relying on, inter alia, the work of the ILC and the 1981 Dubai/Sharjah Award, supra

Bahrain did not constitute an international arbitral award. It did not, therefore, need to consider Bahrain's argument concerning the Court's jurisdiction to examine the validity of arbitral awards.[85] However, under the "*Bahraini formula*", the Court had jurisdiction to decide all questions relating to the Hawar Islands, including the dispute concerning the 1939 British decision, whereas the fact of that decision's not being an award, did not mean that it was devoid of legal effect.[86] The Court carefully considered and rejected all Qatar's arguments challenging the validity of the 1939 decision, which it found as having been binding from the outset on both states and as having continued to be binding on them after they ceased in 1971 to be British protected states.[87] The Court was unable to accept Qatar's contentions that it was subjected to unequal treatment, that lack of reasoning (not communicated to the Rulers of Bahrain and Qatar) supporting the British decision had influence of its validity,[88] and that Qatar's several protests against the decision's content after it had been informed of it were not such as to render the decision inopposable to Qatar. Accordingly, the Court concluded that the 1939 British decision is binding on the parties and that Bahrain has sovereignty over the Hawar Islands.

This conclusion made it unnecessary for the Court to rule on the arguments of the parties related to other issues referred to above. Significantly, Judge Rosalyn Higgins, who concurred in the Court's decision and who was a member of the *Eritrea/Yemen* Arbitral Tribunal, believed in her Declaration that had the Court so chosen, it could also have grounded Bahraini title in the Hawar Islands on the law of territorial acquistion.[89] She stressed that among acts occurring in the Hawars were some that did have relevance for legal title and that 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 were in Judge Higgins' view, sufficient to displace any presumption of title by the coastal state.[90]

Judges Peter H. Kooijmans and Awn Shawkat Al-Khasawneh, who both also cast their concurring votes with respect to Bahrain's sovereignty over the Hawar Islands, raised in their Separate Opinions strong reluctance to the Court's unduly formalistic approach of basing itself exclusively on the nature and the legal effect of the 1939 British decision.[91] Judge Kooijmans considered that the *uti possidetis* principle (relied upon by Bahrain) was not applicable in the present case,[92] and he fundamentally disagreed with the Court that the 1939 decision was the

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note 2, at 574-575. See also Separate Opinion of Judge Kooijmans, paras 45-59.

85 Judgment, paras 111 and 115, and jurisprudence quoted therein. Cf. S.M. Schwebel, Justice in International Law - Selected Writings of Judge Stephen M. Schwebel 213-222 (1994); S. Rosenne, The International Court of Justice and International Arbitration, 6 LJIL 297-322 (1993).

86 Judgment, para.116 and supra notes 12-14, and para.117, quoting the 1981 Dubai/Sharjah Award, supra note 2, at 577.

87 Judgment, para.139.

88 Judgment, para.143, pointing out that no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter.

89 Declaration of Judge Higgins. On Judge Higgins' membership in the Eritrea/Yemen Arbitral Tribunal, see supra note 2.

90 Declaration of Judge Higgins. Cf. infra note 95.

91 Separate Opinions of Judge Kooijmans, paras 1-32 and 44-79, and Judge Al-Khasawneh, paras 1-7.

92 Separate Opinion of Judge Kooijmans, paras 17-26 and 30, noting that the fact that the Protecting Power had not been authorized under the relevant treaties to determine unilaterally and on its own initiative the boundaries of the protected states or to settle territorial issues, is in itself an indication that the uti possidetis principle was not applicable. See also Separate Opinion of Judge Al-Khasawneh, paras 7-12, and Dissenting

result of a dispute settlement procedure to which the Ruler of Qatar had freely agreed at the appropriate time. In his view, in the absence of the consent as well as subsequent acceptance or acquiescence of the local rulers, the British decision had no legal validity in se and all territorial issues had to be resolved in reliance on principles of international law governing the acquisition of territory and not on the position taken by the Protecting Power.[93] Whereas the *Eritrea/Yemen* presumption of proximity (relied upon by Qatar) had to yield to a better claim,[94] the limited scope of the effectivités presented by Bahrain had to be deemed, in the view of both Judges Kooijmans and Al-Khasawneh, to prevail over Qatar's potential title to the Hawars, since there was not even a vestige of display of authority by that state.[95]

Judges Mohammed Bedjaoui, Raymond Ranjeva and Abdul G. Koroma agreed in their Joint Dissenting Opinion with the Court that the 1939 British decision was a political decision and not an arbitral award having the authority of *res judicata*, and that the first condition for the validity of the 1939 decision was the consent of the parties.[96] But they were of the opinion that the circumstances of the case and the historical context clearly demonstrated that the consent given by one of the parties, which (as in the case of any territorial dispute) should have been express, informed and freely given, was tainted with elements of fraud and was restricted to the proceedings and in no sense was a consent to the decision on the merits. Thus, restricting themselves to an examination of the purely formal validity of the British decision, the three dissenters found that this decision could not properly serve as a valid legal title for attribution of the Hawars to Bahrain.[97] Since they saw no support of the title in either the uti possidetis principle or the effectivités,[98] the three Judges ascribed particular attention to identifying the historical title held by Qatar to the Hawars, which title was disregarded by the Court.[99] They considered that the convergence of history and law was also matched in this case by the convergence of geography and law which was substantiated by the *Eritrea/Yemen* presumption of proximity.[100]

Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 244 and 428, both relying on rejection of the uti possidetis by the 1998 Eritrea/Yemen Award, supra note 2, paras 96-100; and Opinion of Judge Bernardez, paras 8, 292-294, 372 and 425-457. On inapplicability of the uti possidetis, see also Joint Legal Opinion, supra note 73, paras 86, 141, 192-198, 219 and Annex II.

93 Separate Opinion of Judge Kooijmans, paras 4-32, analyzing the so-called "Special Relationship" between Britain and the Gulf states and relying on the holdings of (para.9) the 1998 Eritrea/Yemen Award, supra note 2, para.525 (cf. infra note 211), and (paras 12-13 and 28) the 1981 Dubai/Sharjah Award, supra note 2, at 562 and 567. See also Judge Kooijmans' analysis, paras 44-59, of the nature and the legal effect of the 1939 decision.

94 Separate Opinions of Judge Kooijmans, paras 64-66, and Judge Al-Khasawneh, para.20; Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 243-251, 349 and 536, arguing (para.244) that the 1928 Palmas and 1998 Eritrea/Yemen holdings complement each other in this respect; and supra notes 80-81.

95 Separate Opinions of Judge Kooijmans, paras 71-79, relying (para.77) on the 1933 Eastern Greenland holding, infra note 121, and Judge Al-Khasawneh, paras 20-24.

96 Joint Dissenting Opinion of Judges Bedjoui, Ranjeva and Koroma, paras 34-36. See also Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 295-304.

97 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 16-85. See also Dissenting Opinion of Judge ad hoc Torres Bernardez, paras 305-353 and 552-556.

98 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 16-17, 51-85 and 213-216, relying (para.82) on the 1998 Eritrea/Yemen Award, supra note 2, para.239. For arguments rejecting Bahraini effectivités, see also Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 22-32, 62, 72-76, 288, 292 and 350-424, relying (paras 366 and 380) on the Eritrea/Yemen Award as well; and on his rejection of the uti possidetis, see supra note 92.

99 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 86-162 and 217.

100 Id., paras 60, 137-143, 205 and Map 4, noting the geographical continuity between the Hawars and Qatar

The views of three co-authors of the Joint Dissenting Opinion were largely shared by Judge Vladlen S. Vereshchetin, who noted in his dissenting Declaration that the legal effect of the British decision could not be the same in the assessment of the ICJ in 2001 as it could have been for the two "*protected*" states at the time of its adoption in 1939, in an absolutely different legal and political setting.[101] He considered that had the Court properly analyzed the 1939 decision, the subtle interplay of the principle of proximity, effectivités and original title might have led it either to confirm or reverse or else to modify that decision.[102] The position of Qatar on the foregoing and other issues concerned found further reflection in searching views expressed by Judge ad hoc Santiago Torres Bernardez (designated by Qatar), who like Judges Bedjaoui, Ranjeva, Koroma and Vereshchetin dissented from the Court's decisions related to the Hawars and Qit'at Jaradah, as well as from the Court's single maritime boundary line (which was concurred in by Judge Vereshchetin), and whose 556-paragraph Dissenting Opinion exceeded twice the length of the Judgment.[103]

3.4.3 Janan Island, including Hadd Janan

With respect to Janan Island, including Hadd Janan, which were treated as one island located off the south-western tip of Hawar Island proper, the Court attributed by the 13:4 majority vote sovereignty to Qatar.[104] Since the 1939 British decision neither made mention of Janan Island nor specified what was to be understood by the "*Hawar Islands*", the parties have debated at length over the issue of whether Janan fell to be regarded as part of the Hawars 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. The Court was unable to draw definite conclusion from the four lists submitted by Bahrain to Britain (in 1936-1938 and 1946) with regard to the composition of the Hawar Islands. But it drew an authoritative interpretation of the 1939 decision in favour of Qatar's title from decision of the British Government (by means of the letters from the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain) of 23 December 1947 relating to the seabed delimitation between the two states. In particular, those letters made it clear that "*Janan Island is not regarded as being included in the islands of the Hawar group*" (para.4(ii)) but as belonging to Qatar (boundary points fixed in para.5 and map enclosed therewith).[105]

Both Judge Rosalyn Higgins in her Declaration and Judge Shigeru Oda in his Separate Opinion indicated that they dissented from the majority's decision for the reasons elaborated by Judge Peter H. Kooijmans and Judge ad hoc L. Yves Fortier (designated by Bahrain).[106] The Court's decision attributing Janan Island, including Hadd Janan, to Qatar was the only

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demonstrated by the British bathymetric chart; and supra notes 80-81. See also infra notes 140 and 177.

101 Declaration of Judge Vereshchetin, paras 1-10.

102 Id., para.12.

103 Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), structured along two main parts dealing with Territorial Questions, paras 59-461, and The Maritime Delimitation, paras 462-549, followed by his Final Remarks, paras 550-556. See also supra notes 76, 92, 94, 96-98, and infra notes 135, 140, 156, 170, 177, 183, 186, 191 and 217.

104 Judgment, operative para.252(3), and paras 149-165. In favour: President Guillaume, Vice-President Shi, Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, and Judge ad hoc Torres Bernardez (designated by Qatar); Against: Judges Oda, Higgins, Kooijmans, and Judge ad hoc Fortier (designated by Bahrain).

105 Judgment, para.164. For the text of the 1947 British decision, see id., para.61.

106 Declaration of Judge Higgins, noting that as she agreed generally with the delimitation line drawn in the Judgment, she has voted in favour of operative para.252(6), infra note 137; and Separate Opinion of Judge Oda, para.4. See also infra notes 176 and 204-207.

instance in which all four Judges casted their negative votes, even though Judges Kooijmans and Fortier also disassociated themselves in their Separate Opinions from the Judgment's reasoning related to Zubarah, and Judge Kooijmans from that on the Hawars as well. Although the 1947 British decision excluded Janan from the Hawar Islands, Judge Kooijmans found it clear that when the dispute about these Islands arose, Janan was considered part of the Hawars by both parties as well as by the Protecting Power.[107] Nor was Janan given separate mention in the 1939 decision awarding the Hawars to Bahrain. Similarly, Judge ad hoc Fortier had no doubt that the latter decision could only be construed as including Janan.[108] Since the 1947 decision was ambiguous as to its legal character and could not be seen as attributing sovereign rights but at best only as a (belated) interpretation of the 1939 decision, Janan had to be considered part of the Hawars over which Bahrain already had sovereignty at the time of the 1947 decision.[109]

3.4.4 Qit'at Jaradah and Fasht ad Dibal

With respect to what the Court determined to be the island of Qit'at Jaradah and the low-tide elevation of Fasht ad Dibal, which are located off the north-western coast of the Qatar peninsula and to the north-east of the main island of Bahrain, the sovereignty was attributed by the 12:5 majority vote to Bahrain[110] and unanimously to Qatar,[111] respectively. When the British Government drew in 1947 a median (equidistant) line, which "*divides in accordance with equitable principles*" the seabed between Qatar and Bahrain in view of the operations of oil companies in the area concerned, it did so with two exceptions. One of exceptions was that the line gave effect to the 1939 British decision that the Hawar Islands (excluding Janan Island) belonged to Bahrain.[112] The other exception was that Britain recognized "*sovereign rights*" of Bahrain in the areas of the shoals of Fasht ad Dibal and Qit'at Jaradah lying east of that line on the Qatari side.[113] The British Government was of the opinion that these shoals should not be considered to be islands having territorial waters. Qatar agreed with Britain that Dibal and Qit'at Jaradah were low-tide elevations and not islands (possessing territorial waters), but continued to claim that such sovereign rights as existed over both these maritime features belonged to Qatar and not Bahrain. On its part, Bahrain since 1964 has been seeking recognition that both Dibal and Qit'at Jaradah were (even before 1947) islands that remained dry at high tide, possessed territorial waters and belonged to Bahrain.

In the process of determining (for the purposes of drawing the equidistance) the relevant coasts from which the breadth of the territorial seas of the parties is measured, analysis of the evidence submitted by the parties led the Court to conclude that Qit'at Jaradah (situated within the 12-mile limit of both states) meets the criteria of an island as "*a naturally formed area of land, surrounded by water, which is above water at high tide*", as codified in Article 121(1) of the LOS Convention.[114] At the same time, taking into account its very small size, the activities

107 Separate Opinion of Judge Kooijmans, paras 1 and 80-89.

108 Separate Opinion of Judge ad hoc Fortier (designated by Bahrain), paras 42-59.

109 Separate Opinion of Judge Kooijmans, paras 85-86. See also Separate Opinion of Judge ad hoc Fortier (designated by Bahrain), paras 53-55, noting that the 1947 decision purported only to express the British policy and had no legal significance regarding ownership of Janan; and infra note 186.

110 Judgment, operative para.252(4), and paras 191-198; infra note 163. The 12:5 majority vote was the same as in the case of the Hawar Islands, supra note 79.

111 Judgment, operative para.252(5), adopted unanimously by 17 Members, supra note 51, and paras 199-209 and 220; infra note 163.

112 See supra note 105.

113 Judgment, paras 191 and 199.

114 Judgment, para.195, also referring to corresponding Article 10(1) of the 1958 Territorial Sea and Contiguous

carried out by Bahrain on Qit'at Jaradah (including the erection of a beacon, the ordering of the drilling of an artesian well, the granting of an oil concession, and the licensing of fish traps) were considered sufficient to support Bahrain's claim that it has sovereignty over that island.[115] The holding made by the Court in this context that: "*The construction of navigational aids ... can be legally relevant in the case of very small islands*",[116] as preceded by similar approach displayed in the 1998 *Eritrea/Yemen* Award,[117] reversed conclusion of the 1909 *Norway v. Sweden Grisbadarna Maritime Frontier Award* that the placing of beacons and navigational aids was not sufficient evidence substantiating Swedish title,[118] as reaffirmed by the Minquiers and Ecrehos Judgment (rejecting validity of France's title to the Minquiers on this basis).[119] As the *Eritrea/Yemen* Award did,[120] the *Qatar v. Bahrain* Judgment also recalled the 1933 Legal Status of Eastern Greenland pronouncement that:

> *It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been 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.*[121]

The Court noted that similar acts of authority have been invoked by Bahrain in support of its claim over Fasht ad Dibal which, as both parties agreed, is a low-tide elevation governed by rules codified in Articles 7(4) and 13 of the LOS Convention.[122] The decisive question for the present case was, in the Court's view, whether a state can - as Bahrain maintained[123] and Qatar

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Zone Convention. On the meaning of "*above water at high tide*", see C. Symmons, *When Is an "Island" Not an "Island" in International Law? The Riddle of Dinkum Sands in the Case of US v. Alaska*, 2 IBRU Maritime Briefing (1999 No.6). On Article 121(2), see infra note 161.

115 Judgment, para.197, specifying that at high tide length and breadth of Qit'at Jaradah are 12 by 4 metres, whereas at low tide they are 600 and 75 metres, and that at high tide, its altitude is approximately 0.4 metres. See also Separate Opinion of Judge Oda, paras 6 and 9; infra notes 171 and 192-195; and Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/5 [trans.], 33-34 [Counsel Salmon, 29 May 2000], CR 2000/6, 38 [Counsel Sinclair, 30 May], CR 2000/8, 38 [5 June], CR 2000/9 [trans.], 50, 51-52 [Counsel Queneudec], CR 2000/10, 48-49 [6 June], CR 2000/14, 48 [Counsel Reisman, 13 June], CR 2000/15, 13-14 [14 June 2000].

116 Judgment, para.197 in fine. Cf. remarks in Separate Opinion of Judge Kooijmans, para.88 (supra note 107), on no protests of Britain against beaconing Janan Island by Bahrain.

117 1998 Eritrea/Yemen Award, supra note 2, paras 478, 483, 485, 491-492, 510, 513-514 and 516.

118 RIAA XI, 155; No.288/Stuyt.

119 ICJ Reports 1953, supra note 83, at 66, 69, 70 and 71. See also Gulf of Maine Pleadings, Vol.III, 225-226 [Canada's Counter-Memorial], Vol.IV, 76 [US Counter-Memorial], Vol.VI, 137 [Counsel Bowett, 5 April 1984], 352 [Counsel Rashkov, 16 April 1984]; and Gulf of Fonseca Oral Hearings, C 4/CR 91/33, 80 [Counsel Highet, 29 May 1991].

120 1998 Eritrea/Yemen Award, supra note 2, paras 451-452, also quoting the 1928 Palmas Award, supra note 81, at 829.

121 Judgment, para.198, quoting PCIJ Series A/B No.53, 22, 46 (1933).

122 Judgment, para.201, also referring to corresponding Articles 4(3) and 11 of the 1958 Territorial Sea and Contiguous Zone Convention; and Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/9 [trans.], 33, 35, 41-48 [Counsel Queneudec, 5 June 2000], CR 2000/14, 38-45, 49 [Counsel Reisman, 13 June], CR 2000/15, 12 [14 June], 51-52 [Counsel Weil], CR 2000/16, 41, 47 [Reisman, 15 June], CR 2000/25, 6-10 [29 June 2000], 12-14 [Weil]. See also 1977 Anglo/French Continental Shelf Decision [18 ILM 397 (1979)], paras 125-127, 136-138, and 1978 Decision [id. 462]; Tunisia/Libya Continental Shelf (Merits) Judgment, President T.O. Elias, ICJ Reports 1982, 18, 62-64, 88-89, Separate Opinion of Judge Schwebel, id., at 99, Dissenting Opinion of Judge Oda, id., at 157, 266-267; 1992 El Salvador/Honduras Judgment, supra note 55, at 570, para.356; 1992 Canada/France Delimitation of the Maritime Areas Award, para.69 [31 ILM 1170 (1992)]; 1998 Eritrea/Yemen Award, supra note 2, paras 30, 75, 475, 482 and 527.

123 Judgment, para.200, quoting Bahrain's contention that: "*Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its*

contested - acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its TS when that same low-tide elevation lies also within the breadth of the TS of another state. Given that both international treaty and customary law are inconclusive as to whether low-tide elevations can be considered to be "*territory*", the Court drew unprecedented and cautious conclusions that the few existing rules of the LOS Convention referred to above do not justify a general assumption that low-tide elevations are territory in the same sense as islands and that they "*can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory*".[124] The Court was, therefore, of the view that neither Bahrain nor Qatar had the right to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, and that such elevations had to be disregarded for the purposes of drawing the equidistance.[125] Subsequently, Fasht ad Dibal was largely or totally on the Qatari side of two equidistant lines drawn by the Court in the process of adjusting its provisional single boundary, giving no effect to Qit'at Jaradah and treating Fasht al Azm either as part of Sitrah Island or a separate low-tide elevation. Therefore, the Court considered it appropriate to draw the boundary line between Qit'at Jaradah and Fasht ad Dibal, and to conclude that since Fasht ad Dibal was thus situated in the territorial sea of Qatar, it fell for that reason under its sovereignty.[126] The view that low-tide elevations cannot be "*fully assimilated*" with islands[127] did not thus prevent the Court from extending to the former of the proximity presumption reinforced by the 1998 *Eritrea/Yemen* Award that islands within TS are under the same sovereignty as the mainland nearby.[128]

Judge Shigeru Oda, who voted in favour of the Court's decisions attributing Qit'at Jaradah to Bahrain and Fasht ad Dibal to Qatar, believed in his Separate Opinion that the determination of sovereignty over these features was of no significance in the drawing of a maritime delimitation line.[129] He also was of the view that the Court should have dealt more cautiously with the issue concerning islets and low-tide elevations, because the respective rules laid down in the 1958 Territorial Sea and Contiguous Zone Convention when the 3-mile TS prevailed, were copied in Articles 13 and 121 of the LOS Convention without any in-depth discussion at the UNCLOS III and their binding nature in the age of presently prevailing 12-mile TS was open to doubt.[130] The statements in the Judgment concerning Qit'at Jaradah as an island, and Fasht ad Dibal and certain other low-tide elevations (such as Fasht al Azm and Fasht al Jarim) could therefore, according to Judge Oda, have "*an enormous impact on the future development of the law of the sea*".[131] He cautioned that the questions of whether sovereignty over an islet or a low-tide elevation may be acquired through appropriation by a state and how such

subtle dialectic of title and effectivités".

124 Judgment, para.206.

125 Judgment, paras 209 and 215. Note disregard by the 1999 Eritrea/Yemen Award, supra note 2, paras 143-145, in pursuance of Articles 6 and 7(4) of the LOS Convention, as a basepoint of uninhabited Negileh Rock (of the Dahlak Group forming an integral part of Eritrea's mainland coast) on account of its being a low-tide reef; as relied upon in Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/15, 53 [Counsel Weil, 14 June 2000]. Cf. infra note 165.

126 Judgment, para.220, and infra notes 171-172 and 177.

127 See supra note 124.

128 See supra notes 80-81, noting the 1998 Eritrea/Yemen Award's reliance on this presumption also with respect to the low-tide elevations beyond the TS.

129 Separate Opinion of Judge Oda, para.5. On his boundary line, see infra notes 204-207.

130 Separate Opinion of Judge Oda, paras 6-9, noting his concern that modern technology might make it possible to develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities, of which status, including in the context of Articles 60/80 of the LOS Convention, should be reserved for future discussion.

131 Id., para.9. On Fasht al Jarim, see infra notes 192-195.

features can affect the extent or the boundary of the territorial sea remain open matters.[132]

Judge Gonzalo Parra-Aranguren explained in his concurring Separate Opinion that he voted in favour of Bahrain's sovereignty over Qit'at Jaradah, because of his agreement with the Court's single boundary line. But he criticized reversal by the Court of the 1953 Minquiers and Ecrehos holding concerning navigational aids and the Court's reliance on other effectivités claimed by Bahrain.[133] In Judge Parra-Aranguren's view, it was not necessary for the Court to take a stand on the question whether low-tide elevations can from the viepoint of the acquisition of the sovereignty be fully assimilated with islands or other land territory.[134]

The jointly dissenting Judges Mohammed Bedajoui, Raymond Ranjeva and Abdul G. Koroma, as well as Judge ad hoc Santiago Torres Bernardez (designated by Qatar) strongly questioned the Court's conclusion that Qit'at Jaradah met requirements of an island under Article 121(1) of the LOS Convention and its awarding to Bahrain in a situation of the island's location closer to Qatar.[135] Similarly, Judge Vladlen S. Vereshchetin was unable to agree in his dissenting Declaration to island's status of this tiny feature, constantly changing its physical condition, and believed that the attribution of Qit'at Jaradah should have therefore been effected after the TS delimitation and not vice versa.[136]

3.5 Equitable Maritime Boundary Delimitation

The equitable maritime boundary delimitation between Qatar and Bahrain was decided by the majority vote of 13:4, with the dissenters comprising four of five Judges who also voted against decisions subjecting the Hawar Islands and Qit'at Jaradah Island to the territorial sovereignty of Bahrain.[137] The Court held 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*".[138] The boundary was defined by a series of geodetic lines joining 42 points, which were specified in degrees, minutes and seconds of the geographic latitude and longitude, based on the World Geodetic System 1984 and indicated, for illustrative purposes only, in a sketch-map attached to the Judgment.[139]

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132 Separate Opinion of Judge Oda, para.7.

133 Separate Opinion of Judge Parra-Aranguren, paras 4-7.

134 Id., para.7.

135 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 194-205, relying (para.198) on the famous 1805 Anna Judgment of Lord Stowell [5 C.Rob.373; 165 E.R. 809], as also relied upon (para.247) in Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 247, 490 and 523-528 and 551. Cf. Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/6, 46 [Counsel Sir Ian Sinclair, 30 May 2000]. See also infra note 177.

136 Declaration of Judge Vereshchetin, para.13.

137 Judgment, operative para.252(6), and paras 166-251. In favour: President Guillaume, Vice-President Shi, Judges Oda, Herczegh, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, and Judge ad hoc Fortier (designated by Bahrain); Against: Judges Bedjaoui, Ranjeva, Koroma, and Judge ad hoc Torres Bernardez (designated by Qatar). Cf. supra notes 79 (Hawars) and 110 (Qit'at Jaradah), and infra note 177. One Member who also dissented from the latter two decisions, Judge Vereshchetin, was now in the majority.

138 Judgment, operative para.252(6).

139 Judgment, paras 250-251 and Sketch-Map No.7 (reproduced here as Figure 2). The list of points defining the boundary is reproduced in Appendix 1.

Figure 2: Delimitation line fixed by the Court

Identification by the Court of those 42 co-ordinates without explanation given in the Judgment as to how they were selected, was criticized in a Separate Opinion of Judge Oda, especially in the context of difficulty with precise identification of the baselines in the present case.[140]

As in the *Eritrea/Yemen* arbitration, the single all purpose boundary was drawn between both the 12-mile territorial seas and the 200-mile exclusive economic zones (EEZs) and the continental shelves (CSs) of Qatar and Bahrain. It reinforced the governing role of equidistance as the equitable boundary between the (primarily) opposite states under both Article 15 (TS) and Articles 74/83 (EEZ/CS) of the LOS Convention reflecting customary international law,[141] and adjustment of that boundary by the factors pertaining to baselines, islands, low-tide elevations, and interests of third states. Bahrain's claims to archipelagic and straight baselines were rejected, while factors pertaining to (pearl) fisheries, the 1947 seabed delimitation and the disparity between the coastal lengths of the parties (except while giving no effect to Fasht al Jarim) were found to be of no relevance for the actual course of the Qatar/Bahrain boundary line. The role of Article 121(3) rocks was not articulated in the Judgment,[142] while navigational factors played no role in the boundary's drawing process but formed the subject of separate decision related to sovereignty over and the course of boundary in the vicinity of the Hawar Islands.[143]

3.5.1 A Single All-Purpose Equidistant (Median) Line

Bahrain, which did not accept the 1947 delimitation made by Great Britain by means of equidistance (median line), with the exception of Hawar Islands and both shoals (Qit'at Jaradah and Fasht ad Dibal) referred to above,[144] claimed in 1964 a new line delimiting Qatar/Bahrain seabed boundary in Bahrain's favour. While rejecting the two exceptions, Qatar, on its side, did not oppose the part of the British boundary line which was based on the configuration of the coastlines of Qatar and Bahrain and was determined in accordance with equitable principles. In its 1991 Application, Qatar requested the Court:

With due regard to the line dividing the seabed of the two States as described in the British decision of 23 December 1947, to draw in accordance with international law 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.[145]

Both parties also requested the Court "*to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters*" under the terms of the "*Bahraini formula*" and in their final submissions.[146] The Court observed that the concept of a

140 Separate Opinion of Judge Oda, para.28, stressing that in both the 1985 Libya/Malta and the 1993 Denmark v. Norway (Jan Mayen) cases in which co-ordinates were indicated, there was no doubt concerning the baselines to be taken as the basis for drawing a boundary. See also Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 502 and 514-515; and Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, para.205, raising doubts with respect to the Court's use of an American map for the southern sector and a British map for the northern sector, instead of using a single map for the entire course of the Qatar/Bahrain boundary line. Cf. supra note 100. Note that identification of 29 co-ordinates in the 1999 Eritrea/Yemen Award, supra note 2, paras 5 and 168, was assisted by a technical expert designated by the Arbitral Tribunal. Cf. infra notes 153, 191 and 207.

141 See supra note 67, and infra notes 147, 151-152, 182-183 and 248.

142 But see infra notes 171, 194 and 245-247.

143 See supra notes 61-63 and infra notes 208-224.

144 See supra notes 105, 109, 112-113, and infra notes 186, 189.

145 Judgment, para.31.

146 Judgment, para.168, and supra note 12.

single 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*".[147] In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation can - as the Gulf of Maine Chamber held - "*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*".[148]

In the present case, a single all-purpose boundary was sought to delimit exclusively the territorial seas in the southern sector of the delimitation area, where the coasts of Qatar and Bahrain are opposite to each other and the distance between these coasts does not exceed 24 miles, and where in view of 12-mile territorial sea proclaimed by each state, the whole area was thus subjected to their territorial - partially overlapping - sovereignty over the seabed and the superjacent waters and air column.[149] Whereas along with the 12-mile territorial sea both parties proclaimed only the 24-mile contiguous zone, a single boundary was sought to delimit also areas of the CS/EEZs subjected to their sovereign rights and functional jurisdiction in the northern sector, where the coasts of the parties are no longer exclusively opposite to each other but rather comparable to adjacent coasts.[150]

Accordingly, the single Qatar/Bahrain maritime equidistant (median) boundary was constructed by the Court in two sectors, comprising:

- the southern sector of partially overlapping territorial seas, and
- the northern sector of partially overlapping CS/EEZs.

3.5.1.1 Southern Stretch of the Boundary Line

In the southern part of the delimitation area, the Court, basing itself on customary "*equidistance/special circumstances*" rule codified in Article 15 of the LOS Convention (corresponding to Article 12 of the 1958 *Territorial Sea and Contiguous Zone Convention*), followed "*the most logical and widely practised*" two-stage approach of:

- drawing first provisionally an equidistant line, and then

147 Judgment, para.173.

148 Judgment, para.173, quoting the 1984 Gulf of Maine Judgment, supra note 73, at 327, para.194, which was the first decision to apply a single maritime boundary. See also infra note 179. For full citation and further analysis of these Gulf of Maine holdings, see the 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 57-59. The single maritime boundary has also been involved in the 1985 Guinea/Guinea-Bissau Maritime Boundary Award [25 ILM 251 (1986)]; 1989 Guinea-Bissau/Senegal Maritime Boundary Award [83 ILR 1]; Guinea-Bissau v. Senegal cases, ICJ Reports 1990, President M. Ruda, 67 (Provisional Measures), ICJ Reports 1991, President Sir Robert Jennings, 65, 71-71, 74 (Judgment), ICJ Reports 1995, President M. Bedjaoui, 423 (Discontinuance); 1992 El Salvador/Honduras Judgment, supra note 55, at 367-368, 371; 1992 Canada/France Award, supra note 122; 1993 UN Iraq/Kuwait Report, supra note 2; 1999 Eritrea/Yemen Award, supra note 2; 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73; and the pending Cameroon v. Nigeria, Nicaragua v. Honduras and Nicaragua v. Colombia cases, supra notes 4-5.

149 Judgment, paras 169, 171-172 (supra note 69) and 174, and Articles 2-3 of the LOS Convention.

150 Judgment, para.170, and Articles 56 (EEZ) and 77 (CS) of the LOS Convention. Note that by contrast to the CS (Article 77(3)), the exercise of rights over the 200-mile zone, be it EEZ or exclusive fishery zone (EFZ), depends on express proclamation of such zone by a coastal state.

- considering whether that line must be adjusted in the light of the existence of special
- circumstances in order to obtain an equitable result.[151]

Similarly as other decisions involving the single maritime boundary, the Judgment also followed this approach with respect to the CS/EEZ delimitation under Articles 74/83 of the LOS Convention in the northern sector but unlike those decisions, it dealt with its applicability separately.[152]

Having given the definition of equidistance, which can only be drawn when the baselines are known, the Court noted that neither of the parties has as yet specified the baselines for measuring the territorial sea breadth, nor have they produced official maps or charts which reflect such baselines.[153] 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 Court, therefore, first determined the relevant coasts of the parties, from which it determined the location of the baselines and the pertinent basepoints which enabled the equidistance to be measured.

While reviewing the different boundary lines proposed by Qatar and Bahrain,[154] the Court rejected Bahrain's claim (contested by Qatar) to its status as a de facto archipelagic state[155] entitled to draw straight archipelagic baselines meeting the required water to land ratio between 1:1 and 9:1 in pursuance of Part IV of the LOS Convention.[156] Bahrain contended

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151 Judgment, paras 175-176, 217 and 240. In view of both parties possessing at present the 12-mile TS (supra note 69), criticism in Separate Opinion of Judge Oda, paras 10-39, that the Court misconstrued the issues of the maritime boundary by qualifying it as the TS instead of the CS boundary in this sector, is unconvincing. Nor does this criticism seem supported by similarity, if not identity, of delimitation rules concerned.

152 See decisions listed supra note 148, and the Judgment's holdings infra notes 178-184, which also apply to the TS delimitation by means of a single line.

153 Judgment, para.177, and Article 16 of the LOS Convention. Note that the same applied to the 1999 Eritrea/Yemen Award, supra note 2. Cf. supra notes 138-140. On implementation of Article 16, as well as the corresponding Articles 47(8)-(9), 76(9), 75/84 and 134(3), see Oceans and the Law of the Sea - Reports of the Secretary-General, UN Docs A/54/429, 17-18 (1999), and A/56/58, 20-21, Add.1, 9 (2001) <http://www.un.org/Depts/los/>. Cf. North Sea Pleadings, Vol.I, 518-519 [Common Rejoinder of Denmark/NL], Vol.II, 25 [Agent Jaenicke, 23 October 1968], 88-89 [Sir Humphrey Waldock, 28 October 1968]; Denmark v. Norway Oral Hearings, CR 93/2, 62 [Counsel de Arechaga, 12 January 1993], CR 93/10, 39 [Agent Magid, 25 January 1993]; Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/14, 44 [Counsel Reisman, 13 June 2000]. For authoritative interpretation of "*disclaimers*" placed on the UN maps, see the 2002 UN Eritrea/Ethiopia Boundary Decision, supra note 2, paras 3.26-3.28, and Appendix A, paras A26-A32.

154 Judgment, paras 179-184, and Sketch-Map No.2 (reproduced here as Figure 3) illustrating the mainland-to-mainland equidistance of Qatar and two lines proposed by Bahrain, including one based upon its claim to the status of archipelagic state.

155 On the concept of the unity of archipelagic state, see the 1953 Minquiers and Ecrehos Separate Opinions of Judges Basdevant and Levi Carneiro, supra note 83, at 74, 78; 85, 97-102, 108. Cf. Anglo/Norwegian Fisheries Pleadings, Vol.I, 480-495 [Norway's Counter-Memorial], Vol.II, 660-662 [UK Reply), Vol.IV, 283-284 [Counsel Bourquin, 11 October 1951]; Minquiers and Ecrehos Pleadings, Vol.II, 196-197 [Agent Gros, 28 September 1953]. On underlying importance of the archipelagic state regime of Indonesia in the East Timor Judgment, ICJ Reports 1995, 90, see B. Kwiatkowska, Equitable Maritime Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Jennings and Beyond, 28 Ocean Development and International Law 91, 109 (1997).

156 Judgment, paras 180-182, Articles 46-47 of the LOS Convention, and supra note 70. See also Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, para.141, and Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 45-58, 222-226, 248, 462-479 and 507; Qatar v. Bahrain

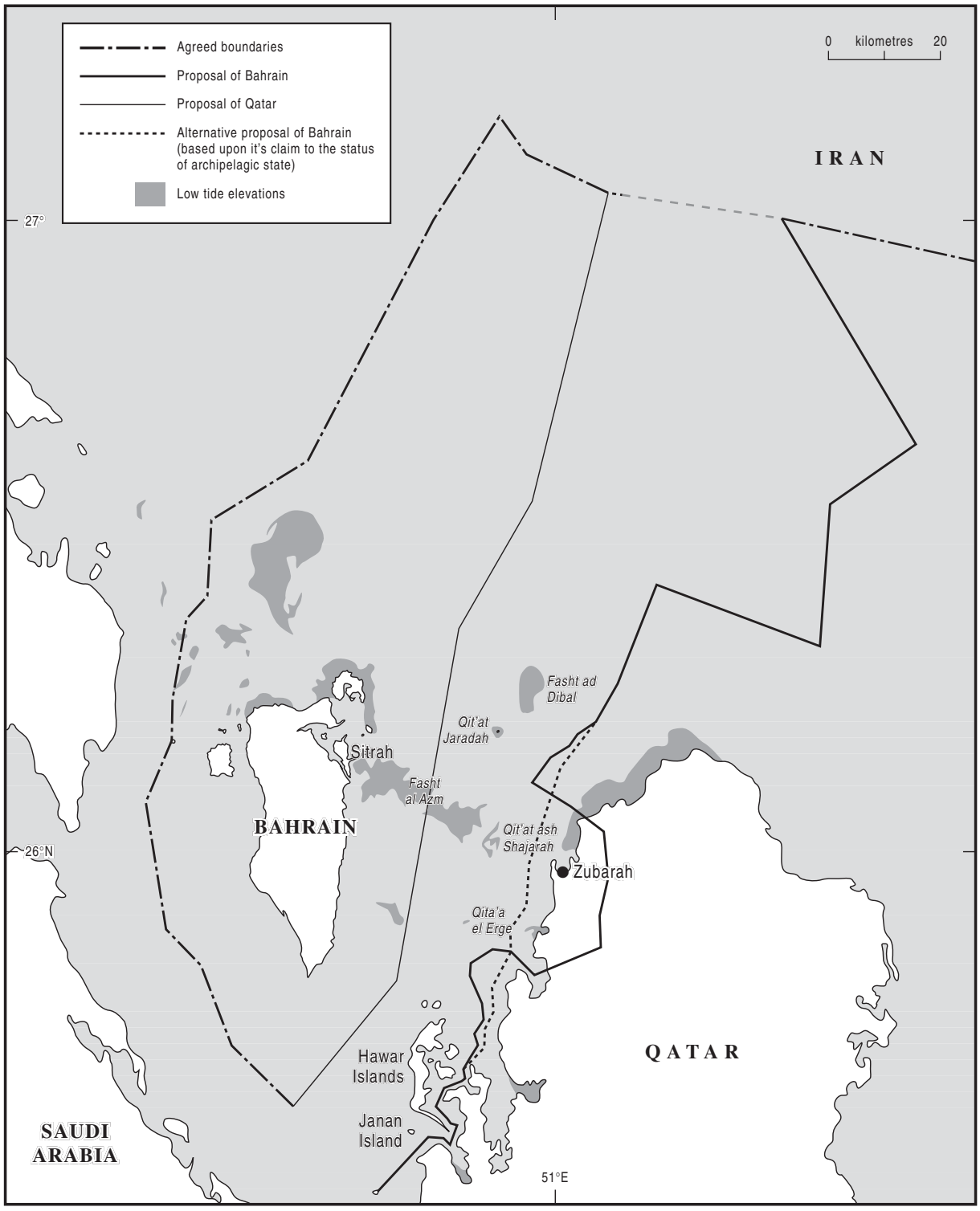

Figure 3: Lines proposed by Qatar and Bahrain

(Merits) Oral Hearings, CR 2000/5, 19 [Agent Al-Muslemani, 29 May 2000], CR 2000/10, 15-16 [Counsel Queneudec, 6 June], CR 2000/14, 33-38 [Counsel Reisman, 13 June], CR 2000/15, 8, 14-16 [14 June], 37 [Counsel Weil], CR 2000/16, 41-42, 45-46, 48-50 [Reisman, 15 June], CR 2000/19, 17-19 [Queneudec, 22 June], CR 2000/25, 7 [Reisman, 29 June 2000]. On the right of innocent passage through archipelagic waters under Article 52 of the LOS Convention, see also the 1982 Tunisia/Libya (Merits) Dissenting Opinion of Judge Evensen, supra note 122, at 283; 1992 El Salvador/Honduras Judgment, supra note 55, at 593, para.393, Dissenting Opinion of Judge Oda, id., at 734 n.1, 745 n.1, 746 and 756.

that it has asserted its archipelagic status in its diplomatic correspondence with other states and during multilateral negotiations over the course of the last century; and that it has been prepared to declare itself an archipelagic state but has been constrained from doing so by the undertaking not to modify the status quo given in the framework of King Fahd's mediation and that will lapse only with the Judgment of the Court. However, the Court considered that as Bahrain has not made this claim one of its formal submissions, the Court was not requested to take a position on this issue, and that it could carry out its task of drawing a single maritime boundary only by applying those rules and principles of customary law which are pertinent under the prevailing circumstances.[157] It also found appropriate to hold that: "*The Judgment of the Court 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*".[158]

Prior to the determination of the relevant coasts from which the breadth of the territorial seas of the parties is measured, the Court recalled the basic rule of low-water line (normal baselines) codified in Article 5 of the LOS Convention,[159] as well as the principles that "*the land dominates the sea*" ("*la terre domine la mer*")[160] and that islands, regardless of their size, enjoy in pursuance of Article 121(2) the same status, and therefore generate the same maritime rights, as other land territory.[161]

Apart from the Hawar Islands and Janan Island determined by the Court to be subject to the territorial sovereignty of Bahrain and Qatar respectively, other islands which were relevant for delimitation purposes in the southern sector were Bahraini islands of Jazirat Mashtan, Umm Jalid, Sitrah and Fasht al Azm. With respect to the latter island the parties differred on whether it formed - as Bahrain claimed - part of Sitrah Island or was - as Qatar argued - a separate low-tide elevation, separated from Sitrah by a natural channel (a "*fisherman's channel*") which

157 Judgment, paras 183 and 214, and infra note 167. Note that whereas Malta's straight baselines (giving 0.64:1 water to land ratio) enclose uninhabited islet of Fifla, the latter was disregarded in the construction of the provisional Libya/Malta equidistance in the Libya/Malta Continental Shelf (Merits) Judgment, President T.O. Elias, ICJ Reports 1985, 13, 48 and 57 (operative para.79.C). But the Court stated, id., at 48, that it "*does not express any opinion on whether the inclusion of Fifla in the Maltese baselines was legally justified*". Cf. Kwiatkowska, supra note 70, at 120. For Malta's Declaration upon ratification of the LOS Convention on 20 May 1993 stating that incorporation of Fifla in the Maltese archipelago as one of the basepoints fully conforms with the Convention, see The Law of the Sea, supra note 66, at 34.

158 Judgment, para.183 in fine. See also emphasis in President Guillaume's Statement, supra note 52, that: "*This Judgment is binding, final and without appeal*"; and infra note 227. See further infra notes 218-224 and 251.

159 Judgment, para.184. Commencing with France v. Turkey S.S. Lotus Dissenting Opinion of Judge Moore, PCIJ Series A, No.10, 75 (1927), the low-water line rule has featured prominentaly in the annals of the International Court. See also 1999 Eritrea/Yemen Award, supra note 2, paras 133-135 and 146.

160 Judgment, para.185, quoting North Sea Continental Shelf Judgment, ICJ Reports 1969, 51, para.51, and Aegean Sea Continental Shelf (Jurisdiction) Judgment, ICJ Reports 1978, 36, para.86. See also Qatar v. Bahrain Separate Opinion of Judge Kooijmans, para.3, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 2 and 181, and Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 505 and 520. See further the 1951 Anglo/Norwegian Fisheries Judgment, supra note 80, at 133; Cameroon v. Nigeria Oral Hearings, CR 98/4 [trans.], 43 [Adviser Bipoun Woum, 6 March 1998]; Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/15, 28 [Counsel Weil, 14 June 2000]. On the original exposition of that principle in the 1909 Grisbadarna Award, supra note 118, at 159, see the North Sea Dissenting Opinion of Vice-President Koretsky, supra, at 160 n.1; and 1984 Gulf of Maine Judgment, supra note 73, at 312, para.157, and 338, para.226, and Pleadings, Vol.II, 67-68, 93 n.2 [US Memorial].

161 Judgment, para.185. Cf. 1982 Tunisia/Libya Dissenting Opinion of Judge Oda, supra note 122, at 252. On Article 121(1), see supra notes 114-115.

was navigable even at low-tide and was filled during the 1982 construction works of Bahraini petrochemical plant. The Court was unable to determine whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken, but ultimately found such determination, in the second stage of its decision-making process, as being unnecessary.[162]

It is at this point that the Court considered and decided the disputed sovereignty over two maritime features - Qit'at Jaradah, which is situated north-east of Fasht al Azm and of which also island status was contested by Qatar (in reliance on the 1947 British decision), and Fasht ad Dibal, of which low-tide elevation status was undisputed by the parties. As noted earlier, Qit'at Jaradah was determined by the Court to meet the legal definition of an island and to be subject (in reliance upon effectivités) to the sovereignty of Bahrain, while the low-tide elevation of Fasht ad Dibal was held, in the second stage of the Court's decision-making process, to fall (in reliance upon its location) within the sovereignty of Qatar.[163]

Having concluded that the low-tide elevations situated in the area of overlapping claims of the parties had to be disregarded for the purposes of drawing the provisional single equidistant line,[164] the Court turned to consideration of the method of straight baselines applied by Bahrain as a multiple-island state. However, as was the case with Bahrain's claim to archipelagic regime, the Court was of the view that Bahrain did not meet conditions for (necessarily restrictive[165]) application of straight baselines either. In the instant case, contrary to the rules codified in Article 7 of the LOS Convention and corresponding Article 4 of the 1958 *Territorial Sea and Contiguous Zone Convention* (not explicitly referred to Bahrain), the coasts of Bahrain's main islands do not form "*a deeply indented*" coast, nor do the maritime features east of those islands qualify "*as a fringe of islands*" along the Bahraini coast.[166] The Court admitted that Bahrain could apply the archipelagic baselines, but restated that Bahrain did not declare itself to be an archipelagic state.[167]

The Court completed its task of drawing the provisional single boundary line by giving special attention to Bahraini Fasht al Azm, with respect to which it could not determine whether it

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162 Judgment, paras 188-190, and paras.216 and 218-220, infra notes 168 and 170-172.

163 See supra notes 110-136.

164 See supra note 125.

165 Judgment, para.212, pointing out that the method of straight baselines is an exception to that of normal baselines, supra note 159. Cf. supra note 125.

166 Judgment, paras 210-215 and 223, infra note 212. Note that those two criteria are not met by a large number of states which nevertheless did establish straight baselines. See Roach and Smith, supra note 62, at 82-101 (coastline not deeply indented and cut into) and 102-112 (coastline not fringed with islands).
The Court did not refer to unprecedented exposition of the straight baselines system and conditions for its application in the 1951 Anglo/Norwegian Fisheries Judgment, supra note 80, as codified in the 1958 and 1982 Law of the Sea Conventions, and as reaffirmed in the 1969 North Sea Judgment, supra note 160, at 21, para.15, and 52, para.98; Fisheries Jurisdiction (Merits) Separate Opinions of Sir Humphrey Waldock, ICJ Reports 1974, 107-114, 227; 1977 Anglo/French Decision, supra note 122, paras 50-51 and 71; 1978 Aegean Sea Judgment, supra note 160, at 37, para.89; 1982 Tunisia/Libya Judgment, supra note 122, at 74-76, and Tunisia v. Libya (Revision) Judgment, ICJ Reports 1985, 225; 1984 Gulf of Maine Judgment, supra note 73, at 309; 1985 Libya/Malta Judgment, supra note 157, at 22; 1994 Libya/Chad Separate Opinion of Judge Ajibola, supra note 55, 79-80; 1992 El Salvador/Honduras Judgment, supra note 55, at 593, Dissenting Opinion of Judge Oda, id., at 745, 755; 1999 Eritrea/Yemen Award, supra note 2, paras 50, 140-145, 151, and Annex II: Eritrea's Answer to Judge Schwebel's Question; and 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, para.5.16.

167 Judgment, para.214, and supra notes 154-158.

formed part of the Sitrah Island. Accordingly, the Court has drawn two equidistant lines. If Fasht al Azm were to be part of Sitrah, the basepoints would be situated on the former's eastern low-water line; and if Fasht al Azm were not to form part of Sitrah but a separate low-tide elevation, it could not provide such basepoints.[168]

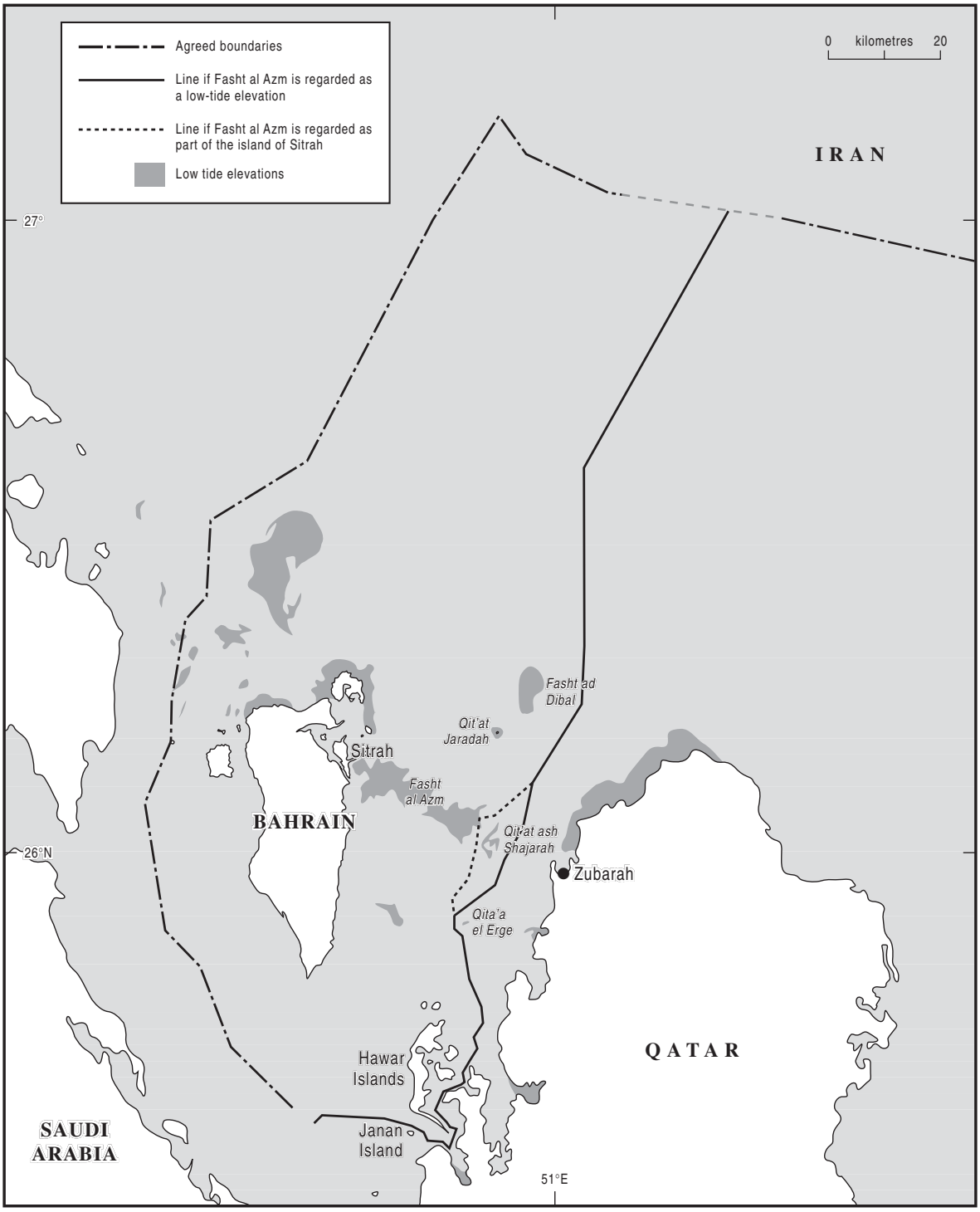

Figure 4: Equidistance line taking into consideration all the islands and those low-tide elevations located in the territorial sea of one State only

168 Judgment, para.216; supra note 162; Sketch-Map No.3 (reproduced here as Figure 4) and its enlargements, Nos 4, 5 and 6.

In the second stage of its decision-making process, the Court considered whether there were special circumstances which required adjustment of the equidistance as provisionally drawn in order to obtain the equitable single boundary.[169] With respect to Fasht al Azm, the Judgment pointed out that on either of the two hypotheses of its forming part of the Sitrah Island (when the boundary would be disproportionately close to Qatar's mainland) and its being a separate low-tide elevation (when the boundary would brush Fasht al Azm), there were thus special circumstances which justified choosing a delimitation line passing between Fasht al Azm and Qit'at ash Sharjah.[170] With respect to tiny, uninhabited Qit'at Jaradah, which was determined to be an island and to come under Bahraini sovereignty, the Court based itself on previous instances of eliminating the disproportionate effect of small islands and chose the line passing immediately to the east of Qit'at Jaradah.[171] It is at this point that by giving no effect to this small island and by testing two equidistant lines corresponding to treatment of Fasht al Azm as part of Sitrah and as low-tide elevation, the Court chose for drawing the boundary between Qit'at Jaradah and Fasht ad Dibal and for awarding the latter to sovereignty of Qatar.[172] In accordance with common practice, the Court also considered it appropriate to take account of interests of Saudi Arabia at the southern-most point, and to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands.[173]

Consequently, the single equidistant boundary adjusted to the foregoing circumstances was drawn from the point of intersection of the respective maritime limits of Saudi Arabia and of the parties, which could not be fixed, and follows a north-easterly direction, then immediately turns in an easterly direction, after which it passes between Jazirat Hawar and Janan.[174] Subsequently, the boundary 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 and Qit'at ash Shajarah on the Qatari side. Finally, it passes between Qit'at Jaradah and Fasht ad Dibal, leaving the former on the Bahraini side and the latter on the Qatari side.[175]

Judges Rosalyn Higgins and Peter H. Kooijmans as well as Judge *ad hoc* L. Yves Fortier (designated by Bahrain), who dissented from the Court's decision attributing Janan Island to Qatar, all concurred in the Court's single maritime boundary line, notwithstanding their belief that it should run south-westward between Janan and the Qatar peninsula, and not between the Hawars and Janan.[176] Judges Mohammed Bedjoui, Raymond Ranjeva and Abdul G. Koroma,

169 Judgment, para.217, quoting the 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 60, para.50, and 62, para.54; and supra note 151.

170 Judgment, para.218, and Sketch-Maps Nos 3 and 5 (Fasht al Azm being part of Sitrah) and Nos 3 and 6 (Fasht al Azm as a separate low-tide elevation). Cf. Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 496, 522 and 530-533.

171 Judgment, Sketch-Maps Nos 3, 5 and 6, and para.219, quoting the 1969 North Sea Judgment, supra note 160, at 20, para.13, and 36, para.57 (applying to: for the FRG - Borkum, Nordstrand, Pellworm, Helgoland (outside TS), Die, Amrun, Fohr and Sylt; for Denmark - Fanö, Mandö and Röm; and for the Netherlands - Texel, Vlieland, Terschelling, Ameland and Schiermonni-Koog); and the 1985 Libya/Malta Judgment, supra note 157 (applying to Maltese Fifla). On Turkey's perception of the Greek islands as "mere protuberance", see the 1978 Aegean Sea Judgment, supra note 160, at 35, 37; Pleadings, 93-94 [Counsel O'Connell, 26 August 1976]. See also supra notes 114-115, and infra notes 192-195.

172 Judgment, para.220, and supra notes 125-128.

173 Judgment, para.221 in fine.

174 Judgment, para.222, and Sketch-Map No.7.

175 Id. Cf. supra notes 138-140.

176 See supra notes 106-109. On the boundary line suggested by Judge Oda, who also dissented from the decision concerning Janan, see infra notes 204-207. On Separate Opinion of Judge Parra-Aranguren, see

as well as Judge *ad hoc* Santiago Torres Bernardez (designated by Qatar), who all dissented from the Court's decisions awarding the Hawars and Qit'at Jaradah to Bahrain, questioned accordingly the course of the boundary in the southern sector and voted against the Court's single line.[177]

3.5.1.2 Northern Stretch of the Boundary Line

In the northern part of the delimitation area of partially overlapping CS/EEZs, the Court followed again "*the most logical and widely practised*" two-stage approach of:

- drawing first provisionally an equidistant line, and then
- considering whether there are circumstances which must lead to an adjustment of that line.[178]

The Judgment continued its reliance on the Gulf of Maine holdings in support of the single line as permitting to avoid the disadvantages inherent in a plurality of delimitations and to use "*criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation*".[179] It reaffirmed that as the two institutions of CS and EEZ are linked together in modern law, "*greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts*".[180] Moreover, the Judgment reaffirmed that it is in accordance with customary law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the UNCLOS III, to begin the CS/EEZ delimitation with a provisionally drawn equidistance and to examine those circumstances which might suggest its adjustment with a view of achieving an equitable result.[181]

Whereas the foregoing pronouncements were based on the previous jurisprudence expressly relying on Articles 74/83 of the LOS Convention,[182] these basic provisions were not referred to by the *Qatar v. Bahrain* Judgment. Nor did the Court quote the 1993 Denmark v. Norway (Jan Mayen) Judgment, while reaffirming the unprecedented holding of the latter, as

supra notes 133-134; and on Declaration of Judge Herczegh, see infra note 215.

177 Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 163-205, Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 462-551, and supra notes 59, 96-100, 103, 135, 137 and 140.

178 Judgment, paras 176, 224-232 and 240, and supra notes 151-152.

179 Judgment, para.225, quoting the second part of the passage found in the 1984 Gulf of Maine Judgment, supra note 73, at 327, para.194, of which the first part was quoted in para.173, supra note 148.

180 Judgment, para.226, quoting 1985 Libya/Malta Judgment, supra note 157, at 33, para.33. Note that the principle of distance (which was newly introduced in Articles 57-EEZ and 76-CS of the LOS Convention, presently reflecting customary law) also implies the use of equidistance in the TS delimitation; and that under the 1958 Continental Shelf Convention, the CS delimitation was governed by the same rules as now retained in Article 15 (TS) of the LOS Convention, supra note 151.

181 Judgment, paras 227-233, quoting 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 61-62, paras 51, 53 and 55, and 1985 Libya/Malta Judgment, supra note 157, at 47, para.63.

182 See, e.g., 1977 Anglo/French Decision, supra note 122, paras 91 and 96; 1982 Tunisia/Libya Judgment, supra note 122, at 48-49; 1984 Gulf of Maine Judgment, supra note 73, at 294-295; 1985 Libya/Malta Judgment, supra note 157, at 30-31, 48, 55; 1985 Guinea/Guinea-Bissau Award, supra note 148, para.88; 1989 Guinea-Bissau/Senegal Award, supra note 148, para.79; 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 59, Separate Opinions of Judge Oda, id., at 106-109, and Judge Schwebel, id., at 127-128; 1998 Cameroon v. Nigeria (Preliminary Objections) Judgment, supra note 4, at 321-322; 1999 Eritrea/Yemen Award, supra note 2, paras 13, 23-24, 116 and 131-133; 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, paras 2.27 and 5.2.

subsequently reaffirmed by the 1999 *Eritrea/Yemen* Award (both under Sir Robert Jennings' Presidency) that the "*equidistance/special circumstances*" rule as codified in Article 15 of the LOS Convention and the "*equitable principles/relevant circumstances*" rule of the customary law as reflected by Articles 74/83, "*are closely interrelated*" (or as the Denmark v. Norway Judgment put, produce "*much the same result*").[183] However, in addition to a number of other Denmark v. Norway pronouncements, the Court did in any event restate that: "*The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa*".[184]

At the second stage of considering whether its single equidistant line had to be adjusted in the light of any relevant circumstances, the Court examined but rejected contentions of Bahrain concerning the pearl fisheries,[185] and those of Qatar related to the 1947 British delimitation line[186] and to a significant disparity between the costal lengths of Qatar and Bahrain (amounting to 1.59:1 ratio).[187]
The pearling industry effectively ceased to exist a considerable time ago. Moreover, even if it were taken as established that pearling had been carried out by fishermen from one state only, it in any event never have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters.[188] The existence of pearlings banks did not therefore, in the Court's view, justify an eastward shifting of its provisional equidistance as requested by Bahrain. Nor could the 1947 British decision be considered to have direct relevance for the actual course of the boundary line, because neither of the parties has accepted it as a binding decision and they have invoked only parts of it to support their arguments. Moreover, the 1947 equidistant line only concerned the seabed delimitation, whereas the delimitation to be effected by the Court was partly the territorial sea and partly the CS/EEZ delimitation. While rejecting the 1947 line, the Court made no pronouncements similar to those found in the 1999 *Eritrea/Yemen* Award with respect to the basic duties of the parties to inform and consult one another and to give every consideration to the shared or joint or unitised exploitation of mineral resources which may be discovered that straddle their maritime boundary or that lie in its vicinity.[189]

183 Judgment, para.231; 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 58-63, relying (para.46) on the 1977 Anglo/French Decision, supra note 122, para.70; and 1999 Eritrea/Yemen Award, supra note 182. In view of applicability and effects of this holding, criticism expressed in Separate Opinion of Judge Oda with respect to both the southern and the northern sectors of the Court's boundary line, supra note 151, is unconvincing. On Judge Oda's boundary line, see infra notes 204-207. For what appears to be proper interpretation of Articles 15 and 74/83, see Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 483-489.

184 Judgment, para.234, quoting the 1993 Denmark v. Norway (Jan Mayen) Judgment, supra note 1, at 67, para.64, and also quoting the 1969 North Sea Judgment, supra note 160, at 22, para.18; and supra note 181.

185 Judgment, paras 235-236.

186 Judgment, paras 237-240, and supra notes 105, 109, 112-113 and 144. Cf. Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 491-496 and 546.

187 Judgment, paras 241-243.

188 Judgment, para.236, noting that pearl diving in the Gulf area was traditionally considered as a joint right of the Arabic coastal pupulations concerned. On the Eritrea/Yemen holdings concerning the "*perpetuation of the traditional fishing regime*", see infra note 211.

189 1999 Eritrea/Yemen Award, supra note 2, paras 84-87, citing, inter alia, the 1969 North Sea Judgment, supra note 160, at 54, operative para.101(D)(2), as reaffirmed by the 1985 Libya/Malta Judgment, supra note 157, at 41, para.50; the North Sea Separate Opinion of Judge Philip C. Jessup, ICJ Reports 1969, 81-83; and M. Miyoshi, The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation, 2 IBRU Maritime Briefing (1999 No.5). See also D.M. Ong, Joint Development of Common Offshore Oil and Gas Deposits, 93 AJIL 771 (1999).

With respect to the contention concerning disparity in length of the coastal fronts of the parties, the Court accepted Bahrain's argument that it resulted from Qatar's assumption that Hawars were under its sovereignty. Given the Hawar Islands were now attributed to sovereignty of Bahrain, the disparity could not be considered such as to necessitate an adjustment of the provisional equidistance.[190] Neither at this point nor subsequently did the Court specify - by contrast to the previous equitable jurisprudence - what are the exact ratios of the Qatar/Bahrain coastal lengths and their water areas.[191]

The only circumstance which the Court found as necessitating such an adjustment was the location of Fasht al Jarim, a sizeable maritime feature, which is partly situated in Bahrain's territorial sea, of which at most a minute part is above water at high tide, and the legal nature of which was disputed by the parties.[192] Given the feature's location, its low-water line could, in the Court's view, in any event be used as the baseline from which the breath not only of the TS, but also of the CS and the EEZ, is measured.[193] However, basing itself on the North Sea and the Libya/Malta (Merits) holdings (also relied upon with respect to Qit'at Jaradah) as well as those of the Anglo/French Decision, concerning the need to avoid the disproportionate effect of "*islets, rocks and minor coastal projections*",[194] the Court considered that equity required giving no effect to Fasht al Jarim in determining the course of its boundary line.

Consequently, the single maritime boundary in this sector was formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, meets the equidistant line as adjusted to take account of the absence of effect given to Fasht al Jarim.[195] The boundary then follows this adjusted equidistance until it meets the delimitation line between the respective maritime zones of Iran on the hand and of Bahrain and Qatar on the other.[196]

3.5.1.3 Interests of Third States: Southern and Northern End Points of the Boundary Line

The Court found it necessary to terminate either end of the Qatar/Bahrain single maritime boundary in such a way as to avoid trespassing upon an area where other claims might fall to

For analysis of these 1999 Eritrea/Yemen holdings, see D.M. Ong, The New Timor Sea Arrangement 2001, 17 IJMCL 79, 90 (2002); and for reliance on these holdings, see the Cameroon v. Nigeria; Equatorial Guinea Intervening (Merits) Oral Hearings, CR 2002/7, 20 [Co-Agent Kamto, 26 February 2002], CR 2002/9, 46 [Counsel Brownlie, 1 March], CR 2002/12, 64 [Counsel Crawford, 6 March], CR 2002/17, 23-24, 27-28 [Deputy Agent Pellet, 12 March], CR 2002/20, 50 [Crawford, 15 March 2002] <http://www.icj-cij.org>; 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, paras 3.4/23 and 5.11.

190 Judgment, para.243, referring to the Court's decision over the Hawar Islands, supra note 79.

191 Cf. Kwiatkowska, supra note 155, at 104-105; and 1999 Eritrea/Yemen Award, supra note 2, paras 20, 39-43, 117 and 165-168. Cf. supra note 140; Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 520-521; T. Yoshifumi, Reflections on the Concept of Proportionality in the Law of Maritime Delimitation, 16 IJMCL 433, 449-453, 457-459 (2001). See also 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, paras 1.28, 2.34, 4.11/24 and 5.14/19.

192 Judgment, paras 245-249. Cf. supra notes 114-136; 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, para.4.35, which basing itself on the Court's treatment of Fasht al Jarim, gave no effect to Sable Island, id., paras 1.28, 4.21, 4.32/36 and 5.13/15.

193 Judgment, para.245. But see Separate Opinion of Judge Oda, paras 6-9, supra notes 130-131.

194 Judgment, para.246, reaffirming the 1969 North Sea and the 1985 Libya/Malta holdings, supra note 171, and Judgment, para. 247, quoting the 1977 Anglo/French Decision, supra note 122, para.244. For Qatar's reliance on the corresponding holding of the 1984 Gulf of Maine Judgment, supra note 73, at 332, para.210, see Judgment, para.179, supra note 154, and infra note 245. For reliance for these Libya/Malta holdings, see also 2002 Newfoundland and Labrador/Nova Scotia (Phase II) Award, supra note 73, para.4.31 n.153.

195 Judgment, para.249, and Sketch-Map No.7.

196 Id. Cf. supra notes 138-140.

be considered.[197] This applied to the southern end point 1 and the northern end point 42.

As regards point 1, the Judgment noted that the southern-most point could not be fixed, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia on the one hand and of Bahrain and Qatar on the other.[198] Having determined all the 42 co-ordinates of the Qatar/Bahrain single maritime boundary, the Judgment specified that below point 1, the boundary follows, 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 the three states concerned.[199] Bahrain and Saudi Arabia delimited their 98.5-mile continental shelf boundary line under their pioneering Boundary Agreement of 22 February 1958,[200] whereas delimitation between Qatar and Saudi Arabia remains yet to be accomplished.[201]

As regards the northern end point 42 of the Qatar/Bahrain single maritime boundary, the Judgment specified that beyond this point, the boundary follows, 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.[202] Thereby, the delimitations under Iran/Qatar and Iran/Bahrain Continental Shelf Agreements of 20 September 1969 and 17 June 1971 respectively, have been completed.[203]

3.5.1.4 A Single Equidistant Line Suggested by Judge Oda

In his Separate Opinion, Judge Shigeru Oda explained that he voted in favour of the Court's single equidistant boundary line, because "*it may well be that Qatar and Bahrain, in the spirit of cooperation between two friendly, neighbouring countries, will be able to accept the demarcated line decided by the Court*".[204] But as Judge Oda was unable to agree with the

197 Cf. the 1999 Eritrea/Yemen Award, supra note 2, paras 44-46, 136, 164 and 167. For the latest instance of third state intervention in the practice of the ICJ, see an Order of 21 October 1999, in which the Court, Presided over by Judge Stephen M. Schwebel, authorized Equatorial Guinea to intervene in the Cameroon v. Nigeria Land and Maritime Boundary (Merits) case as non-party in pursuance of Article 62 of the Statute. See ICJ Communiqués No.99/35, 30 June, and No.99/44, 22 October 1999 <http://www.icj-cij.org>; ICJ Reports 1999, in press, reprinted in 38 ILM 112 (2000). See also the Court's treatment of the eighth Nigeria's objection in the 1998 Cameroon v. Nigeria (Preliminary Objections) Judgment, supra note 4, at 322-324, and operative para.118(2) at 326. On President Schwebel's longstanding appreciation of the right of third states to intervene, see P.H. Kooijmans, Two Remarkable Men Have Left the International Court of Justice, 13 LJIL 341, 347-349 (2000) <http://www.wkap.nl/oasis.htm/273987>. On dismissal of the Philippines' Application for permission to intervene by the Indonesia/Malaysia Judgment, supra note 5, see UN Doc. A/56/58, supra note 32, at 78; ICJ Press Releases Nos 2001/7, 13, 18 of 15 March, 22 May and 29 June, No.2001/28 and 28bis, 23 October 2001.

198 Judgment, paras 221-222, and supra notes 64 and 173-174.

199 Judgment, para.250, and Sketch-Map No.7.

200 1733 UNTS 1993; Judgment, Sketch-Map No.7, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 207-212, and Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), para.516.

201 On recent initiative concerning another of the remaining delimitations in the Gulf, namely that between Iran and Kuwait, see UN Docs S/2001/330 and S/2001/821. On Iran/UAE dispute over Abu Musa and Tunbs, see supra note 2.

202 Judgment, paras 249-250, Sketch-Map No.7, and supra notes 63 and 196.

203 787 UNTS 165 (Iran/Qatar), 826 UNTS 227 (Iran/Bahrain); Judgment, Sketch-Map No.7, and Dissenting Opinion of Judge ad hoc Torres Bernardez, para.517.

204 Separate Opinion of Judge Oda, paras 10 and 41; and infra notes 226 and 251. On his dissent from the Court's decision concerning Janan Island, see supra note 106; and on his criticism of the Court's treatment of islets and low-tide elevations, see supra notes 129-132.

Court's treatment as a whole of the issues relating to the maritime delimitation, he suggested an alternative single equidistance based on the macrogeographical approach and the coastal facade method, with a view of assisting governments in their negotiations with neighbouring states in the future.[205] Whereas Judge Oda's criticism of what he perceived as misconstruction by the Court of the issues of the maritime boundary in both the southern and the northern sectors is unconvincing,[206] his concern with no explanation given in the Judgment as to how were the 42 co-ordinates of the boundary selected appears to merit attention.[207]

3.5.2 Innocent Passage in the Territorial Sea Area of the Southern Stretch of the Boundary Line and Potential Status of Bahrain as an Archipelagic State

With respect to the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands, the Court unanimously recalled that vessels of Qatar enjoy "*the right of innocent passage accorded by customary international law*".[208] Similarly, navigational and other rights were previously pronounced upon by the Court in the 1992 *El Salvador/Honduras; Nicaragua Intervening (Merits)*[209] and the 1999 Botswana/Namibia[210] Judgments, and by the Arbitral Tribunal in the 1998/1999 *Eritrea/Yemen* Awards,[211] in the context of the respective territorial issues.

In the present case, as a result of the boundary line drawn in the southern sector, Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands are connected only by the channel - which is narrow and shallow, and little suited to navigation - separating the Hawars from the peninsula. The Court therefore emphasized that, as Bahrain is not entitled to apply the method of straight baselines, 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, subject to the customary right of innocent passage.[212] The Judgment added that in the same way, Bahraini vessels, like those of all other states, enjoy this right in the territorial sea of Qatar.[213] The Court's characterization of the right of innocent passage by reference to customary international law should be construed as

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205 Separate Opinion of Judge Oda, paras 40-41, admitting that his suggestion may be subject to criticism and that the Court's task is to indicate one line from among the many lines that may reasonably be proposed; and Maps I-II.

206 See supra notes 151 and 183.

207 See supra notes 138-140.

208 Judgment, operative para.252(2)(b), adopted unanimously by 17 Members. supra note 51, and para.223. On operative para.252(2)(a), see supra note 79.

209 See infra note 214.

210 1999 Botswana/Namibia Judgment, supra note 32, paras 101-103. Cf. Qatar v. Bahrain Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 177-179. See also the 1993 UN Iraq/Kuwait Report, supra note 2, paras 96-97; and 2002 Eritrea/Ethiopia Boundary Decision, supra note 2, para.7.3.

211 1999 Eritrea/Yemen Award, supra note 2, paras 107-111, elucidating navigational rights and freedoms within and beyond the TS, as forming "*an integral part*" of the Arbitral Tribunal's definition of the "*perpetuation of the traditional fishing regime in the region*" for both Eritrea and Yemen, paras 62-69 and 87-112. This fishing regime was determined by the 1998 Award, paras 525-526 and operative para.527(vi), to apply around the islands of Jabal al-Tayr, the Zubayr Group and the Zuqar-Hanish Group that were attributed to the sovereignty of Yemen. Cf. supra note 62; Kwiatkowska, The Law-of-the-Sea Related Cases, supra note 2, at 26-27; The Eritrea/Yemen Meeting on 27 March 2002 <http://globalarchive.ft.com /globalarchive/article.html?id=020329004725&query=eritrea>; and Eritrean Foreign Ministry Reply of 15 April 2002 <http://shaebia.org/wwwboard/messages /186.html>.

212 Judgment, para.223, Declaration of Judge Herczegh, and supra notes 165-167. See also Qatar v. Bahrain (Merits) Oral Hearings, CR 2000/14, 36 [Counsel Reisman, 13 June 2000], CR 2000/16, 49-50 [15 June 2000].

213 Judgment, para.223 in fine.

confirming the meaning and scope of this right, including innocent passage of warships without prior authorization and/or notification, as authoritatively exposed in the 1949 *Corfu Channel (Merits) Judgment* and codified in the 1958 and 1982 *Law of the Sea Conventions*, and as reaffirmed in the 1984 *Nicaragua v. USA (Jurisdiction and Admissibility)* and the 1986 *Nicaragua v. USA (Merits) Judgments* and other decisions of the Court (none of which were invoked by the *Qatar v. Bahrain* Judgment).[214]

In his concurring *Qatar v. Bahrain* Declaration, Judge Geza Herczegh stressed that the important holdings drawn in the Judgment on the right of innocent passage enabled him to vote in favour of the Court's single maritime boundary line.[215] Judge Gonzalo Parra-Aranguren, who like Judge Herczegh concurred in all the Court's decisions, clarified that Qatar enjoys this right through "*all*" the territorial sea of Bahrain.[216] The dissenting Judge *ad hoc* Santiago Torres Bernardez (designated by Qatar) pointed out that the right of innocent passage of the vessels of Qatar in the whole of the maritime area concerned falls within the scope of the *res judicata* of the present Judgment concerning the Hawar Islands.[217] As such, that right cannot, in his view, be questioned or jeopardized in its concrete applications in the relations between Bahrain and Qatar defined by the present Judgment.

The Court's repeated emphasis that Bahrain does not meet conditions required for (necessarily restrictive) application of straight baselines appears to preclude claiming such baselines by Bahrain in the future. However, as far as Bahrain's archipelagic status is concerned, the situation seems less unequivocal. In particular, whereas the Court displayed major concern with ensuring that any decision of Bahrain to claim such status does not jeopardize the binding force of the Judgment for the parties,[218] it also admitted that the multi-island state of Bahrain (as now comprising the Hawar Islands) does meet conditions for application of archipelagic baselines[219] and it rejected Bahraini claim to this effect only on the ground that Bahrain did

214 See Corfu Channel (Merits) Judgment, ICJ Reports 1949, 4, 14, 19, 27-31, 33-35; as reaffirmed by the 1951 Anglo/Norwegian Fisheries Judgment, supra note 80, at 137, 142, Dissenting Opinion of Sir Arnold McNair, id., at 162-163, 171-178; Fisheries Jurisdiction (Jurisdiction) Separate Opinions of Judge Fitzmaurice, ICJ Reports 1973, 28 n.8, 72 n.8; 1977 Anglo/French Decision, supra note 122, paras 161-162, 175-176 and 188; Nicaragua v. USA (Jurisdiction and Admissibility) Judgment, ICJ Reports 1984, 424, para.73, as reaffirmed by (Merits) Judgment, ICJ Reports 1986, 93, para.174, also id., at 46-53, paras 76-92, and 111-112, paras 213-214, Dissenting Opinion of Judge Schwebel, id., at 259; 1992 El Salvador/Honduras Judgment, supra note 55, at 379, 590, 592-593, 605, and 616, operative para.432(1), Dissenting Opinion of Judge Oda, id., at 742, 745 and 760, and infra note 251.
See also the USA/USSR Wyoming Joint Statement on Uniform Interpretation of Rules of International Law Governing Innocent Passage of 23 September 1989, 28 ILM 1444 (1989); 6 IJMCL 73 (1991); National Claims to Maritime Jurisdiction - 8th Revision, Limits in the Seas No.36, 10, 119 (US Department of State 2000), indicating that - by contrast to Iran, Yemen and some other states, supra notes 62-63 - neither Bahrain nor Qatar require prior authorization and/or notification for passage of foreign warships through their TSs; UN Docs A/54/429, para.16 (1999) and A/56/58, para.23 (2001), supra note 153; B. Kwiatkowska, The Contribution of the International Court of Justice to the Development of the Law of the Sea - Stockholm Lecture 61 (2002) <http://addaction.net/~bwp/cgi-bin/cart.cgi/9075228287.html>, available as updated at <http://www.law.uu.nl/english/isep/nilos/paper.asp>.

215 Declaration of Judge Herczegh. See also Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, paras 169-177.

216 Separate Opinion of Judge Parra-Aranguren, para.2. also noting that he found the innocent passage related holdings unnecessary.

217 Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), paras 544-545 and 550.

218 See supra notes 52 and 158.

219 See supra notes 70, 154-156 and 167. Note that archipelagic regime and baselines of Indonesia are of relevance in the pending Indonesia/Malaysia case, supra notes 5, 155 and 197.

not formally declare itself in pursuance of the LOS Convention's Part IV to be an archipelagic state.[220]

It appears unlikely that Bahrain would claim archipelagic status in the future with a view of changing its maritime boundary delimitations effected by virtue of the *Qatar v. Bahrain* Judgment and the respective agreements with the third states concerned.[221] However, in the region as strategically important as is the Arabian/Persian Gulf,[222] a *sui generis* regime of archipelagic waters could potentially motivate Bahrain's interest in eventual declaring itself to be an archipelagic state. This is because both within the waters enclosed by archipelagic baselines and through the adjacent territorial sea, not only the right of innocent passage applies, as reaffirmed by the Court with respect to the territorial sea,[223] but so does the much more liberal right of archipelagic sea lanes passage apply in both those maritime areas of archipelagic state.[224]

4. Conclusions

The decade of two-phase, complex proceedings in the *Qatar v. Bahrain Maritime Delimitation and Territorial Questions* case[225] led to settlement of a long-standing dispute in the Arabian/Persian Gulf to satisfaction of both parties[226] and notably enriched the role of the Court as "*an important contributor to an international order influenced if not shaped by the application and development of rules of law*".[227] Thereby, the *Qatar v. Bahrain* case reinforced the paramount functions performed by the Court, as the principal judicial organ of the United Nations and the only truly universal judicial body of general jurisdiction, in terms of its being - in the words of then President Stephen M. Schwebel - an actor in the maintenance of international peace and security and the most authoritative interpreter of the legal obligations of states in disputes between them.[228]

The two 1994-1995 *Qatar v. Bahrain (Jurisdiction and Admissibility) Judgments*, including

220 See supra notes 157-158 and 167.

221 Note that even in the case of states actually enclosed by archipelagic baselines, some components - as was the case with Malta's islet of Fifla - might be disregarded for the purposes of equitable boundary delimitation. Cf. supra notes 157, 194 and infra notes 243-247.

222 See supra notes 11 and 63.

223 See Articles 47(6) and 52 of Part IV of the LOS Convention, providing for application of the right of innocent passage in accordance with Part II, Section 3. Cf. supra note 156.

224 See Articles 53-54 of Part IV of the LOS Convention. Cf. Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Qatar), para.462. Cf. also Roach and Smith, supra note 62, at 26-28; B.H. Oxman, Transit of Straits and Archipelagic Waters, 14 October 1999 <http://www.sils.org/seminar/1999-straits-00.htm>, 4 Singapore Journal of International Law (2001, in press).

225 See supra notes 6-8.

226 See Statement of President Guillaume of 16 March 2001, supra note 52.

227 S.M. Schwebel, The Impact of the International Court of Justice, in Liber Amicorum Boutros Boutros-Ghali 663, 668 (1998). Cf. Schwebel, Justice in International Law, supra note 85, Chapter 1: Reflections on the Role of the International Court of Justice, at 10-11; and Schwebel, The Contribution, supra note 3, at 407. As he observes, whereas Article 59 of the ICJ Statute provides that "[t]*he decision of the Court has no binding force except between the parties and in respect of that particular case*" (as mirrored by Article 296(2) of the LOS Convention), it is undeniable that the decisions of the ICJ (and other courts and tribunals) may have the influence extending beyond the particular case.

228 Statement of President Schwebel to the 53rd United Nations General Assembly, supra note 50, at 2, also referring to the Court's paramount function as the supreme interpreter of the United Nations Charter. Cf. infra notes 250-251; Kwiatkowska, The Law-of-the-Sea Related Cases, supra note 2, at 8-10.

their Opinions, importantly contributed to the interpretation of treaties and various aspects of the jurisdiction of the Court based on the "*framework agreement*" under Article 36(1) of the ICJ Statute,[229] while the 2001 *Qatar v. Bahrain* (Merits) Judgment provided authoritative guidance on the issues of unratified treaties and definition of inter-state arbitration.[230] All those holdings illustrate what Judge Schwebel has characterized as the notably inter-active influence of the Court and the International Law Commission.[231]

The *Qatar v. Bahrain (Merits) Judgment* significantly consolidated and further developed - in continuation of and in accordance with the formidable jurisprudence of the Court and arbitral tribunals - the principles and rules of international law governing two major areas of the acquisition of territorial sovereignty and maritime boundary delimitation. The Judgment provided a valuable model for dealing with those two interlinked areas in one comprehensive decision.[232] It also substantiated, as did the preceding 1998-1999 *Eritrea/Yemen* Awards, the applicability of the "*Queen*" doctrine of equity to both territorial and maritime delimitation issues,[233] as well as essentially geographical nature of equitable delimitation and its effecting in the two main stages (of drawing provisional boundary and its adjustment).[234]
The Court's reliance on the validity of the 1939 decision of Great Britain with respect to attributing sovereignty over the Hawar Islands to Bahrain and over Janan Island to Qatar, made it unnecessary for the Court to rule on the effectivités and other issues pertaining to the acquisition of territorial sovereignty extensively pleaded by the parties.[235] But as did the 1998 *Eritrea/Yemen* Award and other decisions,[236] the *Qatar v. Bahrain (Merits) Judgment* sustained a low standard for what would constitute actual occupation as it relates to small maritime features,[237] and displayed a certain measure of support for the modern concept of effectivités as relying on the relatively recent history of presence and display of governmental authority and other ways of showing possession.[238] In this context, the Court reversed a long-standing holding on the value of navigational aids by now asserting that they "*can be legally relevant in the case of very small islands*", such as was Qit'at Jaradah attributed to Bahrain.[239]

The presumption which played a prominent role in the 1998 *Eritrea/Yemen* Award as relied upon by Qatar with respect to the Hawars and according to which, islands and low-tide elevations within and beyond the territorial sea are under the same sovereignty as the

229 See supra notes 12-45.
230 See supra notes 73 and 84.
231 Schwebel, The Inter-Active Influence, supra note 33, at 479-505.
232 This will also be the case in the future with the Cameroon v. Nigeria; Equatorial Guinea Intervening Land and Maritime Boundary (Merits) Judgment, supra note 4. Since the territorial issues are necessarily dealt with first by the Court, the title of the latter case reflects more correctly the Court's decision-making process than did the title of the Qatar v. Bahrain case, in which reference to those issues was preceded by that to maritime delimitation.
233 See supra note 55.
234 See supra notes 151-152 and 178-181.
235 See supra notes 79-103 (Hawars) and 104-109 (Janan).
236 See supra note 83.
237 See supra notes 120-121.
238 Judgment, paras 92-97 (Zubarah), supra note 71, and para.197 (Qit'at Jaradah), supra notes 115-121, Declarations of Judges Higgins and Vereshchetin and Separate Opinions of Judges Kooymans and Al-Khasawneh (Hawars), supra notes 89-90, 95 and 102. On rejection of Bahraini effectivités (Hawars), see Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, and Dissenting Opinion of Judge ad hoc Torres Bernardez (designated by Bahrain), supra note 98.
239 See supra notes 116-119, and criticism of this reversal in Separate Opinion of Judge Parra-Aranguren, supra note 133.

mainland nearby, unless superior title can be established,[240] found reflection in the Court's decision that the low-tide elevation of Fasht ad Dibal is subject to the sovereignty of Qatar, within whose TS it is located.[241] Otherwise, the Court was cautious not to assimilate, from the viewpoint of the acquisition of sovereignty, the low-tide elevations with islands,[242] and not to assign to such (actual and potential) elevations situated in the zone of overlapping claims any role in construction of (be it provisional or adjusted) equidistant line.[243] At the same time, the *Qatar v. Bahrain (Merits) Judgment* supported a relatively low standard for what is meant by the high-tide elevation under the definition of an island codified in Article 121(1) of the LOS Convention.[244] Whereas the rocks principle of Article 121(3) was not expressly invoked by the Court, it could have formed an unarticulated premise in giving no effect - in reliance on the need to avoid the disproportionate effect of small islands - to tiny, uninahabited island of Qit'at Jaradah and to the maritime feature of Fasht al Jarim, of which legal nature was disputed by the parties.[245] Generally, the Judgment confirmed that within "*more plastic than formed*" process of equitable maritime delimitation,[246] the definition of and entitlement granted or denied to islands, islets, rocks and low-tide elevations depend on the degree to which they "*distort*" an equidistant line and other factors (such as comparison of coastal lengths abutting on the claim area), rather than on their legal status *per se*.[247]

The foregoing treatment of islands and low-tide elevations formed the central part of applying by the Court of equity to maritime delimitation by means of a single all-purpose (equidistant) boundary line, which delimited the respective territorial seas in the southern sector and the CS/EEZs - in the northern sector, in accordance with the preceding jurisprudence and the rules

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240 See supra notes 80-81, 94, 100, 102 and 135-136.

241 See supra notes 126-128.

242 See supra notes 122-125, 132 and 134.

243 See supra notes 125, 164, 168, 170-172 and 194.

244 See supra notes 114-115, 163 (Qit'at Jaradah) and 192-195 (Fasht al Jarim), Separate Opinion of Judge Oda, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, Declaration of Judge Vereshchetin, and Dissenting Opinion of Judge ad hoc Torres Bernardez (Qit'at Jaradah), supra notes 131 and 135-136.

245 See supra notes 125-126, 171 and 175 (Qit'at Jaradah) and 194-195 (Fasht al Jarim). See also Judgment, para.179 (supra notes 154 and 194), referring to Qatar's contention that the majority "*are very small, uninhabited islands, or even simply rocks that are quite uninhabitable, and correspond in reality to what are often referred to in international case-law as 'minor geographical features'*"; Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, para.198. On example provided by Fasht al Jarim for Sable Island, see supra note 192.
Cf. no effect allowed to "*barren and inhospitable*" islands of al-Tayr and Zubayr on the course of single equidistant line in the 1999 Eritrea/Yemen Award, supra note 2, paras 119 and 148. On the important role played by Article 121(3) in the Denmark v. Norway (Jan Mayen) Judgment, see Separate Opinion appended thereto by Judge Schwebel, ICJ Reports 1993 (supra note 1), at 126-127; Kwiatkowska, supra note 155, at 106-107.

246 1984 Gulf of Maine Separate Opinion of Judge Schwebel, supra note 73, at 357; as reaffirmed in the 1985 Libya/Malta (Merits) Dissenting Opinion of Judge Schwebel, supra note 85, at 187; and the 1993 Denmark v. Norway (Jan Mayen) Separate Opinion of Judge Schwebel, supra note 1, at 120, remarking that "what is equitable is as variable as the weather of The Hague".

247 See also the 1999 Eritrea/Yemen Award, supra note 2, para.117. For rough categorization based on the predominant geographical factors, as relied upon in the extensive state practice and international jurisprudence, see D.W. Bowett, Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations, J.I. Charney and L.M. Alexander eds, International Maritime Boundaries 131-147 (1992). On the role to be played by these features in the pending Nicaragua v. Honduras and Nicaragua v. Colombia cases, see M. Pratt, The Maritime Boundary Dispute Between Honduras and Nicaragua in the Caribbean Sea, 9 IBRU Boundary and Security Bulletin 108, 113-116 (2001 No.2); P.H.F. Bekker, Nicaragua Sues Colombia Before the World Court, ASIL Insights (December 2001) <http://www.asil.org/insights/insigh79.html>.

codified in Articles 15 and 74/83 of the LOS Convention respectively. Significantly, the Court reaffirmed the critical Denmark v. Norway (Jan Mayen) holding that the "*equidistance/special circumstances*" (territorial sea) and the "*equitable principles/relevant circumstances*" (CS/EEZ) rules codified in those provisions are closely interrelated.[240] The *Qatar v. Bahrain* (Merits) Judgment also displayed consistency with other - by and large mutually reinforcing - pronouncements of the ICJ and arbitral tribunals surveyed in this article and concerning various concepts and regimes codified and progressively developed in the LOS Convention, and confirmed that "*that great law-making treaty*"[241] is generally declaratory of customary international law. Thereby, the Judgment enhanced the "*intrinsic*" authority of the Court's decisions and the coherence of its case-law, which have been perceived by both the immediate past President Stephen M. Schwebel and current President Gilbert Guillaume as fundamental factors of the unique role of the Court as the principal judicial organ of the United Nations in the present era of proliferation of specialized courts and tribunals.[242]

Along with its multiple contributions to the development of the modern law of the sea as part of the general international law and the global system of peace and security, the *Qatar v. Bahrain* Judgment will undoubtedly reinforce the remarkable record of implementation of judicial and arbitral decisions involving territorial and/or maritime delimitation questions, which were almost all implemented through bilateral treaty practice of the respective parties to the disputes concerned.[243] It will also provide an incentive for the Gulf's coastal states to complete in the importantly accelerated spirit of cooperation the remaining boundary delimitations, coupled with territorial attributions, in this strategically sensitive region of the world.[244]

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248 See supra notes 141, 151-152 and 178-184.

249 2000 Southern Bluefin Tuna (Jurisdiction and Admissibility) Award, supra note 32, para.44.

250 Statements of President Schwebel to the 53rd United Nations General Assembly, supra note 50, at 4, and the 54th United Nations General Assmebly, supra note 3, at 3; Schwebel, The Contribution of the ICJ, supra note 3, at 406-408, relying on the concept of an "*intrinsic*" authority of the Court's decisions as expounded by Sir Hersch Lauterpacht, The Development of International Law by the International Court 22 (1934/1982); and Statements of President Guillaume to the 55th United Nations General Assembly, supra note 50, at 4-5, and the 56th United Nations General Assembly, supra note 50, at 4. Cf. UN General Assembly Resolution 55/2 on United Nations Millennium Declaration of 8 September 2000, paras 1-4 and 30, and Resolution 56/95 on Follow-Up to the Outcome of the Millennium Summit of 14 December 2001, endorsing Road Map Towards the Implementation of the United Nations Millennium Declaration - Report of the Secretary-General, UN Doc. A/56/326 (2001); supra note 228; Kwiatkowska, The Law-of-the-Sea Related Cases, supra note 2, at 6-7 and 39-40. For in-depth survey of an "*intrinsic*" authority of the Court's jurisprudence, see B. Kwiatkowska, Decisions of the World Court Relevant to the UN Convention on the Law of the Sea - A Reference Guide (2002) <http://www.wkap.nl/prod/b/90-411-1806-3>.

251 Cf. Letters of Bahrain and Qatar of 19 and 27 March, 40 ILM 898-899 (2001). Whether this implementation will prevent Bahrain from declaring itself to be an archipelagic state remains, as was noted supra notes 218-224, to be seen.

Note that on 18 January 2002, Honduras requested the UN Security Council in pursuance of Article 94(2) of the United Nations Charter for assistance in ensuring implementation of the 1992 El Salvador/Honduras; Nicaragua Intervening Judgment, supra note 55. Cf. Nicaragua's Declaration of 3 May 2000 and Honduras's Decree No.7, Article 1.B, UN Law of the Sea Bulletin 13, 96 (2000 No.43); Nicaragua/El Salvador Summit of 27 August 2001 <http://www.americas.org/news/nir/20010906 _honduras_not_invited_to_summit_asp>. On Article 94 of the UN Charter, see Schwebel, Justice in International Law, supra notes 85, 227, at 10; Rosenne, The Law and Practice of the International Court, supra note 14, at 249-258, 274-276.

252 In addition to Qatar/Saudi Arabia, Iran/Kuwait and Iran/UAE delimitations referred to supra notes 2 and 201, other maritime boundaries still to be delimited include those between Iran/Iraq and Oman/UAE. For Saudi Arabia/Kuwait Agreement of 2 July 2000, see UN Law of the Sea Bulletin 84-86 (2001 No.46).

Appendix 1:
Paragraph 250 of the International Court of Justice's Judgment Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

Merits

16 March 2001

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 co-ordinates:

(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.