

REFLECTIONS ON MARITIME DELIMITATION IN THE *QATAR/BAHRAIN* CASE

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I. INTRODUCTION

A. *Nature of the Problem*

After nearly 10 years of proceedings before the International Court of Justice (ICJ), the Court, on 16 March 2001, rendered the decision concerning maritime delimitation and territorial questions between Qatar and Bahrain. One may identify two interesting features in this judgment. First, the ICJ, in the *Qatar/Bahrain* case (Merits), peacefully resolved a difficult dispute regarding territorial sovereignty as well as maritime delimitation.¹ In this connection, a question which arises is the interrelation between territorial disputes and maritime delimitation.² As will be seen later, the status of low-tide elevations, in particular, generated a serious disputes between the Parties. Secondly, the equidistance method was, for the first time in the case law of the ICJ, explicitly applied to a delimitation between States with adjacent coasts under customary law. Considering that the Court has been reluctant to apply the equidistance method to delimitations in situations of adjacency, this may be said to be a new development.

Noting these features, this paper examines the maritime delimitation in the

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¹ The *Qatar/Bahrain* case (Merits), <<http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>>; (2001) 40 *ILM*, 847–99. The analysis in this paper is based on the electronic version of the judgment. Memorial, Counter-Memorial, Reply and Verbatim Records are available at the above internet address. Regarding an overview of this decision, see MD Evans, 'Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)', (2002) 51 *ICLQ*, 709–722.

² The *Dubai/Sharjah Boundary* Arbitration of 1989, the *Land, Island and Maritime Frontier Dispute* case of 1992, the *Eritrea/Yemen* arbitrations of 1998 and 1999 and the *Land and Maritime Boundary* case between Cameroon and Nigeria (Pending) provide instances of such composite disputes. In the *Land, Island and Maritime Frontier Dispute* case of 1992 case, however, the Chamber of the ICJ decided that the Parties had not conferred upon the Chamber jurisdiction to effect any delimitation of maritime spaces, whether within or outside the Gulf of Fonseca; accordingly, no maritime delimitation was effected. *ICJ Reports*, 1992, 617, para 430 (2). In any case, the interrelation between territorial disputes and maritime delimitation might be an issue that has not been sufficiently studied in international law. Regarding this subject, there are only a few articles, for instance: D Bardonnnet, 'Frontières terrestres et frontières maritime,' (1989) 35 *AFDI*, 1–64; P Weil, 'Délimitation maritime et délimitation terrestre', *Ecrits de droit international*, Paris, PUF (2000), 249–54; L Caflisch, 'Essai d'une typologie des frontières' (1990) 63 *Relations internationales*, 265–93.

Qatar/Bahrain case of 2001 (Merits).³ After briefly mentioning the background of that case (Section I), we will describe the law applicable to maritime delimitation (Section II) and the establishment of maritime boundary (Section III). Next, three issues will be considered: the interrelation between territorial disputes and maritime delimitation (Section IV), the applicability of the equidistance method to delimitations relating to adjacent coasts (Section V) and the obscurity of the criteria for evaluating possible disproportions (Section VI). Finally, a general conclusion will be attempted (Section VII).

B. Background

On 8 July 1991, Qatar instituted proceedings before the ICJ against Bahrain regarding disputes between two States relating to the 'sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qui'at Jaradah, and the delimitation of the maritime areas of the two States'. The application was based on two 'agreements' between Qatar and Bahrain of December 1987 and December 1990, respectively. According to the applicant, the subject and scope of the commitment to jurisdiction was determined by the formula that Bahrain proposed to Qatar on 26 October 1988 and accepted by Qatar in December 1990 ('Bahrain formula').⁴ Bahrain contested, however, the basis of jurisdiction invoked by Qatar. On this point, the Court, in its decision of 1 July 1994, found that two 'agreements' of 1987—the Exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain dated 19 and 26 December 1987—and the document headed 'Minutes' and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar, and Saudi Arabia were international agreements creating rights and obligations for the Parties. The Court thus decided to afford the Parties the opportunity to submit to the Court the whole of the dispute.⁵

On 30 November 1994, within the time limit laid down by the judgment of 1 July 1994, Qatar submitted to the Court 'the whole of the dispute'. By a letter of 5 December 1994, Bahrain objected that the Qatari separate application could not create any jurisdiction for the Court or effect a valid submission in the absence of Bahrain's consent.⁶ In its decision of 15 February 1995, the Court found that it had jurisdiction to adjudicate upon the dispute between Qatar and Bahrain and to be seised of the whole of the dispute; and that the application of Qatar as formulated on 30 November 1994 was admissible.⁷ The Court thus turned to the merits.

³ Thus, we will focus mainly on maritime delimitation. Territorial questions will be discussed only to the extent necessary.

⁴ The *Qatar/Bahrain* case (Jurisdiction and Admissibility), *ICJ Reports*, 1994, 144, para 3.

⁵ *Ibid.*, 126–7, para 41. Yet Judge Oda was opposed to each and every item in the operative part of the judgment. Dissenting opinion of Judge Oda, 133–49, paras 1–36.

⁶ The *Qatar/Bahrain* case (Jurisdiction and Admissibility), *ICJ Reports*, 1995, 11, para 14.

⁷ *Ibid.*, 26, para 50.

Qatar asked the Court 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.⁸

Furthermore, Qatar asked the Court 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 by following points indicated by Qatar on the basis that the Hawar islands and the island of Janan belonged to Qatar (see Fig 1).

On the other hand, Bahrain asked the Court to adjudge and declare that Bahrain was sovereign over Zubarah, the Hawar Islands, including Janan and Hadd Janan. In view of Bahrain's sovereignty over all insular and other features, including Fasht ad Dibal and Qit'at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar was to be that described in Part Two of Bahrain's Memorial, Part Two of Bahrain's Counter-Memorial and in its Reply (see Fig 1).⁹

With respect to the maritime delimitation, the Court held that the Parties wished the Court to draw a 'single maritime boundary'. In the southern part of the delimitation area, where the coasts of the Parties lie opposite each other, however, the distance between the coasts is nowhere more than 24 miles and, thus, delimitation of the territorial sea was at issue.¹⁰ In the northern part,

⁸ The *Qatar/Bahrain* case (Merits), op cit, n 1, para 33.

⁹ Ibid.

¹⁰ When Qatar submitted the dispute to the Court in 1991, the breadth of the territorial seas of both Qatar and Bahrain was 3 nautical miles. Thus, at the time of the application, the issue brought before the Court concerned the delimitation of the continental shelf. In 16 April 1992, however, Qatar extended the breadth of its territorial sea to 12 nautical miles, and, on 20 April 1993, Bahrain did likewise. Ibid, para 172. Consequently, in the southern sector, the potential territorial seas of the Parties overlapped in that area. In this respect, a question arises as to how to deal with the change of the situation during the proceedings. The Court considered its task to be the delimitation of the territorial seas of the Parties. Judge Oda criticised that view by stating that the 'two States never thought that they would be engaged in a dispute concerning the delimitation of their respective *territorial seas*'. Separate opinion of Judge Oda, para 15. According to the Memorials submitted by the Parties, it appears that they regarded that the delimitation in the southern sector concerned the territorial sea. In fact, in its Memorial, Bahrain clearly mentioned that: 'The maritime boundary which the Court is asked to delimit is, therefore, a territorial sea boundary in the southern sector and in a small part of the northern sector, and a boundary dividing the continental shelf and exclusive economic zone in most of the northern sector.' Memorial submitted by Bahrain, 246, para 560. Qatar took a similar view. Memorial submitted by Qatar, 250, para 11.11, 252, para 11.16, and 258–60, paras 11.35–11.37.

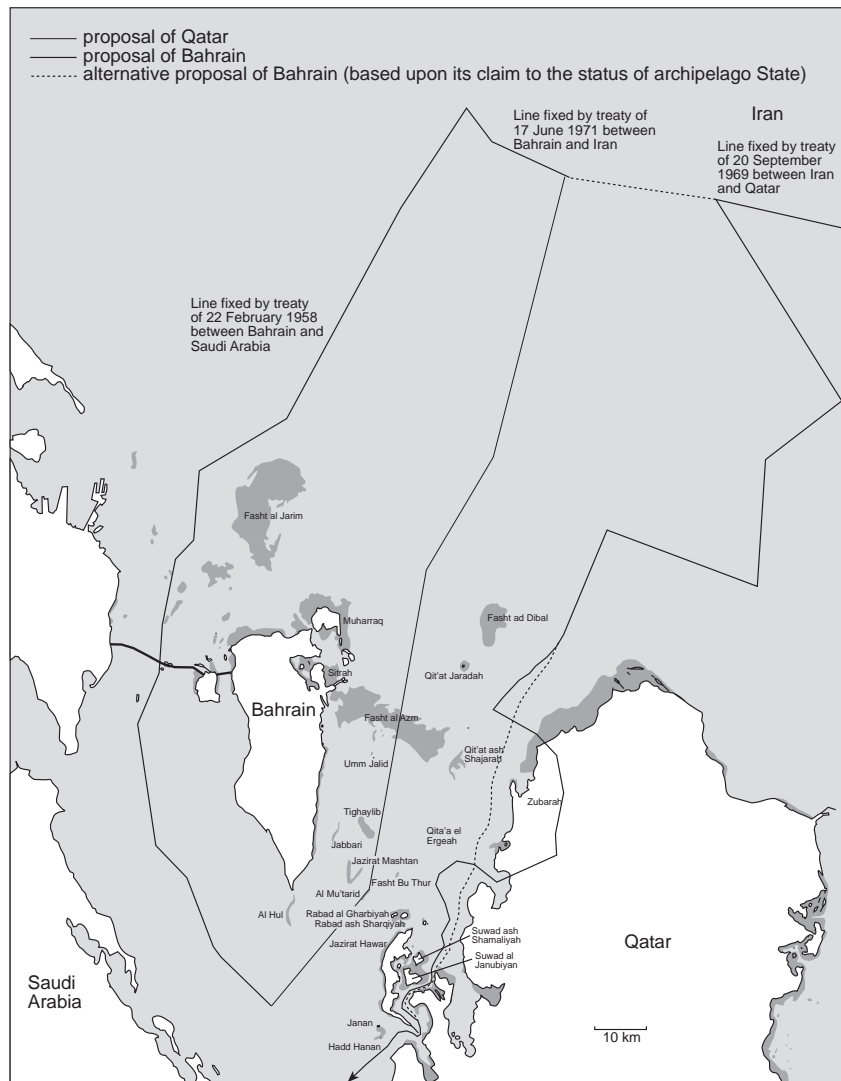


Figure 1

Source : Map No. 2 annexed to the judgment

<<http://www.ici-cij.org/icjwww/idocket/iqb/iqbframe.htm>>

where the coasts of the two States are comparable to adjacent coasts, the delimitation to be carried out was the drawing of a single line dividing the continental shelf and the EEZ. Therefore, the nature of the delimitation line to be established, in reality, differed between the southern and the northern sectors.¹¹ In this sense, the Court's usage of the term 'single maritime boundary' might cause confusion in so far as it includes both a territorial sea boundary and a boundary for the continental shelf and the EEZ.¹²

II. THE LAW APPLICABLE TO MARITIME DELIMITATIONS

Neither Bahrain nor Qatar is a Party to the 1958 Geneva Conventions on the Law of the Sea. While Bahrain has ratified the 1982 UN Convention on the Law of the Sea, Qatar is only a signatory thereof. Thus, customary law applies to this case.¹³ In this section, it would be appropriate to consider the law applicable to the territorial sea delimitation and to single maritime boundaries, respectively.

A. Law Applicable to Territorial Sea Delimitations

The first task of the Court was to identify the customary law governing the delimitation of the territorial sea. The Parties agreed that Article 15 of the UN Convention on the Law of the Sea was part of customary law. The Court agreed that that provision, which is virtually identical to Article 12 (1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, was to be regarded as customary in character. Hence it concluded that:

The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.¹⁴

Consequently, the territorial sea boundary is determined in two steps: An equidistance line is drawn at the first stage; if necessary, the provisional line is then adjusted taking special circumstances into account.

¹¹ Ibid, paras 169–70. The distinction between the southern and northern sectors is not altogether clear. In fact, while the Parties agreed that there were two sectors, their views differed regarding the location of the line dividing the two sectors. Bahrain proposed the line connecting Fasht-ad-Dibal with Fa's Rakan, while Qatar suggested a line drawn from Muharraq to Ra's Rakan, namely, the line MQ/RK marked as a 'closing line'. Counter-Memorial submitted by Bahrain, paras 593–5; Counter-Memorial submitted by Qatar, Maps 6, 7, and 8.

¹² The Court understood a 'single maritime boundary' as 'one uninterrupted boundary line delimiting the various—partially coincident—ones of maritime jurisdiction appertaining to them'. Ibid, para 173. As Judge Oda indicated, however, that the term 'single maritime boundary' usually means a single line for the two different spaces, ie, the continental shelf and the FZ/EEZ. Separate opinion of Judge Oda, para 12.

¹³ Judgment, op cit, n 1, para 167. It should be noted that both Parties agreed that most provisions of the 1982 Convention which were relevant for the present case reflected customary law. Ibid.

¹⁴ Ibid, para 176.

B. Law Applicable to the Drawing of a Single Maritime Boundary

Regarding the law applicable to the establishment of a single maritime boundary, the Court first referred to the *dictum* in the *Libya/Malta* case. Having referred to the close relationship between the continental shelf and the EEZ, the ICJ, in the *Libya/Malta* case, had held that ‘greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts’.¹⁵ Furthermore, mentioning the *Greenland/Jan Mayen* case of 1993, the Court, in the *Qatar/Bahrain* case, clearly stated that it would follow the approach taken in the *Greenland/Jan Mayen* case.¹⁶ Thus, the Court would,

first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.¹⁷

Furthermore, it is important to note that in the area where a single maritime boundary was to be drawn, the coasts of the two States are rather comparable to *adjacent coasts*.¹⁸ Accordingly, the ICJ explicitly accepted, for the first time in the case law of the Court, the applicability of the equidistance method under customary law in a situation of adjacency. This is a welcome development in view of enhancing the predictability of the law of maritime delimitations since the equidistance method is the only one which could ensure total predictability.¹⁹ When justifying the applicability of the equidistance method, however, the Court relied solely on the *Libya/Malta* and *Greenland/Jan Mayen* judgments, without examining State practice or *opinio juris* on this matter. On this point, one might speak of ‘judge-made law,’ which is an important feature of the law of maritime delimitation.²⁰

In short, the Court adopted the two-stage approach regarding delimitation of the territorial sea as well as a single maritime boundary. This may be called the corrective-equity approach in the sense that an equidistance line provisionally drawn is, if necessary, to be corrected taking relevant circumstances into account in order to achieve an equitable result.

¹⁵ The *Libya/Malta* case, *ICJ Reports*, 1985, 33, para. 33.

¹⁶ The *Qatar/Bahrain* case (Merits), *op cit*, n 1, para 230.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para 170.

¹⁹ HWA Thirlway, ‘The Law and Procedure of the International Court of Justice Part Five’ (1994) 64 *BYBIL*, 41.

²⁰ In an article published in 1981, Jennings said that: ‘[T]he law of continental shelf boundaries outside the parties to the 1958 Convention, is pure judge-made law. The supposition that the principles emerged from practice is a pure fiction.’ RY Jennings, ‘What Is International Law and How Do We Tell It When We See It?’ (1981) 37 *ASDI*, 68. See also P Weil, *Perspectives du droit de la délimitation maritime* (Paris: Pedone, 1988), 13; P Cahier, ‘Les sources du droit relatif à la délimitation du plateau continental’, in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally* (Paris: Pedone, 1991), 175–82. In a recently published book, Churchill and Lowe took a similar view. RR Churchill and AV Lowe, *The Law of the Sea*, 3rd edn (Manchester: Manchester University Press, 1999), 185.

III. ESTABLISHMENT OF MARITIME BOUNDARIES

A. Territorial Sea Delimitation

1. Identification of Relevant Coasts

In drawing a provisional equidistance line at the first stage of the delimitation, it is necessary to identify baselines. However, neither Party had specified the baselines to be used for the determination of the breadth of the territorial sea, nor did they produce official maps or charts reflecting such baselines.²¹ Accordingly, the Court had to determine first the relevant coastlines from which it would determine the location of baselines and the pertinent base-points generating an equidistance line.²²

Qatar argued that the mainland-to-mainland method should be applied in order to draw such a line.²³ 'Mainland' refers to the Qatar peninsula, including the main Hawar Island, and Bahrain Island, together with al-Awal, al-Muharraq and Sitrah. For Qatar, the application of the mainland-to-mainland method had two main consequences: First, it took no account of the islands and low-tide elevations in the area, except for the above-mentioned islands.²⁴ Secondly, the equidistance line had to be constructed on the basis of the high-water line. Furthermore, Qatar argued that on several occasions, the case law in the field of maritime delimitation did not rely on the baselines used for measuring the breadth of the territorial sea in applying the equidistance method.²⁵ Bahrain contended that, as a multiple-island State characterised by a cluster of islands off the coast of its main islands, it was entitled to draw a line connecting the outermost islands and low-tide elevations.²⁶

In determining the relevant coasts, the Court first recalled that, as provided in Article 5 of the UN Convention on the Law of the Sea, the normal baseline was the low-water line along the coast.²⁷ Consequently, Qatar's claim for using the high-water line could not be accepted. Secondly, since maritime rights derive from the coastal State's sovereignty over the land, the Court had to decide which islands came under Bahraini or Qatari sovereignty. On this point, the Court concluded that the Hawar Islands belonged to Bahrain and that Janan belonged to Qatar.²⁸ Moreover, Qatar did not contest that Bahrain had sovereignty over the Jazirat Mashtan and Umm Jalid islands in the southern sector. Nevertheless, the Parties were divided regarding other islands or low-tide elevations in four respects.

²¹ The *Qatar/Bahrain* case (Merits), op cit, n 1, para 177.

²² Ibid, para 178.

²³ Counter-Memorial submitted by Qatar, 228 et seq.

²⁴ Ibid, 223, para, 7.9.

²⁵ Ibid, 232, para 7.30. See also 235, para 7.38.

²⁶ Reply submitted by Bahrain, paras 287–305. See also argument by Professor Weil, Counsel of Bahrain, Verbatim Record, CR 2000/15, paras 12 et seq; judgment, op cit, n 1, paras 210–11.

²⁷ Ibid, para 184.

²⁸ Ibid, para 187. For territorial questions concerning those islands, see paras 98–165.

(1) The first dispute concerned the status of Fasht al Azm. Qatar contended that Fasht al Azm was a low-tide elevation that had always been separated from Sitrah Island by a natural channel that remained navigable even at low tide. According to Qatar, this natural channel was filled during 1982 construction works.²⁹ By contrast, Bahrain claimed that Fasht al Azm was part of Sitrah Island. The main question was whether Fasht al Azm was divided from Sitrah by a natural and permanent channel at low tide. On this point, Bahrain maintained that there was no permanent channel at low tide between Sitrah Island and Fasht al Azm.³⁰ Regarding this problem, the Court ruled that it could not establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken. At the same time, it held that, as will be seen below, it was able to undertake the requested delimitation in this sector without determining the status of Fasht al Azm.³¹

(2) The second issue was whether Qit'at Jaradah, a maritime feature situated northeast of Fasht al Azm, was an island or a low-tide elevation. By referring to a number of eyewitness reports, Bahrain contended that there were strong indications that Qit'at Jaradah was an island that remained dry at high tide.³² Qatar maintained that Qit'at Jaradah was always reflected on nautical charts as a low-tide elevation.³³ Having carefully analysed the evidence submitted by the Parties and the conclusions of experts, the Court concluded that Qit'at Jaradah was an island which should be considered for the drawing of the equidistance line.³⁴ At the same time, taking into account the smallness of the island, the Court ruled that the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.³⁵

(3) The third question to be considered was whether Fasht ad Dibal may be used as a basepoint. Fasht ad Dibal is situated in the overlapping area of the territorial seas of the Parties,³⁶ which both agreed that it was a low-tide elevation.³⁷ According to the Court, in such a situation, both States are entitled to use their low-water line for the measuring of the breadth of their territorial

²⁹ Ibid, para 189. See also argument by Professor Quéneudec, Counsel of Qatar, Verbatim Record, CR 2000/9, paras 24–6.

³⁰ Argument by Professor Reisman, Counsel of Bahrain, Verbatim Record, CR 2000/14, paras 12–25; Judgment, op cit n 1, para 189.

³¹ Ibid, para 190.

³² Ibid, para 192; Argument by Professor Reisman, Counsel of Bahrain, Verbatim Record, CR 2000/14, paras 26–31.

³³ Judgment, op cit, n 1, para 193; Argument by Professor Quéneudec, Counsel of Qatar, Verbatim Record, CR 2000/9, paras 32–9.

³⁴ Judgment, op cit, n 1, para 195.

³⁵ Ibid, para 197. At high tide, its length and breadth are about 12 by 4 metres, and its altitude is approximately 0.4 metres. Ibid.

³⁶ According to Qatar, Fasht ad Dibal is located 9.3 miles from the nearest point on the low-water line of Qatar and 13.7 miles from the nearest point on the low-water line of Bahrain. Memorial submitted by Qatar, 212, para 9.11.

³⁷ Memorial submitted by Bahrain, 270, para 626; Argument by Professor Weil, Verbatim Record, CR 2000/15, para 41; Memorial submitted by Qatar, 238, para 10.54, 239, para 10.58. and 245, para 10.73; Counter-Memorial submitted by Qatar, 267, para 8.43.

sea.³⁸ That is so even if the low-tide elevation is nearer to the coast of one State than to that of the other, or nearer to an island belonging to one Party than to the mainland coast of the other. However, the Court did hold that:

For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other.³⁹

It thus concluded that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.⁴⁰

(4) Finally, the Court examined Bahrain's claim to straight baselines and discarded it. The Court's view on this subject may be worthy of note:

[T]he method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.⁴¹

It is important to note that the Court interpreted the faculty to draw straight baselines restrictively. Furthermore, it stated that 'the fact that a State considers itself a multiple-island State or a *de facto* archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrain's main islands do not form a deeply intended coast, nor does Bahrain claim this.'⁴² The Court therefore held that Bahrain was not entitled to apply the method of straight baselines.⁴³

On the basis of above considerations, the Court finally concluded that:

Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn.⁴⁴

Furthermore,

[i]n accordance with Article 121, paragraph 2, of the UN Convention on the Law of the Sea, which reflects customary law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.⁴⁵

³⁸ Art 13 of the UN Convention on the Law of the Sea stipulates that: '1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-tide line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.'

³⁹ Judgment, *op cit*, n 1, para 202. See also para 215.

⁴¹ *Ibid*, para 212.

⁴³ *Ibid*, paras 213–15.

⁴⁵ *Ibid*, para 185.

⁴⁰ *Ibid*, para 209.

⁴² *Ibid*, para 213.

⁴⁴ *Ibid*, para 215.

The above phrase appears to suggest that the Court rejected the mainland-to-mainland method claimed by Qatar.

2. *Special Circumstances*

Having identified the basepoints generating a provisional equidistance line, the Court turned to the question of whether special circumstances existed. The first question to be considered was that of Fasht al Azm. The Court presented two hypotheses. First, if Fasht al Azm were to be regarded as part of Sitrah Island and used as a basepoint creating an equidistance line, this would place the boundary at a disproportionate proximity of Qatar's mainland coast in view of the fact that less than 20 per cent of the surface of this island was permanently above water. In the Court's view, it would not be appropriate to adopt the equidistance line as the maritime boundary. Secondly, if Fasht al Azm were to be regarded as a low-tide elevation, the equidistance line would brush Fasht al Azm, and, consequently, be equally inappropriate. The Court thus considered that, based on either hypothesis, there were special circumstances promoting a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah.⁴⁶

The second question to be considered was that of Qit'at Jaradah. This tiny island, which is under Bahrain's sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. According to the Court, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, a disproportionate effect would be given to an insignificant maritime feature. On the basis of the *North Sea Continental Shelf* and *Libya/Malta* cases, the Court found that there was here a special circumstance warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.⁴⁷

Thirdly, on the basis of security interests, Qatar contested the boundaries proposed by Bahrain. According to Qatar, the Bahraini line in the southern sector was drawn so closely to its coast that it would certainly create serious security problems to Qatar.⁴⁸ Bahrain did not contest the fact that security was one of factors to be taken into account for reaching an equitable result. However, it argued that in no case had a court or tribunal 'reshaped' geography for security purposes.⁴⁹ The ICJ did not touch on this point. When examining the nature of Fasht al Azm, however, the Court held that if Fasht al Azm was to be regarded as part of the Sitrah Island, a possible equidistance line would place the boundary at a disproportionately close range to Qatar's mainland coast.⁵⁰ In so stating, the Court might have implicitly considered security interests.

⁴⁶ Ibid, para 218.

⁴⁷ Ibid, para 219.

⁴⁸ Counter-Memorial submitted by Qatar, 230–1.

⁴⁹ Reply submitted by Bahrain, para 305; Argument by Professor Weil, Counsel of Bahrain, Verbatim Record, CR 2000/15, paras 42–5.

⁵⁰ Judgment, op cit, n 1, para 218.

Finally, in the southern sector, the interests of Saudi Arabia are involved in the determination of the starting point of the delimitation line. The Court found that it could not fix that point since its definitive location depended on the limits of the maritime zones of Saudi Arabia and the Parties. The Court therefore simply stated that the delimitation line began from the point of intersection of the respective maritime limit of Saudi Arabia, on the one hand, and of Bahrain and Qatar, on the other, which could not be fixed.⁵¹ Based on the above considerations, the Court drew the territorial sea boundary in the southern sector as illustrated in Fig 2.⁵²

According to the delimitation line drawn by the ICJ, 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 separating the Hawar islands from the Qatar peninsula. As this channel is narrow and shallow, it is unsuitable for navigation. Hence the Court held, unanimously, that the waters lying between the Hawar Islands and the other Bahraini islands are not Bahrain's internal waters, but her territorial sea, which means that Qatari vessels shall enjoy in these waters the right of innocent passage accorded by customary international law.⁵³

B. The Single Maritime Boundary

In constructing the single maritime boundary, the Court drew, provisionally, an equidistance line at the first stage of delimitation. It then examined whether there were circumstances that would require any adjustment of that line. The factors to be examined were: Pearling; the 1947 line described by a British decision; proportionality; and Fasht al Jarim. Having examined each and every element, the Court only took Fasht al Jarim into consideration as a relevant circumstance.

1. Pearling (Historic Rights)

Bahrain maintained that the pearling banks, many of which were situated to the north of the Qatar peninsula, appertained to Bahrain since time immemorial, and that Bahrain had consistently exercised jurisdiction and control over them.⁵⁴ According to Bahrain, its historic rights over these banks were relevant to the delimitation of the maritime boundary in accordance with equitable principles.⁵⁵ By contrast, denying Bahrain's exclusive rights over the exploitation of the pearling banks, Qatar maintained that these fisheries had always been considered as common to all tribes along the shores of the Gulf.⁵⁶

⁵¹ *Ibid.*, paras 221–2. See also para 250.

⁵² *Ibid.*, para 222.

⁵³ *Ibid.*, para 223.

⁵⁴ Memorial submitted by Bahrain, 257; Argument by Professor Reisman, Counsel of Bahrain, Verbatim Record, CR 2000/15, paras 55–8; judgment, *op cit*, n 1, para 235.

⁵⁵ Memorial submitted by Bahrain, 274. See also 283–4.

⁵⁶ Counter-Memorial submitted by Qatar, 282–8.

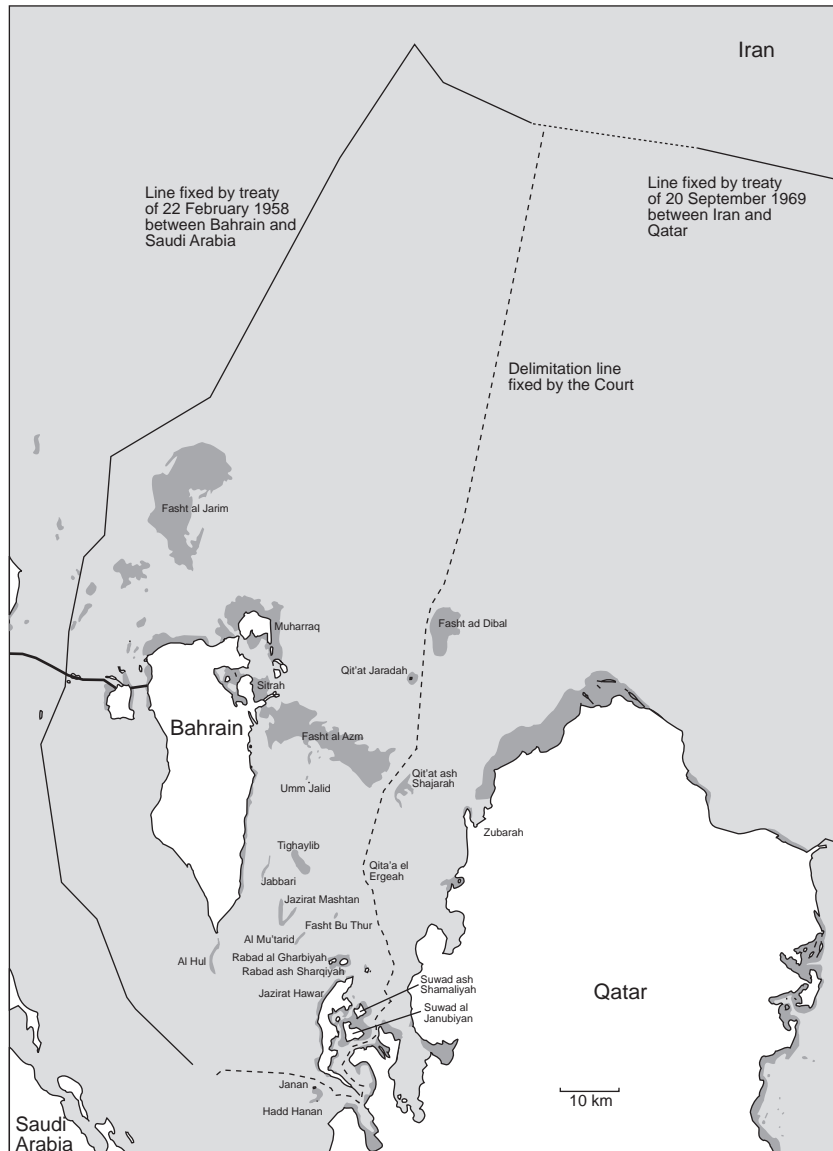


Figure 2

Source : Map No. 7 annexed to the judgment

<<http://www.ici-cij.org/icjwww/idocket/iqb/iqbframe.htm>>.

Furthermore, Qatar alleged that Bahrain's claim had lost its relevance as the pearl fisheries had ceased to exist over half a century ago.⁵⁷

The Court first confirmed that the pearling industry effectively ceased to exist a considerable time ago. It also held that, from the evidence submitted to it, it was clear that pearling was traditionally considered as a right that was common to the coastal populations. Moreover, in the Court's view, even if pearling had been conducted by a group of fishermen of one State only, this never seemed to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters. Consequently, the Court rejected the argument that pearling constituted a circumstance that would justify an eastward shifting of the equidistance line.⁵⁸

2. *The 1947 Line Described in a British Decision*

The relevance of a line dividing the seabed of the two States, described in a British decision of 23 December 1947, created a sharp dispute between the Parties. The British decision had been adopted within the context of the emerging legal continental shelf doctrine.⁵⁹ On the one hand, Qatar asked the ICJ to draw the single maritime boundary 'with due regard to the line dividing the seabed of the two States' described in the above British decision,⁶⁰ alleging that 'it cannot be said that the Court is faced with a purely *de novo* maritime delimitation, since in a part of the relevant maritime area a line dividing the seabed between the Parties had already been drawn in 1947 by the British authorities'.⁶¹ In Qatar's view, 'the 1947 line in itself constitutes a special circumstance insofar as it was drawn in order to permit each of the two interested States actually to exercise its inherent right over the sea-bed'.⁶² At the same time, Qatar did *not* contend that the 1947 line was to be automatically regarded as the boundary line delimiting the maritime areas pertaining to Qatar and Bahrain. In fact, although the British decision drew a line encaving the Hawar Islands, Qatar insisted that the third part of the 1947 line had to be disregarded for two reasons: Qatar's sovereignty over the Hawar islands and a third State's rights at the entrance of the Dawhat Salwah.⁶³

⁵⁷ Ibid, 277–8; Argument by Professor Salmon, Counsel of Qatar, Verbatim Record, CR 2000/10, paras 2–4; judgment, op cit, n 1, para 235.

⁵⁸ Ibid, para 236.

⁵⁹ Memorial submitted by Qatar, 215. Regarding the background and contents of the British decision, see *ibid*, 218–24. According to Qatar's explanation, the 1947 line was not a strict or true median line, but a line drawn in accordance with equitable principles. *Ibid*, 224. Furthermore, according to Qatar, the 1947 line also concerns the territorial sea delimitation in the southern sector, although the Court discussed this issue in the context of a single maritime boundary. In fact, Qatar argued that the 1947 line constituted special circumstances of the territorial sea delimitation. *Ibid*, 258–61, paras 11.35–11.39.

⁶⁰ Judgment, op cit, n 1, para 31. See also argument by Professor Quéneudec, Verbatim Record, CR 2000/10, para 43.

⁶¹ Memorial submitted by Qatar, 247.

⁶² *Ibid*, 261. See also 261–2.

⁶³ *Ibid*, 253–8. The 1947 line began at point M, which was near the Dawhat Salwah. That point was plotted at latitude 25°30'00"N, longitude 50°33'55"E. According to Qatar, point M is clearly situated within the maritime zone pertaining to Saudi Arabia and cannot be regarded as a

However, Bahrain contested the relevance of the 1947 line for the following reasons: (i) The 'decision' contained in the letters of 23 December 1947 to the Rulers of Bahrain and Qatar drawing the 1947 dividing line was not a binding decision. (ii) The 1947 line was not based exclusively on legal criteria. (iii) The 1947 line related exclusively to the delimitation of the continental shelf and expressly did not purport to delimit the superjacent waters. (iv) The concepts and rules by reference to which the 1947 line had been drawn did not meet the requirements of contemporary law. Indeed, the notion of the EEZ, unknown in 1947, brought about a fundamental change in the theory of the continental shelf. (v) The 1947 line did not rest on any known or identifiable legal ground. (vi) The 1947 line had no relevance in the light of the supervening extension of the territorial seas of both countries from 3 to 12 miles. (vii) The 1947 line had no relevance as a source of 'historic rights'.⁶⁴

The ICJ held that the 1947 line could not be considered to be of direct relevance for the present delimitation process for two reasons. First, neither Party had accepted it as a binding decision, and they invoked only parts of it to support their arguments. Secondly, while the British decision only concerned the division of the seabed between the Parties, the operation to be effected in the present case was mainly a combined delimitation of the continental shelf and the EEZ.⁶⁵ This appears to suggest that in the drawing of single maritime boundaries, theoretically at least, existing seabed lines would have no influence since they concern the seabed alone.

3. *Proportionality*

Qatar had recourse to proportionality as a test of the equitableness of the delimitation line.⁶⁶ According to Qatar, the ratio of its mainland coasts to that of Bahrain's principal islands was 1.59 to 1, and such a significant disparity between the coastal lengths of the Parties constituted a special or relevant circumstance calling for an appropriate correction of an equidistance line provisionally drawn.⁶⁷ In applying the proportionality test to the single maritime boundary proposed by Qatar in the northern sector, the ratio between the sizes of the maritime areas on either side of the boundary would have been 1.68 to 1 in favour of Qatar. It was thus argued that the proportionality test was sufficient to conclude that the boundary advocated by Qatar was equitable.⁶⁸ By contrast, Bahrain contended that the above calculation relied on the

dividing point between Qatar and Bahrain. *Ibid.*, 256. For the location of the 1947 line, see Map No 6 of Counter-Memorial of Qatar.

⁶⁴ Counter-Memorial submitted by Bahrain, paras 552–86; Argument by Professor Weil, Counsel of Bahrain, Verbatim Record, CR 2000/16, paras 125–62.

⁶⁵ Judgment, *op cit*, n 1, paras 239–40.

⁶⁶ Memorial submitted by Qatar, 301. See also 279–83; Argument by Professor, Quéneudec, Counsel of Qatar, Verbatim Record, CR 2000/10, para 17 and paras 38–9.

⁶⁷ Judgment, *op cit*, n 1, para 241.

⁶⁸ Memorial submitted by Qatar, 304–5.

assumption that the Hawar Islands were under Qatar's sovereignty. If these islands were considered as appertaining to Bahrain, the lengths of the relevant coasts would be almost equal.⁶⁹ Furthermore, Bahrain refused to recognise the result of the Qatar's proportionality test, which it found arbitrary.⁷⁰

The ICJ supported Bahrain's view. With respect to the Hawar Islands, the Court held that Bahrain had sovereignty over those islands. Accordingly, 'the disparity in length of the coastal fronts of the Parties cannot be considered such as to necessitate an adjustment of the equidistance line'.⁷¹ The Court's view, which is very condensed on this matter, calls for two comments. First, proportionality was not regarded as a relevant circumstance in this case. As the Court indicated, however, this was because there was no disparity between the coastal lengths of the Parties which called for an adjustment of an equidistant line. This appears to suggest that, where there is a disproportion between coastal lengths, proportionality may be considered. Secondly, the Court's reasoning relied on the fact that the lengths of the relevant coasts between the Parties were approximately the same. As Judge ad hoc Torres Bernárdez points out, however, no precise figures are given in the judgment to bear out that conclusion.⁷² It would appear, at the least, that the Court should have explained in more detail the method of calculation used for computing the relevant coasts.

4. *Fasht al Jarim*

According to the Court, it could not ignore the location of Fasht al Jarim, which was a sizable maritime feature partly situated in the Bahrain's territorial sea. In this respect, the Court recalled the *Libya/Malta* case, in which it had stated that: '[T]he equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islets, rocks and minor coastal projections", to use the language of the Court in its 1969 Judgment.'⁷³

The coasts of the Parties in the northern sector of delimitation are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories concerned are flat and have a gentle slope, and there is no marked difference in character or extent. In the Court's view, thus, Fasht al Jarim is the only noticeable feature. Having noted the above geographical situation, the Court considered that, if full effect were given to Fasht al Jarim, it would 'distort the boundary and have disproportionate effects', to quote the *Anglo-French Continental Shelf*

⁶⁹ Judgment, op cit, n 1, para 242; Counter-Memorial submitted by Bahrain, paras 647–9.

⁷⁰ Ibid, para 647; Argument by Professor Reisman, Counsel of Bahrain, Verbatim Record, CR 2000/16, para 17.

⁷¹ Judgment, op cit, n 1, para 243.

⁷² Dissenting opinion of Judge ad hoc Torres Bernárdez in the *Qatar/Bahrain* case (Merits) judgment, op cit, n 1, para 521.

⁷³ Ibid, para 246. The *Libya/Malta* case, *ICJ Reports* 1985, 48, para 64.

award. Thus, the Court held that Fasht al Jarim should have no influence on the boundary line in the northern sector.⁷⁴ A reason for this finding may be that only a minute part of it is above water at high tide.⁷⁵ Another explanation may be that the delimitation in the relevant area was one between adjacent coasts. It is conceivable that, if it had been a delimitation between opposite coasts, Fasht al Jarim would have been given more effect.

Accordingly, the ICJ decided that the single maritime boundary in the northern sector was to be formed by a line as illustrated in Fig 2.⁷⁶ The Court did not fix a tri-point between Iran, Bahrain, and Qatar.

IV. INTERRELATION BETWEEN TERRITORIAL DISPUTES AND MARITIME DELIMITATION

As indicated earlier, an important feature of the present case is that territorial disputes and one on maritime delimitation were submitted to the Court as a set. We will thus first consider the interrelation between territorial disputes and maritime delimitation.

A. The Court's Decision on Territorial Disputes and its Influence on Maritime Delimitation

'The land dominates the sea.' This is a fundamental principle in international law. Accordingly, the Court had to determine the territories coming under Bahraini or Qatari sovereignty before effecting maritime delimitations. In the first part of its judgment, the Court thus found that Qatar has sovereignty over Zubarah as well as Janan Island, including Hadd Janan. Furthermore, it held that Bahrain has sovereignty over the Hawar islands and the island of Qit'at Jaradah.⁷⁷

Needless to say, the Court's determination concerning sovereignty over those territories did affect the maritime delimitation. In fact, since the Court rejected Qatar's claim to sovereignty over the Hawar Islands, a delimitation line proposed by Qatar and presupposing its sovereignty over the Hawar lost its validity. At the same time, as the Court decided that Zubarah was under Qatar's sovereignty, Bahrain's delimitation line, which was calculated from the coasts of Zubarah, also became irrelevant. In short, where territorial and maritime delimitation disputes were submitted together, the legitimacy of the delimitation line proposed by each Party relies on the hypothesis of a favourable issue of its territorial claim. If the Court rejects a Party's assertion concerning sovereignty over a certain area, a maritime boundary based on that claim automatically becomes irrelevant. In this respect, it is interesting to note

⁷⁴ Judgment, *op cit*, n 1, paras 247–8.

⁷⁶ *Ibid*, para 249.

⁷⁷ *Ibid*, para 252. See also Evans, *op cit*, n 1, 710–713.

⁷⁵ *Ibid*, para 248.

that, provided that Bahrain's sovereignty over Zubarah were inadmissible, Bahrain proposed an alternative median line between Bahrain's archipelagic baselines and Qatar's relevant coast. According to Bahrain, should the Court not accept Bahrain's archipelagic baselines, the median line should be measured from its normal baselines.⁷⁸ Yet the Court did not refer to this alternative proposition when drawing its own maritime boundary, while rejecting Bahrain's sovereignty over Zubarah.

Furthermore, it should be noted that the Court discussed the question of sovereignty over Qit'at Jaradah in the context of the maritime delimitation.⁷⁹ Bahrain's submissions also refer to Qit'at Jaradah in connection with the maritime delimitation, and not as an independent territorial issue.⁸⁰ This might suggest that, for Bahrain at least, Qit'at Jaradah was of particular importance in the context of maritime delimitation and not as territory per se. In fact, as pointed out earlier, the Court recognised Bahrain's sovereignty over Qit'at Jaradah when drawing the maritime boundary. At the same time, it considered Qit'at Jaradah as a special circumstance but attributed almost no effect to it.

Nevertheless, all 'territorial' disputes were not necessarily resolved *before* drawing maritime boundaries. Indeed, sovereignty over the low-tide elevation of Fasht ad Dibal was not determined at the first stage of the decision concerning territorial disputes. In determining the sovereignty over that low-tide elevation, a question which arose was whether the law regarding the acquisition of territory could apply to low-tide elevations. This question produced a serious dispute between the Parties in the context of the maritime delimitation.

B. Territoriality of Low-Tide Elevations and its Influence on Maritime Delimitation

1. Arguments Regarding Territoriality of Low-Tide Elevations

(a) Qatar's Arguments

Qatar asserted that low-tide-elevations were not parts of the land territory of States and, thus, the law regarding the acquisition of territory could not be applicable to them. In this connection, Qatar argued that :

As a matter of fact, the possibility of a coastal State to use the low-tide mark on a low-tide elevation as the baseline for measuring the breadth of the territorial sea is strictly dependent on the distance of that low-tide elevation from the mainland or an island, that distance being determined by reference to the breadth of the territorial sea as adopted by the coastal State concerned in conformity with international

⁷⁸ Counter-Memorial submitted by Bahrain, 298–9, paras 690–4.

⁷⁹ Judgment, *op cit*, n 1, paras 191–8. Separate opinion of Judge Oda, *ibid*, para 5.

⁸⁰ Judgment, *op cit* n 1, paras 33–4. Memorial submitted by Bahrain, 253–8, paras 580–92, 268–9, paras 622–4; Counter-Memorial submitted by Bahrain, paras 511–20.

law. In other words, in order to decide whether a low-tide elevation lying off the coast is under the sovereignty of the coastal State and may thus be used as a base-point for the calculation of the external limits of the territorial sea, it is first necessary to make a projection of the territorial sea from the coast. And it is when, and only when, the low-tide elevation is situated wholly or partly within the projection of the territorial sea from the main coast that the coastal State has a title over that low-tide elevation and can use it as a basepoint for purposes of determining the outer limits of the territorial sea.⁸¹

Furthermore, Professor Quéneudec, Counsel of Qatar, pointed out that:

[S]elon la jurisprudence de la Cour elle-même, un haut-fond découvrant n'est pas en lui-même 'susceptible d'appropriation'. Dès lors, s'il peut être réputé relever de la souveraineté territoriale d'un Etat, c'est uniquement à raison de sa localisation dans un espace maritime qui est déjà soumis à la souveraineté de cet Etat, c'est-à-dire à l'intérieur de sa mer territoriale.⁸²

According to Qatar's view, it is a maritime delimitation line that decides on a title over low-tide-elevations and, consequently, a delimitation line should be drawn before determining title over those elevations.⁸³

(b) Bahrain's Arguments

By contrast, Bahrain alleged that low-tide-elevations form part of the land territory and that their appropriation should be decided by the law regarding acquisition of territory. Bahrain therefore contended that:

[T]he fact that low-tide elevations may in some circumstances give rise to a territorial sea entitlement demonstrates that they form part of the territory of the State in question and that they are subject to its territorial sovereignty. Territorial sea can only exist if territorial sovereignty exists to generate it. This brings to an end the old controversy as to whether low-tide elevations are capable of appropriation in sovereignty : it is accepted today that they are.⁸⁴

Furthermore, Professor Weil, Counsel of Bahrain, insisted that :

[E]tant donné que des lignes de base droites ne peuvent être tirées que vers ou à partir de « points appropriés »-comme le dit d'ailleurs la convention-sur la côte et ne peuvent certainement pas être tirés vers ou à partir des points dans l'eau, des points aquatiques, en plein mer, le principe énoncé par cette disposition implique nécessairement que par leur nature les hauts-fonds découvrants sont de la terre et non pas de la mer, et s'ils sont de la terre ils font partie du territoire étatique.⁸⁵

He then questioned Qatar's view according to which low-tide-elevations have the character of sea or 'corps aquatique' since '[s]ils n'étaient pas territoire

⁸¹ Reply of Qatar, para 7.40.

⁸² Argument by Professor Quéneudec, Verbatim Record, CR 2000/9, para 45.

⁸³ Ibid, CR 2000/10, para 64.

⁸⁴ Counter-Memorial of Bahrain, para 524.

⁸⁵ Argument by Professor Weil, Verbatim Record, CR 2000/15, para 76.

étatique par leur nature, ils ne pourraient jamais engendrer de juridiction maritime'.⁸⁶ Weil also criticised Qatar's argument because it would inverse the fundamental principle of 'the land dominates the sea' into 'the sea dominates the land'.⁸⁷ In short, according to Bahrain, the Court should determine the sovereignty over low-tide-elevations, if disputed between the Parties, and next should effect maritime delimitation.⁸⁸ In Bahrain's view, the appropriation of low-tide elevations should be determined by having recourse to the principle of effectiveness.⁸⁹ Thus, Bahrain submitted some evidences of the exercise of Bahrain's sovereignty over Fasht ad Dibal, including the conduct of surveys and the grant of oil concessions, and the construction of a cairn and an artesian well, etc.⁹⁰

2. *The Court's Solution*

Regarding the divergence on this point, first, the Court began by examining the nature of low-tide-elevations. There is no doubt that a coastal State has sovereignty over low-tide elevations that are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil. According to the Court, the decisive question is 'whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State'.⁹¹ It accepted that treaty law is silent on the question of whether low-tide elevations can be considered to be 'territory' and that there is no uniform and widespread State practice on this matter.⁹² Yet the Court recalled that a low-tide elevation which is situated beyond the limits of territorial sea does not have a territorial sea of its own.⁹³ A low-tide elevation as such does not generate the same rights as islands or other land territory. The Court therefore found that:

The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that

⁸⁶ Ibid, para 77.

⁸⁷ Ibid, para 54. See also Verbatim Record, CR 2000/25, para 2; Counter-Memorial of Bahrain, para 529.

⁸⁸ Ibid, para 532; Reply of Bahrain, para 302; Verbatim Record, CR 2000/25, para 31.

⁸⁹ Reply of Bahrain, paras 358–9.

⁹⁰ Ibid, para 345.

⁹¹ Judgment, op cit, n 1, para 204.

⁹² Ibid, para 205.

⁹³ Art 13 (2) of the UN Convention on the Law of the Sea. According to the Court, the relevant provisions on low-tide elevations reflected customary law, *ibid*, para 201. Yet Judge Oda doubted the customary-law character of the provisions relating to the limits of the territorial sea of the 1982 Convention, including these concerning low-tide elevations, since the latter copied relevant provisions of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone without any careful consideration of the radical change resulting from the extension of the breadth of the territorial sea to 12 nautical miles. In his view, low-tide elevations located in the narrow 3-mile belt off the coast would not have had much effect on the extent or the boundary of the territorial sea. But the situation is different for the contemporary 12-mile territorial sea. Separate opinion of Judge Oda in the Qatar/Bahrain case (Merits), in *ibid*, paras 7 and 20.

islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.⁹⁴

In the Court's view, Article 4 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 7 (4) of the 1982 UN Convention on the Law of the Sea, according to which straight baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them, also support that view.⁹⁵ Consequently, the Court held that there was no reason to recognise the rights of Bahrain to use, as a baseline, the low-water line of those low-tide elevations, ie, Fasht ad Dibal, which were situated in the zone of overlapping claims, nor to recognise that Qatar has such a right. It then concluded that, for the purpose of drawing the equidistance line, such low-tide elevations must be disregarded.⁹⁶

How, then, is it possible to decide on the sovereignty over low-tide elevations? In this respect, the Court drew provisionally two equidistance lines. On the one hand, if no effect were given to Qit'al Jaradah and Fash al Azm were to be considered to be part of Sitrah island, the adjusted equidistance line would cut through Fasht ad Dibal, leaving the greater part of it on the Qatari side. On the other hand, if Fasht al Azm were seen as a low-tide elevation, the adjusted equidistance line would run west of Fasht ad Dibal. In either hypothesis, thus, Fasht ad Dibal is largely or totally on the Qatari side of the adjusted equidistance line. Accordingly, the Court concluded that it was 'appropriate to draw the boundary line between Qit'al Jaradah and Fasht ad Dibal'. 'As Fasht ad Dibal is thus situated in the territorial sea of Qatar', the Court continued, 'it falls for that reason under the sovereignty of that State.'⁹⁷ Sovereignty over the low-tide elevation was thus determined by the location of the maritime boundary. In so doing, it is conceivable that the Court assimilated low-tide elevation to the ocean, not to land. If not, the Court's solution would run counter to the fundamental principle of 'the land dominates the sea'.

Low-tide elevations could be used as basepoints only if situated within the breadth of the territorial sea.⁹⁸ In other words, low-tide elevations could generate territorial sea on the basis of the fact that they are already under the territorial sovereignty of coastal States. The power of low-tide elevations generating territorial sea depends on whether they are situated within the

⁹⁴ Judgment, *ibid*, para 206.

⁹⁶ *Ibid*, para 209.

⁹⁸ For a historical analysis regarding the effect to be given to low-tide elevations, see H Dipla, *Le régime juridique des îles dans le droit international de la mer* (Paris: PUF, 1984), 57–74.

⁹⁵ *Ibid*, para 208.

⁹⁷ *Ibid*, para 220.

breadth of territorial sea. As the Court indicated, thus, it may be irrelevant to assimilate low-tide elevations to land territory or islands.

To a certain extent, the Court's previous practice seems to support this view. For instance, in the *Minquiers and Ecrehos* case, the Parties (France and the United Kingdom) had asked the Court, in the Compromis, to determine the question of sovereignty over the islets and rocks of the groups 'in so far as they are capable of appropriation'. In this connection, the Court held that:

These words must be considered as relating to islets and rocks which are physically capable of appropriation. The Court is requested to decide in general to which Party sovereignty over each group as a whole belongs, without determining in detail the facts relating to the particular units of which the groups consist.⁹⁹

On this point, Sir Gerald Fitzmaurice commented that: 'By this finding, the Court also implicitly endorsed the rule that certain kinds of territory are not capable of appropriation in sovereignty at all. The usual case is that of the island, rock, bank or shoal only uncovered at low tide.'¹⁰⁰ Sir Gerald further pointed out that:

It is a well-established rule of international law that territory, in order to be capable of appropriation in sovereignty, must be situated permanently above high-water mark, and not consist, eg, of a drying-rock, only uncovered at low tide, unless it is already within the territorial waters of appropriable territory.¹⁰¹

Moreover, in the *El Salvador/Honduras* case concerning their *Land, Island and Maritime Frontier*, the Chamber of the ICJ ruled:

That Meanguerita is 'capable of appropriation', to use the wording of the *dispositif* of the *Minquiers and Ecrehos* case, is undoubted; it is not a low-tide elevation, and is covered by vegetation, although it lacks fresh water.¹⁰²

This phrase appear to suggest that if Meanguerita were a low-tide elevation, it would be incapable of appropriation.¹⁰³

In State practice, one notes with interest that the 1978 Torres Strait Treaty between Australia and Papua New Guinea regarded low-tide elevations as a part of the seabed, by stipulating that: "seabed jurisdiction" means sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law' (Article 1 (1) (i)).¹⁰⁴

⁹⁹ *ICJ Reports*, 1953, 53. Professor Quéneudec, Counsel of Qatar, referred to this judgment, see Verbatim Record, CR 2000/9, para 44.

¹⁰⁰ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol I (Cambridge: Cambridge University Press, 1993), 287. ¹⁰¹ *Ibid*, 286–7.

¹⁰² *ICJ Reports*, 1992, 570, para 356.

¹⁰³ Argument by Professor Quéneudec, Verbatim Record, CR 2000/9, para 44.

¹⁰⁴ For the text of the Treaty, see JI Charney, and LM Alexander (eds), *International Maritime Boundaries*, vol I (Dordrecht: Nijhoff, 1993), 1937 et seq.

V. THE APPLICABILITY OF THE EQUIDISTANCE METHOD TO THE DELIMITATION
BETWEEN STATES WITH ADJACENT COASTS

The applicability of the equidistance method to maritime delimitation is a central issue in the law of maritime delimitation. There is no doubt that maritime delimitation shall be governed by equitable principles. Yet it is important to note that there are two approaches to equitable principles.

A. Two Approaches Favoured by the Case Law

The first approach is that of result-oriented equity. According to this approach, equitableness of the result is the only rule prescribed by the law of maritime delimitation and, thus, there is no obligatory method of delimitation. The origin of that approach lies in the *North Sea Continental Shelf* judgment of 1969, which negated the existence of any obligatory method of continental-shelf delimitation. The ICJ held that ‘there [is] no other single method of delimitation the use of which is in all circumstances obligatory’.¹⁰⁵ Accordingly, ‘it is necessary to seek not one method of delimitation but one goal’.¹⁰⁶ The same approach was used in the *Tunisia/Libya* judgment, where the Court said that:

The result of the application of equitable principles must be equitable.[. . .] It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.¹⁰⁷

The Court thus rejected both the mandatory character of equidistance and the idea of attributing a privileged status to equidistance in relation to other methods.¹⁰⁸ This approach is echoed in the *Gulf of Maine*,¹⁰⁹ *Libya/Malta*,¹¹⁰ *Guinea/Guinea-Bissau*¹¹¹ and *St. Pierre and Miquelon* cases¹¹² as well.

The second approach is that of corrective equity, which uses a two-tiered method: The equidistance method is applied at a first stage, and a shift of the equidistance line is then envisaged if the relevant circumstances warrant it. According to this view, a specific method, ie, equidistance, is part of the law. This approach was first used by the Court of Arbitration in the *Anglo-French Continental Shelf* case of 1977. In that case, the Court interpreted Article 6 of the 1958 Convention on the Continental Shelf as a single rule combining the equidistance method with special circumstances. The Court thus assimilated

¹⁰⁵ *ICJ Reports*, 1969, 53, para 101. See also 49, para 90.

¹⁰⁶ *Ibid*, 50, para 92.

¹⁰⁷ *ICJ Reports*, 1982, 59, para 70. See also separate opinion of Judge Jiménez de Aréchaga, *ibid*, 106, para 24.

¹⁰⁸ Judgment, *ibid*, 79, para 110.

¹⁰⁹ *ICJ Reports*, 1984, 312–13, paras 157–8. See also 315, paras 162–3.

¹¹⁰ *ICJ Reports*, 1985, 38–9, paras 44–5.

¹¹¹ The *Guinea/Guinea-Bissau* case (1985) 89 *RGDIP*, 521, para 89; 525, para 102.

¹¹² The *St Pierre and Miquelon* case (1992) 31 *ILM*, 1163, para 38.

Article 6 to the customary law of equitable principles, which lead to the important consequence of incorporating the equidistance method into customary law.¹¹³ On the basis of the above construction, in the Atlantic sector, the Court applied the equidistance method as a starting point, and, at the second stage, modified the equidistant line drawn on account of relevant circumstances.¹¹⁴ In so doing, it considered equity to be a corrective element. This approach was explicitly ratified by the ICJ itself in the *Greenland/Jan Mayen* case of 1993, which related to the delimitation of continental shelves and fishery zones in a situation of coasts located opposite each other.¹¹⁵ The *Eritrea/Yemen* arbitration (Second Phase) of 1999 also advanced that approach in a maritime delimitation between States with opposite coasts.¹¹⁶ In sum, in the present writer's view, the history of the law of maritime delimitation is a succession of two contrasting approaches to equitable principles.¹¹⁷

B. New Developments in the Qatar/Bahrain Judgment

An important factor that differentiated the courts' approaches may be the situation of the relevant coasts opposite or adjacent, even though it is difficult in some cases clearly to distinguish the two hypotheses. Regarding delimitation between States with opposite coasts, international courts and tribunals tended to adopt the corrective-equity approach. Indeed, except for the *Tunisia/Libya* case, in which the equidistance method was completely rejected, five decisions in this field, ie, the *Anglo-French Continental Shelf* delimitation of 1977 (sectors of the English Channel and the Channel Islands), the *Gulf of Maine* case of 1984 (second sector), the *Libya/Malta* case of 1985, the *Greenland/Jan*

¹¹³ United Nations, 18 *Reports of International Arbitral Awards*, 45, para 70. This view was also expressed in the *Dubai/Sharjah Border* arbitral award rendered on 19 Oct 1981. Applying equitable principles of customary law, the Court of Arbitration considered the island of Abu Musa as a 'special circumstance'. At the same time, it held that the equidistance method was thought generally appropriate for the delimitation of the maritime boundary where that boundary was unaffected by the presence of Abu Musa (1993) 91 *International Law Reports*, 672–3, para 256.

¹¹⁴ The *Anglo-French Continental Shelf* case, op cit, n 113, 114–16, paras 245–9.

¹¹⁵ *ICJ Reports*, 1993, 61–2, paras 53–6.

¹¹⁶ The *Eritrea/Yemen* Arbitration (Second Stage: Maritime Delimitation), (2001) 40 *ILM*, 1005, paras 131–2.

¹¹⁷ Legault and Hankey confirm this view. L Legault, and B Hankey, 'Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation', in Charney and Alexander, op cit, n 104, 203. While the result-oriented equity approach emphasises maximum flexibility, the corrective-equity approach stresses predictability. In this sense, it could be contended that the history of the law of maritime delimitation was that of the dilemma between predictability and flexibility of the law. In fact, on the one hand, in effecting maritime delimitations, flexible consideration of geographical and non-geographical factors is required in order to achieve equitable solution. On the other hand, as with all types of law, that which relates to maritime delimitation should have a certain degree of predictability. How, then, is it possible to ensure predictability while taking into account a diversity of factors in order to achieve an equitable result? In the present writer's view, thus, the quest for a legal framework that would reconcile the predictability and flexibility is at the heart of the law of maritime delimitation. See Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, thesis, Geneva, IUHEI (2002).

Mayen case of 1993 and the *Eritrea/Yemen* arbitration of 1999, chose, wholly or partly, the corrective-equity approach. It is especially worth noting that, even while promoting the result-oriented equity approach, the ICJ, in the *Gulf of Maine* and *Libya/Malta* cases, applied the corrective-equity approach in sectors relating to coasts opposite each other.¹¹⁸ It follows that, so far as delimitations in situations of opposite coasts are concerned, international courts and tribunals have accepted the legitimacy of the corrective-equity approach.

By contrast, for delimitations between States with adjacent coasts, except for the *Anglo-French Continental Shelf* case, which expressly adopted the corrective-equity approach in the Atlantic sector, international courts and tribunals have tended to practice the result-oriented-equity. Even though this does not necessarily mean that the legitimacy of the corrective-equity approach has been rejected altogether for situations of adjacency, it could be said, at least, that international courts and tribunals were less favourable to the corrective-equity approach in delimitations relating to adjacent coasts. An explanation may be that, according to the courts, the risks of inequity arising from the equidistance method were different between opposite and adjacent coasts. On this point, the ICJ in the *Libya/Malta* case held that:

[I]t is well to recall the precise reason why the Court in its 1969 Judgment contrasted the effect of an equidistance line the between opposite coasts and the effect between adjacent coasts. In the latter situation, any distorting effect of a salient feature might well extend and increase through the entire course of the boundary; whilst in the former situation, the influence of one feature is normally quickly succeeded and corrected by the influence of another, as the course of the line proceeds between more or less parallel coasts.¹¹⁹

In the *Qatar/Bahrain* judgment, however, the ICJ explicitly adopted, for the first time in its case law, the corrective-equity approach for the delimitation in the northern sector where the coasts are adjacent. In so doing, the equidistance method is applied in the part of the maritime delimitation relating to adjacent

¹¹⁸ In addition, even in the *North Sea Continental Shelf* judgment, which denied the customary law character of the equidistance method, the Court had accepted the validity of the latter in the case of opposite coasts from the viewpoint of natural prolongation: 'The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line', *ICJ Reports*, 1969, 36, para 57.

¹¹⁹ The *Libya/Malta* case, *ICJ Reports*, 1985, 51, para 70. See also the *North Sea Continental Shelf* cases, *ICJ Reports*, 1969, 37, para 58. In reality, however, there is no practical difficulty in applying the corrective-equity approach to delimitations between States with adjacent coasts; even when the application of the equidistance method at the first stage produces inequitable results owing to geographical configurations such as concavity or convexity, these results can be corrected at the second stage by considering relevant circumstances. Indeed, to cite a precedent, the Court of Arbitration, in the *Anglo-French Continental Shelf* dispute, used the equidistance method in the Atlantic sector where the coasts were in a relation of adjacency. The *Anglo-French Continental Shelf* case, *op cit*, n 113, 116, para 249. Cf G Guillaume, 'Les accords de délimitation maritime passé par la France', in *Colloque de Rouen, Perspectives du droit de la mer à l'issue de la 3e Conférence des Nations Unies* (Paris: Pedone, 1984), 282.

coasts. Furthermore, as explained earlier, the Court, in the *Qatar/Bahrain* case, used the corrective-equity approach to the territorial sea delimitation under customary law. Consequently, every maritime delimitation will be effected on the basis of the corrective-equity approach regardless of the configuration of the coasts.

This unified approach to equitable principles under the corrective-equity is a welcome development for at least three reasons: First, while the result-oriented equity approach is so flexible that it might blur the distinction between decisions based on equitable principles and those taken *ex aequo et bono*, the corrective-equity approach carries a higher degree of predictability by incorporating a predictable method, ie, the equidistance, into the legal domain. Furthermore, as Judge Sørensen indicated in the *North Sea Continental Shelf* cases, there is good reason to argue that the rules of international law should be so framed and constructed as to reduce causes of disagreement and dispute to a minimum. The clearer the rule, and the more automatic its application, the less the seed of discord will be sown.¹²⁰ In that sense, the corrective-equity approach will enhance predictability as a requirement of law in the international community.¹²¹

Secondly, the distinction between adjacent and opposite coasts is, in some cases, hard to make. There is no scientific criterion to be applied. Where the coasts represent hybrid configurations, it will be difficult to choose an approach. It is thus useful to unify the differing approaches to equitable principle under the corrective-equity approach, regardless of the configurations of the coasts.

The third reason relates to the link between the delimitation method and legal title. It is true that, in the *North Sea Continental Shelf* cases, the idea of combining the delimitation method and legal title, suggested by the Netherlands and Denmark, was rejected by the ICJ at that time,¹²² since the legal title over the continental shelf was natural prolongation, not distance. At present, however, there is no doubt that the substance of legal title lies in the distance criterion.¹²³ In this connection, the ICJ, in the *Libya/Malta* case, clearly supported the idea of combining delimitation method and legal title by saying that:

¹²⁰ Dissenting opinion of Judge Sørensen, *ICJ Reports*, 1969, 256.

¹²¹ Bedjaoui expressly states that: 'Ils [les principes équitables] ne constituent pas une forme d'équité autonome, indépendante de la règle de droit et substituable à celle-ci, mais bien une équité *correctrice* intervenant de manière endogène pour éviter que la règle de droit n'aboutisse à un résultat inéquitable dans son application à un cas concret', Bedjaoui, M., 'L' "énigme" des "principes équitables" dans le droit des délimitations maritimes' (1990) 17 *Revista española de derecho internacional*, 384. More generally, Charles De Visscher considered the function of equity as corrective and supplementary. He mentioned that: 'La fonction de l'équité apparaît tantôt comme correctrice, tantôt comme supplétive de la règle de droit. Correctrice, elle peut se limiter à une attitude générale d'application du droit positif dans un esprit libéral. Supplétive, elle remplit dans des cas individuels la fonction de compléter la réglementation positive', Charles De Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Paris: Pedone, 1972), 5–6.

¹²² *ICJ Reports*, 1969, 32, para 46.

¹²³ *ICJ Reports*, 1985, 35, para 39. See further 33, para 34.

The criterion is linked with the law relating to a State's legal title to the continental shelf. [. . .] It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.¹²⁴

Following the deductive approach, the legal title embodied in the distance criterion would, theoretically, lead to equidistance regardless of the configuration of the coasts since equidistance is the only method which does reflect the spatial nature of the distance criterion, for it comes nearest to an equal division of overlapping areas by relying on the distance from the coasts.¹²⁵ Considering that the distance criterion, which is in essence of a *spatial* nature, is the common denominator of jurisdiction of coastal States over maritime spaces, it is conceivable that the equidistance method, derived from the customary criterion of distance, has also a customary nature.

VI. OBSCURITY OF THE CRITERIA FOR EVALUATING DISPROPORTIONATE EFFECTS

The third issue to be examined is that of the obscurity of the criteria to evaluate disproportionate effects. For instance, in considering effects to be given to Qit'at Jaradah, which is situated within the 12-mile limits of the Parties, the Court held that 'if its low-water line were to be used for determining a base-point in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature'.¹²⁶ Accordingly, the Court drew a delimitation line passing immediately to the east of Qit'at Jaradah.¹²⁷ As a result, approximately no effect was given to it. However, it is unclear as to how Qit'at Jaradah creates a disproportionate effect. Indeed, according to the Court's solution, Qit'at Jaradah has no territorial sea despite the fact that it is an island.¹²⁸

Furthermore, in the northern sector, the Court decided that Fasht al Jarim,¹²⁹ which is partly situated in the Bahraini territorial sea, should have no

¹²⁴ Ibid, 46–7, para 61. See also 34, para 34.

¹²⁵ Weil is the principal writer advancing this view: 'La délimitation ne peut pas être comprise en dehors du titre; elle est fille du titre', Weil, op cit, n 20, 53. He concludes that: 'tous les chemins convergent en définitive vers l'équidistance', ibid, 86. Lucchini and Voelckel take the same view by saying that: 'Le titre est, en effet, l'élément fondamental de base. La délimitation ne peut avoir lieu qu'à partir de lui et en s'appuyant sur lui', L Lucchini, and M Voelckel, *Droit de la mer, tome 2, Volume 1: délimitation* (Paris: Pedone, 1996), 211. ¹²⁶ Judgment, op cit, n 1, para 219.

¹²⁷ Ibid, para 219.

¹²⁸ In another part of the judgment, the Court found that Qit'at Jaradah is an island which should be taken into consideration for the drawing of the equidistance line, ibid, para 195.

¹²⁹ Although the legal nature of Fasht al Jarim was not specified, the Court held that, given its location, the low-water line might be used as the baseline from which the breadth not only of the territorial sea, but also of the continental shelf and the EEZ, is measured, ibid, para 245. It appears thus that the Court indirectly regarded it as an island, not a low-tide elevation, by referring to the breadth of the territorial sea as well as to the continental shelf/EEZ. If Fasht al Jarim were a low-tide elevation, it would have no continental shelf or EEZ. In addition, the Court observed that at most a minute part of Fasht al Jarim is above water at high tide.

effect in determining the boundary line since the use of Fasht al Jarim as a baseline would lead to an inequitable result. Again, however, no explanation was made as to the extent to which Fasht al Jarim would produce an inequitable result in drawing an equidistant line. If, as indicated by the Court, giving full effect to Fasht al Jarim would cause an inequitable result, there would have been another solution of giving a partial effect to Fasht al Jarim.

In sum, when disregarding Qit'at Jaradah and Fasht al Jarim, the Court failed to explain how and to what extent giving full effect to those maritime features would have produced a disproportionate effect. It appears that the only criterion for evaluating disproportionate effects was whether there was a sufficient distance between the delimitation line and each coast. Nevertheless, such a criterion is far from objective. On this point, it appears that there is a danger of an excessive subjectivity in the law of maritime delimitation.¹³⁰

As one cannot expect there to be specific rules regarding each and every relevant circumstance to be considered, it is inevitable that, to a certain extent, international courts and tribunals exercise their discretion. At the same time, however, it is necessary to stress that the law of maritime delimitation is not a simple mosaic of ad hoc considerations regarding equity in each case. Since a law which is wholly unpredictable is a contradiction in terms, an effort must be made for limiting such subjectivity by objectivising the criteria for evaluating the equitableness of delimitation lines.¹³¹ Such a goal could be achieved by formulating objective criteria for evaluating relevant circumstances. The quest

¹³⁰ In this respect, Judge Oda stated that: 'I fail to understand how it is possible for the reasoning given by the Court in its Judgment (which is not set out with mathematical precision) to be translated into the precise line determined by reference to the indicated co-ordinates.' Separate opinion of Judge Oda, *ibid*, para 28. Evans also said that: 'the Court is, once again, better at conveying the impression of fidelity to a methodology than at demonstrating how that methodology translates over into the actual line on the map, which in this case is barely less mysterious than has by now become habitual', Evans, *op cit*, n 1, 718. In this connection, it should be recalled that, in the *Greenland/Jan Mayen* case, Judge Oda took the following view: 'Accordingly, and on the premise that there are in fact no rules of law for effecting a maritime delimitation in the presence of overlapping *titles* (not overlapping *claims*), it follows that if the Court is requested by the parties to decide on a maritime delimitation in accordance with Art 36, para 1, of the Statute, it will not be expected to apply rules of international law but will simply "decide a case *ex aequo et bono*."' Separate opinion of Judge Oda in the *Greenland/Jan Mayen* case, *ICJ Reports*, 1993, 113, para 85. See also *ibid*, p 114, para 88; by the same author, 'The International Court of Justice Viewed from the Bench (1976-1993)' (1993) 244 *RCADI*, 151-4. Although Judge Oda's opinion is an extreme one, it is undeniable that the law of maritime delimitation does include a subjective aspect.

¹³¹ It is easy enough to agree with the view of Jennings: 'A structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate', RY Jennings, 'Equity and Equitable Principles' (1986) 42 *ASDI*, 38. Judge Gros expressed a similar view in the *Gulf of Maine* case: 'Controlled equity as a procedure for applying the law would contribute to the proper functioning of international justice; equity left, without any objective elements of control, to the wisdom of the judge reminds us that equity was once measured by "the Chancellor's foot"', *ICJ Reports* 1984, 386, para 41. See also P Weil, 'Le droit international en quête de son identité, Cours général de droit international public' (1992-VI) 237 *RCADI*, 254-60. In this lecture, Weil considered the notion of equity in recent ICJ judgments as changing process from 'une juridisation sauvage de l'équité' to 'une juridisation sage de l'équité', *ibid*, 245-60.

for such criteria, which could only be effected by an accumulation of case law and State practice, is indispensable for the law of maritime delimitation.¹³²

VII. GENERAL CONCLUSION

The significance and problems of the *Qatar/Bahrain* judgment may be summarised as follows:

First, the ICJ peacefully resolved a dispute relating to both the territorial disputes and maritime delimitation. In that sense, the decision in the present case will provide an important precedent resolving a complex problem concerning both territorial and maritime domains.

Secondly, the dual nature of this case gave rise to the question of the interrelation between the two types of disputes. As 'the land dominates the sea' is a fundamental principle, territorial sovereignty shall be determined before drawing maritime boundaries. In the case reported here, however, the Parties were divided regarding the territoriality of low-tide elevations. Having held that low-tide elevations could not be fully assimilated to islands or other land territory, the Court determined sovereignty over the low-tide elevation of Fasht ad Dibal on the basis of the location of the maritime boundary. Consequently, the appurtenance of low-tide elevations was determined by reference to marine criteria, ie, the position of the maritime boundary.

Thirdly, the ICJ in the *Qatar/Bahrain* case expressly applied, for the first time in its practice, the equidistance method to a delimitation relating to adjacent coasts under customary law. Considering that international courts and tribunals have been less favourable to the equidistance method in the context of delimitations between States with adjacent coasts, this may be a landmark in the case law regarding maritime delimitation. In this respect, the *Qatar/Bahrain* judgment marks an important step enhancing the predictability of the law of maritime delimitation. The Court's views are also significant for unifying the approaches to equitable principles in the framework of corrective equity.

Finally, the *Qatar/Bahrain* case, once again, draws attention to the obscurity of the criteria for measuring disproportionate effects. It would appear that, in the present case, the only criterion for evaluating disproportionate effects was the distance between the delimitation line and each coast. That is a subjective test, however. Accordingly, the quest for the objective criteria for appreciating disproportionate effects is of particular importance to the law of maritime delimitation.

¹³² For an analysis of the principal factors taken into account in the case law and State practice, see Tanaka, *op cit*, n 117, 177–379. See also MD Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989).