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QATAR *v.* BAHRAIN (MERITS)

139 ILR 1

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INTERNATIONAL COURT OF JUSTICE

139 ILR 1

MARITIME DELIMITATION AND TERRITORIAL QUESTIONS
BETWEEN QATAR AND BAHRAIN(QATAR *v.* BAHRAIN)(MERITS)¹*International Court of Justice.* 16 March 2001

(Guillaume, *President*; Shi, *Vice-President*; Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buerghenthal, *Judges*; Torres Bernárdez and Fortier, *Judges ad hoc*)

SUMMARY:² *The facts*.—Qatar and Bahrain are located in the southern part of the Persian Gulf, an area of potential submarine oil and natural gas reserves. Following a protracted dispute between the Parties with respect to issues of territorial sovereignty and maritime delimitation, which remained unresolved in spite of various initiatives and mediation, Qatar instituted proceedings before the Court against Bahrain on 8 July 1991. The background to the present proceedings can be found in 102 ILR 1.³

During the late nineteenth and early twentieth centuries, the United Kingdom concluded agreements with the Ruler of Bahrain and the Al-Thani Chiefs of Qatar under which the two States came under British protection. In 1936, in the context of negotiations between the British and both Parties concerning the grant of oil concessions, the British Political Agent in Bahrain wrote that the Hawar Islands belonged to Bahrain. On 11 July 1939, the Rulers of Qatar and Bahrain were informed that the British Government had decided that the Hawar Islands belonged to Bahrain (“1939 British decision”).⁴ Qatar claimed that it protested against both the decision and Bahrain’s “unlawful occupation” of the Hawar Islands. Following a request by the Bahrain Petroleum Company Ltd to drill in certain areas of the continental shelf, the British Government

¹ For an earlier phase of this case, see 102 ILR 1. A list of counsel appearing in the merits phase is set out at para. 28.

² Prepared by Ms Karen Lee.

³ The Court’s Judgments of 1 July 1994 (First Decision) and 15 February 1995 (Second Decision) on jurisdiction and admissibility and the Order of 28 April 1995, which fixed 29 February 1996 as the time-limit for the filing by each of the Parties of a memorial on the merits, can be found in 102 ILR at pp. 9, 47 and 119 respectively.

In the course of the written proceedings on the merits, Bahrain challenged the authenticity of eighty-two Qatari documents annexed to its pleadings. The Court made several orders. By its last Order on the issue, of 17 February 1999, the Court disregarded these eighty-two documents. Following the filing of the Replies, the Parties were permitted to file supplemental documents.

⁴ The Weightman Report, written by the British Political Agent in Bahrain on 22 April 1939, was considered to be the basis of the 1939 British decision.

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divided the seabed between Bahrain and Qatar in a decision contained in identical letters, dated 23 December 1947, to the Parties.⁵

In 1971 Qatar and Bahrain ceased to be British protected States and were admitted to the United Nations. Thereafter, attempts to find a solution to the dispute in the context of mediation conducted by the King of Saudi Arabia were unsuccessful and the dispute persisted in spite of the approval of a set of “Principles for the Framework for Reaching a Settlement” in 1983. New proposals that “all the disputed matters” be referred to the Court and that a Tripartite Committee be established to achieve that purpose, contained in a 1987 Exchange of Letters and accepted by the Amirs of Qatar and Bahrain, also failed to end the dispute. Meetings of the Tripartite Committee ceased after failure to reach agreement. When, at a 1990 meeting in Doha, Qatar let it be known that it was ready to accept the 1988 proposal by Bahrain as to how the dispute was to be submitted to the Court (the “Bahraini formula”),⁶ Minutes were signed affirming the previous agreement between the Parties and providing that the good offices of the King of Saudi Arabia would continue until May 1991. This attempt to resolve the dispute also failed and Qatar unilaterally instituted proceedings before the Court.

Qatar claimed territorial sovereignty over Zubarah, the Hawar Islands and Janan Island. Qatar contended that, although Zubarah had been occupied in the 1760s by the family that later settled in Bahrain, Bahrain had not ruled Zubarah during the nineteenth and early twentieth centuries, whereas Qatar’s title to Zubarah had always been recognized by Great Britain. Qatar asserted that it was merely imposing authority over its own territory in the 1930s, and that any rights asserted by the Ruler of Bahrain were personal and not sovereign. With respect to the Hawar Islands, Qatar based its sovereignty upon its original title and the principle of proximity and territorial unity, claiming that the 1939 British decision was null and void since Qatar had not consented. Qatar had sovereignty over Janan Island in its territorial waters even if the island was located only partially within the then three-mile limit. In its final submissions Qatar requested the Court, rejecting all contrary claims and submissions:

- I. To adjudge and declare in accordance with international law:
 - A. (1) That the State of Qatar has sovereignty over the Hawar islands;
 - (2) That Dibal and Qit’at Jaradah shoals are low-tide elevations which are under Qatar’s sovereignty;
 - B. (1) That the State of Bahrain has no sovereignty over the island of Janan;
 - (2) That the State of Bahrain has no sovereignty over Zubarah;
 - (3) That any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

⁵ The text of this 1947 British decision can be found at para. 61 of the Judgment.

⁶ The text of the Bahraini formula read: “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.”

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- II. To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain on the basis that Zubarah, the Hawar islands and the island of Janan appertain to the State of Qatar and not to the State of Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51° 05' 54" E and 27° 02' 47" N), thence proceeding in a southerly direction up to BVL (50° 57' 30" E and 26° 33' 35" N), then following the line of the British decision of 23 December 1947 up to NSLB (50° 49' 48" E and 26° 21' 24" N) and up to point L (50° 43' 00" E and 25° 47' 27" N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50° 31' 45" E and 25° 35' 38" N).⁷

Bahrain claimed territorial sovereignty over Zubarah, the Hawar Islands and Janan and Hadd Janan Islands.⁸ Bahrain argued that, from 1783 until 1937, it had full and internationally recognized title to Zubarah through effective occupation and the fealty of its inhabitants. It claimed that Qatar's eviction in 1937 of Naim tribesmen loyal to Bahrain was an unlawful use of force from which no valid title could arise. Bahrain contended that geographical proximity was an insufficient basis for title to the Hawar Islands, over which it had exercised sovereignty continuously over the last two centuries as acknowledged by the inhabitants. The 1939 British decision was to be regarded as a *res judicata* arbitral award or, at the very least, a binding political decision. It claimed sovereignty over Janan, which was not part of the Hawars, since only half of the island was in Qatar's three-mile territorial limit and proximity was no basis for title in international law. The Ruler of Bahrain had exercised authority over Janan, which was used by Bahraini subjects. In its final submissions Bahrain requested that the Court, rejecting all contrary claims and submissions, adjudge and declare that:

1. Bahrain is sovereign over Zubarah.
2. Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.
3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qir'at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain's Memorial.⁹

Both Parties requested the Court to draw a single maritime boundary in accordance with international law. Both Parties differentiated between a southern and a northern sector. In the southern sector, the coasts of the Parties were opposite to each other at a distance of no more than 24 nautical miles, with any boundary delimiting exclusively their territorial seas and an area over which they enjoyed territorial sovereignty. In the northern sector, the coasts of the Parties were comparable to adjacent coasts, with any delimitation being between the continental shelf and exclusive economic zone belonging to each

⁷ See sketch map No 2 at p. 65 for the delimitation line proposed by Qatar.

⁸ Although considered by Bahrain to be two islands, the Court considered itself entitled to treat Janan and Hadd Janan as one island (para. 150).

⁹ See sketch map No 2 at p. 65 for the delimitation line proposed by Bahrain.

of the Parties, areas in which States had only sovereign rights and functional jurisdiction.

Held:—(1) (unanimously) Qatar had sovereignty over Zubarah. During the period of British paramountcy in the Gulf, the British authorities had made clear that they recognized the sovereignty of Qatar. The new rulers of Bahrain were never thereafter in a position to engage in direct acts of authority in Zubarah. There was no evidence that members of the Naim tribe exercised sovereign authority on behalf of the Ruler of Bahrain within Zubarah. Any ties of personal allegiance between some members of the Naim tribe and the Ruler of Bahrain were irrelevant. The various agreements between the United Kingdom and the Ottoman Empire immediately before the First World War had treated Zubarah as part of Qatar (paras. 74-97).

(2)(a) (by twelve votes to five, Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin and Judge *ad hoc* Torres Bernárdez dissenting) Bahrain had sovereignty over the Hawar Islands. Although the 1939 British decision that the Hawar Islands belonged to Bahrain did not constitute an arbitral award, it was nevertheless binding on the Parties. The British Government had possessed jurisdiction to decide the Hawar Islands question since both Parties had consented to entrust that decision to it and to participate in proceedings leading up to the decision. Although the validity of the decision was not subject to the procedural principles governing the validity of arbitral awards, the decision had been undertaken to be rendered “in the light of truth and justice”. There was no bias or prejudgement on the part of British officials. Both Parties had a fair and equal opportunity to present their arguments. Since no obligation to state reasons had been imposed on the British Government, the absence of communication of reasons to the Parties did not invalidate the decision. Neither did the Sheikh of Qatar’s protests as to the decision’s content render the decision inopposable to him. It was therefore unnecessary to consider the Parties’ arguments as to the existence of an original title, *effectivités* and the applicability of the *uti possidetis juris* principle (paras. 98-148).

(b) (unanimously) Since the waters between the Hawar Islands and other Bahraini islands were not internal but part of Bahrain’s territorial sea, Qatar, together with other States, enjoyed the right of innocent passage in these waters in accordance with customary international law (para. 223).

(3) (by thirteen votes to four, Judges Oda, Higgins, Kooijmans and Judge *ad hoc* Fortier dissenting) Qatar had sovereignty over Janan Island, including Hadd Janan. Although the 1939 British decision did not mention Janan Island, letters sent by the British Government to the Rulers of Qatar and Bahrain in 1947 informing the two States of the delimitation of their seabeds provided an authoritative interpretation of the 1939 decision and of the situation resulting from it (paras. 157-65).

(4) (by thirteen votes to four, Judges Bedjaoui, Ranjeva, Koroma and Judge *ad hoc* Torres Bernárdez dissenting) The single maritime boundary that

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divided the various maritime zones of Qatar and Bahrain was to be determined according to a series of geodesic lines joining the points with the co-ordinates listed at para. 250 of the judgment. The course of the boundary was indicated on sketch map No 7.¹⁰

(a) The applicable law was customary international law. Neither Qatar nor Bahrain was a party to the 1958 Geneva Conventions on the Law of the Sea and, although ratified by Bahrain, the 1982 United Nations Convention on the Law of the Sea had only been signed by Qatar. In any event, most of the relevant provisions of the 1982 Convention reflected customary law (para. 167).

(b) *Southern sector: single maritime boundary delimiting the Parties' territorial seas.* From the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which could not be fixed, the boundary would follow a north-easterly direction, then immediately turn in an easterly direction, after which it would pass between Jazirat Hawar and Janan; it would subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it would pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side (para. 222).

(i) With respect to the delimitation of the territorial seas of the Parties, Article 15 of the 1982 Convention had a customary character. In order to draw a provisional equidistance line, which could then be adjusted in the light of any special circumstances, it was necessary to determine the relevant coasts of the Parties, from which baselines and pertinent basepoints could be located from which to measure the equidistance line (paras. 168-78).

(ii) Bahrain could not declare itself an archipelagic State since it had not claimed archipelagic status in its formal submissions. The Court's judgment on the delimitation of a single maritime boundary had binding force between the Parties (paras. 179-83).

(iii) Under the applicable rules of international law, the normal baseline for measuring the breadth of the territorial seas of the Parties was the low-water line along the coast (Article 5 of the 1982 Convention). Since maritime rights derived from the coastal State's sovereignty over the land, it was necessary to determine which islands came under Bahraini sovereignty in order to determine Bahrain's relevant coasts and baselines. In addition to the Hawar Islands, Bahrain had sovereignty over the uncontested Jazirat Mashtan and Umm Jalid (paras. 184-7).

(iv) (by twelve votes to five, Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin and Judge *ad hoc* Torres Bernárdez dissenting) Bahrain had sovereignty over the island of Qit'at Jaradah. On the basis of the evidence of the Parties and the conclusions of the experts, Qit'at Jaradah was an

¹⁰ See map at back of volume.

island, not a low-tide elevation, to be considered in drawing the equidistance line. Given the island's very small size, the construction of navigational aids by Bahrain was sufficient to support its claim to sovereignty (paras. 191-8).

(v) (unanimously) The low-tide elevation of Fasht ad Dibal fell under Qatar's sovereignty. Low-tide elevations were not territory in the same sense as islands. Bahrain could not acquire sovereignty by appropriation over Fasht ad Dibal, which also lay within Qatar's territorial sea. It was to be disregarded for the purposes of drawing the equidistance line (paras. 199-209).

(vi) Bahrain was not entitled to apply the method of straight baselines. Instead normal rules applied since maritime features east of the main islands did not qualify as a fringe of islands which could constitute a whole with the mainland, and it was accepted that the coastline was not deeply indented. Moreover, Bahrain had not declared itself an archipelagic State under the 1982 Convention. The equidistance line had to be drawn on the basis that each maritime feature had its own effect for the determination of baselines and disregarding low-tide elevations in the overlapping zone of territorial seas. Since it had not been determined whether Fasht al Azm was part of Sitrah island or a low-tide elevation, two equidistance lines reflecting each hypothesis were drawn (paras. 210-16).

(vii) There were special circumstances which made it necessary to adjust the provisionally drawn equidistance line in order to obtain an equitable result. Whether Fasht al Azm was to be regarded as part of Sitrah island or as a low-tide elevation, there were special circumstances to choose a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah. In addition, a delimitation line passing immediately to the east of the very small island of Qit'at Jaradah was appropriate to avoid a disproportionate effect. Since under either hypothesis Fasht ad Dibal was largely or totally on the Qatari side of the adjusted equidistance line, it was appropriate to draw the line between Qit'at Jaradah and Fasht ad Dibal. Fasht ad Dibal was in Qatar's territorial sea and thus under Qatar's sovereignty (paras. 188-90 and 217-20).

(viii) Since the boundary's southernmost point was dependent upon the respective maritime zones of Saudi Arabia and of the Parties, it could not be fixed. It was appropriate to simplify the delimitation line in the Hawar Islands region in accordance with common practice (para. 221).

(c) *Northern sector: single maritime boundary delimiting the Parties' continental shelf and exclusive economic zone.* The boundary was to be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, was to meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. It then followed this adjusted equidistance line until it met the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other (para. 249).

(i) In accordance with the Court's case-law, for the delimitation of the continental shelf and exclusive economic zone, it was appropriate first provisionally

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to draw an equidistance line which could be adjusted in accordance with the equitable principles / relevant circumstances rule. Developed since 1958 in case-law and State practice, this rule was closely related to that applicable to territorial sea delimitation (paras. 224-31).

(ii) In the circumstances of the case, considerations of equity required that Fasht al Jarim had no effect in determining the boundary line in the northern sector. This sizeable maritime feature partly situated in Bahrain's territorial sea was located well out to sea, and only a minute part of it was above water at high tide and it would have otherwise distorted the boundary (paras. 232-48).

Separate Opinion of Judge Oda: (1) Except for the matter of the Zubarah region, the territorial issues were not distinctly separate from the maritime delimitation (paras. 1-3).

(2) Qatar did not have sovereignty over Janan Island, including Hadd Janan. Since Bahrain had sovereignty over the Hawar Islands by dint of the 1939 British decision and the Hawars were understood to include Janan, and given that Qatar could not demonstrate a stronger claim, Janan was under Bahraini sovereignty. The question as to whether Janan formed part of the Hawar Islands should have been raised by the Court (paras. 4, 42-57 and 80-9).

(3) With respect to Qir'at Jaradah and Fasht ad Dibal, their territorial sovereignty had been decided solely in connection with the maritime delimitation. Believing in a very different approach to maritime delimitation, this determination of sovereignty was of no significance in the drawing of a maritime delimitation line (paras. 5-6).

(4) The issues concerning islets and low-tide elevations, which remained open matters, should have been dealt with more cautiously. Apart from sovereignty over the Hawar Islands, these issues were the most crucial in determining the maritime boundary (paras. 6-9 and 20).

(5) The concept of a "single maritime boundary" had been misused. The view that the maritime boundary in the southern sector should have been the delimitation line of the territorial sea was erroneous. The rules applicable to the territorial sea boundary were distinct from those applicable to the continental shelf. The concept of the equidistance/special circumstances rule had not been correctly understood. Neither had any precise construction lines been provided in demarcating the area of Fasht ad Dibal, Qir'at Jaradah and Qir'at ash Shajarah in the northern sector. Guidelines should have been indicated for drawing the maritime boundary in the disputed sea areas. The maritime boundary could not be defined, with legal precision, by reference to any legal standard and whether marine features constituted special circumstances could not be legally determined. The determination of the boundary by geometric means was beyond the competence of the Court, which should have only described in general terms to experts the method to be used (paras. 10-28 and 32).

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(6) The delimitation line should have divided the sea areas in the Gulf, including the seabed and subsoil, for the exploitation of oil in the seabed. It was most important to examine the region's topography from the macro-geographical perspective before drawing the equidistance line which could then be adjusted to take account of special circumstances. The maritime boundary line most appropriate in meeting the requirements of equity was illustrated on the two maps at pp. 118 and 119 in the hope that they might assist future governments in their negotiations with neighbouring States (paras. 29-41).

Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma:

(1) Although the case had to be decided solely in accordance with international law, the Court had a duty to find the solution most likely to pacify the dispute (paras. 1-12).

(2) A solution based on the 1939 British decision alone was questionable and hazardous. The decision had no formal validity and could not properly serve as title for an award of the Hawars to Bahrain. The decision had been criticized by British senior officials before and after it had been taken and available evidence had not been taken into account. The decision was purely political or administrative. It was not binding. Under international law, any renunciation of territorial sovereignty had to be expressed and established in unequivocal terms. Qatar's consent was null and void since it had not been express, informed and freely given (paras. 13-47).

(3) Had the Court considered the substantive validity of the 1939 British decision, it would have been able to reach a solution that shared the Hawars, taking account of Bahrain's *effectivités*. There was no legal basis to justify in its totality the decision, based on the Weightman Report, and the award to Bahrain of the entirety of the Hawar Islands (paras. 47-64).

(4) Qatar's persistent protests against the 1939 British decision and Bahrain's activities in the Hawar Islands prevented any title arising in favour of Bahrain. The acts of occupation of the Hawars by Bahrain from 1936 to 1939, or after 1939, were not *effectivités* capable of establishing Bahraini title. The Hawar Islands should have therefore been awarded to Qatar or, alternatively, shared between the two States (paras. 65-85).

(5) Assuming Bahrain had had a historical title to the Hawars in the past, the 1868 Anglo-Bahraini and Anglo-Qatari treaties established Bahrain's loss of sovereignty over the Qatar peninsula. Qatar's title was subsequently strengthened by various conventions, its definitive consolidation of title recorded in the 1916 Great Britain-Qatar treaty. It was striking that the Court did not address this question, which traditionally decided territorial attribution and confirmed Qatar's better title to the Hawars. This confirmed the physical geographical reality that the Hawars were a peninsula forming part of the Qatar mainland (paras. 86-136).

(6) There was a strong legal presumption under international law that islands lying within the territorial waters of a State belonged to that State.

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Using the twelve-mile limit, all the Hawar Islands belonged to Qatar (paras. 137-43).

(7) It was impossible to ignore the map evidence presented by Qatar which, particularly on the 1901, 1908, 1911 and 1934 British War Office maps, indicated that the entire peninsula, including the Hawar Islands, was under Qatar's sovereignty. This was confirmed by the territorial description of Bahrain and Qatar in various documents and works (paras. 144-62).

(8) With respect to the maritime delimitation, the judgment fell *infra petita* having regard to the terms of the Bahraini formula by failing to investigate the impact upon the legal status and regime of the various areas delimited by the single maritime boundary. The provisional equidistance line should, in the circumstances of the case, have been constructed using equitably chosen baselines, requiring it to be moved west of the proposed line in the judgment. That Qir'at Jaradah was characterized as an island was disputable given its geophysical characteristics. The course of the final line of delimitation had been distorted in an inequitable manner. Qir'at Jaradah had been accorded excessive influence and two contradictory maps had been used to establish a single boundary, which had created a real risk of amputation of the territory of Qatar proper (paras. 163-205).

(9) In this sensitive case the judgment might have been more acceptable had the Parties been encouraged to consider mutual financial compensation in the form of oil (and other) resources following, for example, the 1958 Saudi-Bahraini delimitation agreement precedent (paras. 206-12).

(10) While the Court was correct in refusing to apply the principle of *uti possidetis juris* in the present case, this was an important principle for the post-colonial phase of State development in Africa under conditions of stability and peace (paras. 213-17).

Declaration of Judge Herczegh: Voting for the single maritime boundary as drawn by the Court was enabled by the characterization of the waters lying between the Hawar Islands and the other Bahraini islands as Bahrain's territorial sea over which Qatar had the right of innocent passage under customary international law (p. 196).

Declaration of Judge Vereshchetin: (1) In determining sovereignty over the Hawar Islands, reliance on the 1939 British decision was only possible and legally correct together with the application of the *uti possidetis* principle, whose primary aim was to secure respect for territorial boundaries after independence (para. 1).

(2) The 1939 British decision did not have the character of *res judicata*. Its substantive legality, as well as its formal procedural aspects, should have been analysed more deeply and the decision rectified as appropriate (paras. 2-12).

(3) Qir'at Jaradah was a low-tide elevation and did not have the legal status of an island under the 1982 Convention. Its attribution should have been effected after the delimitation of the territorial seas of the Parties (para. 13).