SEPARATE OPINION OF JUDGE KOOIJMANS

Historical context of dispute — Character of British policy in Gulf region — Maritime security main policy goal — Treaty-relations with local rulers — Non-territorial character of these relations — Absence of colonial structures — Political and legal changes as a result of discovery of oil — Legal framework of treaty relations kept unchanged — Evolution of modern concept of State — No discontinuance of State identity after termination of status British protected State.

Non-applicability of principle of uti possidetis juris *— No transfer of sovereignty — No transformation administrative boundaries — 1939 decision determined international boundary.*

Character of relationship Protecting Power — Protected States — No treaty-based right for Great Britain to decide unilaterally matters of territorial sovereignty — Either consent of local rulers or subsequent acceptance or acquiescence required.

Zubarah — Dispute not territorially defined — Ties of allegiance of Naim tribe with Ruler of Bahrain — Gradual consolidation of Qatar authority — Acquiescence by Bahrain.

Hawar Islands — 1939 decision no arbitral award — Character of procedure leading to 1939 decision — No consent by Ruler of Qatar in 1938 — No subsequent acceptance or acquiescence. Qatar's claim based on original title by virtue of 1868 agreement and proximity principle — No evidence of Qatari display of authority — Irrelevance of cartographic evidence —Bahrain's claim based on ties of allegiance with Dowasir and effectivités.

Janan — not excluded from Hawar group in 1939 decision — Character of 1947 decision —Detachment from group not justified.

I. Introductory Remarks

1. Although I have voted in favour of all but one of the operative provisions of the Judgment which deal with the territorial aspects of the dispute between Qatar and Bahrain, I cannot associate myself with the reasoning which lies at the basis of a number of these provisions. Especially with respect to the issue of sovereignty over the Hawar Islands and over Janan, the Court has in my view taken an unduly formalistic approach by basing itself exclusively on the nature and the legal effect of the so-called 1939 decision of the British Government.

To a certain extent this formalistic approach is also reflected in the Court's position on sovereignty over the Zubarah region, although the (former) Protecting Power never took a decision on the issue, as it did in the case of the Hawars. Nevertheless the Judgment seems to give more weight to the position taken by that Protecting Power than to considerations of substantive law, in particular those on the acquisition of territory.

2. As a result, the Judgment has a rather ambiguous character. Whereas the part devoted to maritime delimitation deals with substantive rules of the law of the sea, including rules regarding the (quasi-)territorial dispute about which Party has sovereign rights over Qit'at Jaradah and Fasht ad Dibal, the part devoted to territorial questions is singularly devoid of considerations on the substance of the law. It deals mainly with the legal effects to be attributed to the position adopted by a third State (Zubarah) or the decision taken by it (on the Hawars and Janan); this third State has beyond any doubt been a factor of primary importance in the history of the Parties and relations between them, but has certainly not exclusively determined those relations. The past surely casts a long shadow over present and future relations between the Parties but the Court singled out only one element from it.

3. It could be argued that this ambiguous character stems from the nature of the dispute before the Court. The land dominates the sea — territorial issues determine matters of maritime delimitation. Territorial disputes have their roots in the past whereas maritime delimitation is future-oriented once the territorial issues have been settled.

4. It is by no means my intention to suggest that the historical aspects should not be considered. On the contrary, only by taking into account the full spectrum of the Parties' history, can their present rights be properly evaluated. By not giving the full historical context its due, however, the Court has in my opinion unnecessarily curtailed its scope for settling the dispute in a persuasive and legally convincing way. To elucidate my viewpoint, I will start with some remarks on the historical context of the dispute, although I certainly do not pretend to be an expert on the history of the Gulf region.

II. The Historical Context

5. "[T]he concept of a State with clearly defined boundaries was totally alien to the political notions of the rulers and the tribes of the area. Political boundaries were dependent on tribal loyalties to particular shaikhs and consequently were subject to frequent change . . . a

> tribe's loyalty was determined by its own interests and could, and at this time often did, alter."[1]

This quotation from a book by an Arab author on the history of the Gulf area seems to give an accurate picture of the situation in the region concerned in the not too distant past.

6. Colonization, which was such an overriding factor during the nineteenth century in other parts of the world, only had a limited effect in the Gulf region. The Western Power which had continuously expanded its influence in the area, Great Britain, never occupied the various sheikhdoms located on the Arab side of the Gulf, encapsulating them in its colonial empire. For reasons which do not need to be analysed here, the British Government preferred to enter into treaty relations with the local rulers and to keep these treaty relations intact, instead of allowing them to be gradually overgrown by administrative structures of the colonial type, as for instance was the case in parts of sub-Saharan Africa.

7. Since the main concern of the British in the nineteenth century was maritime security rather than natural resources, they obtained — and sometimes even imposed — commitments from the local rulers to abstain from acts of piracy and other activities which might endanger maritime peace. They had to intervene from time to time in situations of conflict between the local rulers themselves and to take appropriate measures to settle a dispute in order to prevent it from jeopardizing peace at sea and the safety of the Gulf as a major commercial route. A case in point is the difficulties between the Al-Khalifahs of Bahrain and the Al-Thani of Qatar in the second half of the nineteenth century which culminated on various occasions in clashes around (I do not use the word "about" advisedly) Zubarah.

8. It was in the interest of the British to prevent the existence of overlapping zones of influence for the local rulers since this could lead to competition and tension. Zubarah was an obvious candidate for becoming such an overlapping zone of influence and both in the 1870s and in 1895 the British took measures to nip an armed conflict in the bud, the first time to the detriment of the Ruler of Bahrain, the second time to the detriment of the Ruler of Qatar. In both cases, an important factor for the British was also presumably that a clash between the two Rulers would in all probability also have led to problems between the British Government and the Ottoman Empire, which in the second half of the nineteenth century tried to re-establish its control over the

[1] Muhammed Morsy Abdullah, *The United Arab Emirates: A Modern History*, 1978, p. 291, quoted by Mr. John L. Simpson, QC, in his dissenting opinion to the Award of the Court of Arbitration in the *Dubai/Sharjah Border* case (*International Law Reports (ILR)*, Vol. 91, p. 681).

Arabian peninsula of which the Qatar peninsula was considered to be part.

9. The British attitude may be seen as a recognition of Turkish suzerainty over certain parts of the Gulf region; it would, however, be an unwarranted assumption to interpret this attitude as a recognition of claims of sovereignty or of territorial boundaries between the various sheikhdoms. As the Arbitral Tribunal in the case between Eritrea and Yemen said:

> "the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law" (*Award, Phase One,* p. 137, para. 525)[2].

10. It can therefore be said that the formation of States as territorially based sovereign entities in the Arab part of the Gulf region was very slow and gradual. The British policy to secure maritime peace by apportioning areas of influence to the local rulers, at the same time prohibiting them from interfering in each other's domains, may have contributed to the growth of separate, territorial entities but all this is a far cry from the establishment of well-defined, centrally led spheres of exclusive jurisdiction. In this respect it is noteworthy that the various treaties, in which the British Government took upon itself to provide protection against "aggression *by sea*" (emphasis added) were concluded with the various rulers in their personal capacity. In no way can it be deduced from these treaties that the British promised to guarantee the *territorial integrity* of the sheikhdoms. That concept was simply non-existent at the time.

11. It would be highly artificial indeed to construe the various agreements concluded by Great Britain in 1868 with the rulers in Manama and Doha as providing the latter with a title to the whole of the peninsula, including any islands off the coast. Surely it was Britain's intention in concluding these agreements to keep the Ruler of Bahrain from meddling in affairs on the mainland, but it is highly improbable that the British saw such meddling as equivalent to an intervention in the internal affairs of another sovereign State. Preventing the Al-Khalifa from undertaking activities in Zubarah certainly cannot be seen as recognition of Al-Thani sovereignty over that area. British policy, however, allowed local rulers to consolidate their control over the zones of influence allotted to them and this facilitated the formation of States in a more contemporary sense.

[2] The present author has been told that the Arab word "dirah" can hardly be translated by "territory". See also Muhammed Morsy Abdullah (*op. cit.*, note 1): "*Dirah* in Arabia at this time (nineteenth century) was a flexibly defined area, changing in size according to the strength of the tribe which wandered within it."

12. The need for such a modern concept of State was greatly enhanced by the discovery of oil in the region in the years after the First World War. The Court of Arbitration in the *Dubai/Sharjah Border* case aptly summarized this highly important development when it said that

> "the concept of a boundary in the Western sense was in the early days quite unknown to the nomadic peoples of this region. When, however, some recognition of the potential oil resources of the area was possible, it became necessary to consider the establishment of precise and clearly defined boundaries between the Emirates. It was in the interest of both the Rulers and the concessionary companies that the extent of each concession be capable of exact determination. The prospect of the future exploration and exploitation of oil resources led directly to the first tentative steps toward the establishment of boundaries." (*Award, ILR*, Vol. 91, p. 562.)

13. The new era also led to a change in character of British involvement in the area. Economic and strategic interests took the place of maritime security as the dominant policy goals of a State which set great store by remaining the main power in a part of the world of increasing strategic importance. Great Britain obtained from the local rulers the promise that no concessions for the exploration and exploitation of oil would be granted without its consent. It was, therefore, not only in the interest of the rulers and the concessionary companies that the extent of each concession be capable of exact determination, as the Court of Arbitration in the *Dubai/Sharjah Border* case said, but also in the interest of the Protecting Power. The exact location of boundaries, which had been a matter of minor concern to the British in the nineteenth century, became an issue of direct importance in the twentieth century.

14. As a result, Great Britain's grip on the local rulers undoubtedly tightened and in some aspects its relations with them may have even assumed the features of a quasi-colonial régime, hardly leaving these rulers room for an autonomous policy. It is noteworthy, however, that formally nothing changed in the relationship between Great Britain and the "Protected States", a term which gradually came to be used to indicate the sheikhdoms in the Gulf area.

15. For a legal evaluation of the "Special Relationship" between Great Britain and the Gulf States the unchanged nature of these relations since the conclusion of the original treaties with Bahrain in 1892 and with Qatar in 1916 is highly relevant. It is difficult to give an exact characterization of this relationship. Perhaps the best description was given by Lord Curzon, Viceroy of India, in a speech addressed to the Chiefs of the Trucial Coast in 1903. He said: "your independence will continue to be

upheld; and the influence of the British Government must remain supreme"[3].

And the British Government itself never ceased to refer to the Gulf States as "independent States which Her Majesty's Government are under an obligation to protect".

16. This so-called Special Relationship may have been equivocal from a legal point of view, but it would be wholly unwarranted to place it on a par with a colonial relationship. When in 1971 the special relations between the United Kingdom on the one hand and Bahrain and Qatar on the other came to an end, it can be said that the latter two States (re)gained full independence, but it would be inaccurate to say that they became independent. They were the same States before and after 1971. This is also recognized in the Court's Judgment when it states in paragraph 139 that

> "The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on *those same States* after 1971, when they ceased to be British protected States." (Emphasis added.)

III. The Principle of *Uti Possidetis Juris*

17. The conclusion reached by the Court on the basis of the British decision of 1939 made it, in the Court's view, unnecessary "to rule on the arguments of the Parties based on the existence of an original title, *effectivités* and the applicability of the principle of *uti possidetis juris* to the present case" (Judgment, para. 148).

18. I disagree with the Court's evaluation of the legal effect to be given to the 1939 decision. My vote in favour of paragraph 2 *(a)* of the *dispositif* is based on considerations relating to title to sovereignty, geographical proximity and *effectivités*. Since, however, Bahrain explicitly invoked the principle of *uti possidetis juris* — though at a very late stage — and since this argument is of a preliminary character, as counsel for Bahrain correctly stated, I deem it necessary to give first my views on the question whether this principle is applicable in the present case. If it were, all other grounds submitted by the Parties would have become redundant.

19. In its famous statement in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court called the principle of *uti possidetis*

> "a general principle, which is *logically connected* with the pheno-

[3] Quoted in the Award in the *Dubai/Sharah Border* case, *ILR*, Vol. 91, p. 561.

> menon of the *obtaining of independence*, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers *following the withdrawal of the administering power*." (*I.C.J. Reports 1986*, p. 565, para. 20; emphasis added.)

20. The Chamber's statement in my opinion presumes a transfer of sovereignty from the former colonial power to a newly independent State. Malcolm Shaw is of a similar opinion when, in his seminal article "The Heritage of States: The Principle of *Uti Possidetis Juris* Today" he says that: "The principle of *uti possidetis* functions in the context of the transmission of sovereignty and the creation of a new independent State and conditions that process."[4]

21. Shaw's formulation is broader than that used by the Chamber of the Court, as it also covers the situation where parts of an already independent State achieve independence as the result of the (partial) dissolution of that State. Under those circumstances the principle has been declared applicable (*inter alia*, by the Arbitration Commission of the European Conference on Yugoslavia) with regard to administrative boundaries between the component units of the dissolving State. As the Commission said:

> "Except where otherwise agreed, the former (administrative) boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and in particular from the principle of *uti possidetis*."[5]

According to Shaw the rationale for application of the principle in such non-colonial situations is the same as that underlying the Chamber's position in the *Burkina Faso/Republic of Mali* case: "the same dangers resulting from the break-up of existing States are evident".

22. What the two situations just mentioned have in common is that administrative, i.e., non-international boundaries are turned into international boundaries. It would be nonsensical to apply the principle to a boundary separating the colonial territories of two different colonial powers. That boundary was already an international boundary and as such protected by international law. What distinguishes the present case from the situations in which the principle was applied is of a similar character.

23. The crucial question in my view is: is there *(a)* a transfer of sovereignty from one State to another State as a result of which *(b)* administrative boundaries are invested "with a significance and a purpose that

[4] *British Year Book of International Law*, Vol. 67, 1996, p. 98.
[5] Quoted in Shaw, *op. cit.*, p. 109.

they were never intended to have"[6]. In the present case neither of these questions can be answered affirmatively.

24. As already mentioned (para. 16 above), there was no transfer of sovereignty in 1971 by the United Kingdom to either Bahrain or Qatar; these States kept the same identity as they had before relations with the Protecting Power were terminated. It is often said that the *uti possidetis* principle is only applicable when there is a succession of States. Bahrain has contended that this concept must be interpreted also to mean "replacement of one State by another in the responsibility for the international relations of territory" and that this is what actually occurred in 1971.

25. It is true that both Gulf States were not capable of conducting a foreign policy without a "droit de regard" of the Protecting Power and that in this respect their sovereignty was restricted. But more important than the question whether there was a succession of States in the narrow or the broad sense of the word is the fact that there was no transfer of sovereignty. From a legal point of view there is a world of difference between restricted sovereignty and non-existent sovereignty. The former can be restored, the latter can only be replaced by a transferred, and therefore new sovereignty.

26. Of equal importance is the question whether there was an administrative boundary which was transformed into an international boundary. From the files it is patently clear that the British Government never intended to draw an administrative boundary or to settle a dispute between administrative officials. From the very start it was clear that a decision with regard to the "ownership" of the Hawar Islands was determinative for the international boundaries between two separate entities under international law. The potential concessionaires wanted to know to which capital they had to go in order to apply for a concession. Both parts of the crucial question I formulated earlier must, therefore, be answered in the negative. Already for these reasons the principle of *uti possidetis juris* is not applicable in the present case.

IV. The Territorial Issues: The General Context

27. Since the *uti possidetis* principle cannot be considered to be applicable, the various territorial issues (Zubarah, the Hawar Islands and Janan) must be dealt with separately and on their own merits.

In view of the fact that the position of the British Government has had a considerable impact on the course of events leading to the dispute before the Court, one preliminary point must be made.

28. Neither the Treaties of 1880 and 1892 with Bahrain nor the Treaty of 1916 with Qatar conferred upon the Protecting Power, Great Britain,

[6] Shaw, *op. cit.*, p. 117.

the right to unilaterally determine the boundaries of the sheikhdoms or to decide upon matters of territorial sovereignty. Such decisions could therefore only be made with the consent of the protected States themselves and this seemed not to be in dispute between the Parties, since the question which bitterly divided the Parties was whether such consent to authorize the British Government to decide to which of the Parties the Hawar Islands belong, was actually given. In this respect the protected States had therefore retained their sovereignty. The Court of Arbitration in the *Dubai/Sharjah Border* case explicitly stated with regard to the Trucial States, with which similar treaties had been concluded:

> "It is therefore clear that no treaty authorised the British authorities to delimit unilaterally the boundaries between the Emirates and that no British administration ever asserted that it had the right to do so." (*Award, ILR*, Vol. 91, p. 567.)

29. In this respect it is useful to recall the viewpoint of the Ruler of Bahrain who, after the British Government had informed him in 1947 of the decision on the division of the sea-bed between the Parties, wrote to the British Political Agent: "we ask under which of the treaties between us and the British Government it is laid down that the British Government may make decisions regarding the boundaries without reference or consultation with the Ruler of Bahrain".

30. The fact that the Protecting Power had not been authorized under the relevant treaties to determine unilaterally and on its own initiative the boundaries of the protected States or to settle territorial issues, is in itself an indication that the *uti possidetis* principle is not applicable. The ensuing situation is, namely, completely different from a colonial situation where the administering power had full discretion to draw an administrative boundary and from situations in dissolved or partially dissolved federal States, where the federal organs by internal legal measures established the boundaries separating the various federal units.

31. For our present purposes, however, it is particularly relevant to point out that territorial issues could not be resolved without the consent of the local rulers. If it is not possible to satisfactorily substantiate that such consent was given or that there was subsequent acceptance or acquiescence, a territorial settlement by the British authorities has no legal validity *per se*; any remaining issue must be resolved in the light of the general principles of international law.

32. This in no way implies that the Protecting Power by definition acted *ultra vires* if it acted on its own initiative or unilaterally when confronted with factors of instability originating in a dispute over territory and which might threaten peace in the region. Within the context of the special relations established by the treaties, Great Britain was under an obligation to protect the local rulers and in most cases this might imply

protection against their unfriendly intentions and/or activities with respect to one another. In order to be able to honour its commitments, the Protecting Power acted well within its powers if it tried to defuse existing tensions by taking a position with regard to competing claims or even imposing a settlement. An example of the former approach is British policy with regard to Zubarah, an example of the latter is the 1939 "decision" on the Hawars and the 1947 "decision" on Janan. In order to give such an arrangement legal validity, prior consent or subsequent acceptance or acquiescence is required. In this respect it is irrelevant whether the Protecting Power acted *intra vires* within the context of the Special Relationship. That question simply lies outside the Court's scope.

V. The Question of Zubarah

33. It is difficult to characterize the dispute concerning sovereignty over Zubarah as a dispute over territory or over the location of territorial boundaries. Even in the beginning of the twenty-first century it still carries the nature of contested hegemonic spheres or disputed entitlements to ties of allegiance rather than that of conflicting claims to exclusive spatial authority over a certain piece of land. That peculiar character of this part of the dispute is even today illustrated by the fact that Bahrain neither in the written nor in the oral pleadings defined the extent of the area over which it claimed sovereignty, but simply referred to the Zubarah region. Only on maps annexed to the pleadings did it indicate what was to be understood by that term. But it was only after an explicit request from the Bench to give an accurate description of the territory that the co-ordinates for the locations establishing the perimeters of the Zubarah region were provided.

34. Bahrain bases its claim mainly on historic rights and ties of allegiance with the Naim tribe, which has frequented the Zubarah region over the last two centuries without it being clear whether it is actually settled there. Qatar for its part maintains that these ties of allegiance have only existed with a particular branch of the Naim tribe, although this allegiance by the Al-Jabr branch has not been constant and was at least formally terminated after 1937.

35. As for the historical aspects, it is not disputed that Zubarah was the power base of the present ruling family of Bahrain in the area before they moved to the main island in the Bahrain group where they stayed until the present day, with a number of short interruptions in the nineteenth century when they temporarily returned to Zubarah. Nor is it disputed that until the 1870s Zubarah was considered part of that ruling family's domain.

36. After Great Britain had concluded the agreements with the local

rulers in 1868, it became British policy to look unfavourably on Bahraini incursions into the Qatar peninsula. As I made clear with respect to the historical context, it would be an anachronism to interpret the 1868 Agreement with the Sheikh of Doha as providing this ruler with a sovereign title to the whole of the peninsula. But this certainly does not mean that Bahrain had original title to a rather well-defined territory, a title which even survived an alleged illegal occupation by Qatar in 1937.

37. In this respect it is useful to recall what was said by Mr. Muhammed Morsy Abdullah, namely, that "the concept of a State with clearly defined boundaries was totally alien to the political notions of the rulers and the tribes of the area" (see para. 5 above). Against this backdrop certain effects of post-1868 British policy can be observed: it became more difficult for the Al-Khalifah to maintain their traditional relations with the area, whereas the Al-Thani were in a position to gain control over this part of the peninsula, acting under the umbrella of the Ottomans who (re-)established their authority over the greater part of the Arabian peninsula.

38. Although this consolidation of power by Qatar's ruling family may not have been continuous in character, it was periodically reaffirmed. It was acknowledged by the Protecting Power which only tried to smooth out such frictions between the two ruling families potentially leading to serious conflicts without, however, contesting the claims or rights of Qatar's ruling family to Zubarah at any moment.

39. As for the purported ties of allegiance of the Naim (or at least the Al-Jabr branch) with the Ruler of Bahrain, such ties as have existed — and there is no reason to doubt that they did —seem to have been rather ambivalent. In the *Western Sahara* case the Court stated that ties of allegiance have frequently formed a major element in the composition of a State but that in order to afford indications of the ruler's sovereignty, they must clearly be real and be manifested in acts evidencing acceptance of his political authority (*I.C.J. Reports 1975*, p. 42, para. 88).

40. I have serious doubts whether these criteria are met. From the rather casuistic and often inconsistent evidence presented to the Court, I get the impression that the Naim used these ties of allegiance with the Ruler of Bahrain primarily to serve their own purposes, often to resist the expanding authority of the Ruler of Qatar. Moreover, Bahrain has been unable to demonstrate that such ties of allegiance also existed with other tribes regularly frequenting the Zubarah region or that it even tried to extend its authority over these tribes also; for only in that case could the ties of allegiance transform themselves into a title to territorial sovereignty.

41. In the *Western Sahara* case the Court, though not denying that there had been legal ties of allegiance between the States in the region and some of the Western Sahara tribes, concluded that the materials and information presented to it did not establish any tie of territorial sover-

eignty between the territory of Western Sahara and the neighbouring States (*I.C.J. Reports 1975*, p. 68, para. 162). A similar conclusion may be drawn for the present case.

42. It must, therefore, be said that, whatever historical rights Bahrain may have had in the past, they have long since been set aside by the rights of Qatar, at least as far as their character of rights under public international law is concerned. For it is by no means impossible that these "historic rights" must rather be seen as a reflection of traditional links between the ruling family of Bahrain and Zubarah which call for a different solution than one based on public law. Even members of the ruling family of Bahrain seem to have admitted that their interest in Zubarah is primarily an emotional one which could be satisfied by granting them certain privileges. Also the fact that the Zubarah region was not included in oil negotiations by Bahrain with a number of oil companies in the 1930s (an inclusion which the Protecting Power would never have allowed) and the fact that in the 1944 Agreement between the Parties (the result of mediation by the Protecting Power) the concession agreement concluded between Qatar and the oil company concerned for the whole of the peninsula mainland is explicitly recognized (although the remainder of the 1944 agreement is couched in extremely ambiguous terms) seem to indicate that — at least during a certain period — Bahrain or its Ruler recognized that their claim was not a claim to sovereign rights. Just as indicative is the fact that Bahrain, when it expressed its discontent with the 1947 British decision on the delimitation of the sea-bed, did not claim to be entitled to the sea-bed adjacent to the coast of the Zubarah region.

43. Consequently I agree with the Court that sovereignty over Zubarah appertains to Qatar. However, I am less inclined than the Court to give paramount importance to the position taken by third States, in particular Great Britain and the Ottoman Empire. For me it is more relevant that Bahrain has been unable to transform the rights it may have had over Zubarah in a period when governmental authority had a different connotation than it has nowadays, into sovereign rights in the modern sense of the word (even if that was partly attributable to external factors), whereas Qatar has gradually established its authoritative control over the area even before 1937. I can therefore fully associate myself with the Court's conclusion that the actions of the Sheikh of Qatar in Zubarah in that year were an exercise of his authority over that territory and were not an unlawful act of force against Bahrain (Judgment, para. 96).

VI. The Hawar Islands

44. The Court bases its finding that Bahrain has sovereignty over the Hawar Islands (with the exception of Janan) on the British decision of

11 July 1939. Although I am also of the opinion that the Hawar Islands (including Janan, see VII, below) belong to Bahrain, I completely disagree with the Court's reasoning leading up to that conclusion. In my opinion the British decision provides no basis for Bahrain's sovereignty over the islands.

45. In its pleadings Bahrain contended that the 1939 decision, by which the Hawar Islands were attributed to it, is an arbitral award which has the character of *res judicata* and consequently must be respected by the Court. The Court has rejected this argument and has found that the decision does not constitute an arbitral award since it has not been taken by judges chosen by the Parties and ruling either on the basis of the law or *ex aequo et bono* (Judgment, para. 114). I share this aspect of the Court's perception of the 1939 decision. The concept of arbitration may be used in a very broad sense in that it encompasses all kinds of third-party settlement. When however the character of *res judicata* is attributed to a settlement awarded by a third party, a much narrower definition of the term "arbitration" is required. This does not only hold true for modern times. Arbitration as a procedure for dispute settlement with a final and binding character has for centuries been seen as requiring an agreement concluded by two parties to a dispute on the basis of formal equality to entrust the resolution of that dispute to a mutually agreed third party and to comply with the decision given by that third party. It is the combination of consent to the procedure and of commitment to compliance which produces the *res judicata* character of the decision, although the procedure itself is subject to certain requirements of fairness and equality of arms. What is decisive, however, is that the third party does not act on its own authority or of the instigation of only one of the parties to the dispute.

46. The Court goes on to say that it will determine what is the legal effect of the 1939 decision for the Parties after analysing the events which preceded and immediately followed its adoption. The Court then concludes that the decision was binding on both States and continued to be so. It is on this point that my difficulties arise.

47. The Court does not deny that the Parties' consent was necessary in order to enable the British Government to take a decision with binding effect. The Court construes the exchange of letters of May 1938 between the Ruler of Qatar and the British Political Agent in Bahrain as containing such consent.

48. Before dealing with the Court's interpretation of these letters, it may be useful to point out that the present case fundamentally differs in one important aspect from that of the *Dubai/Sharjah Border* case, although it is in other respects very similar to it. In that case too, the Court of Arbitration concluded that the British decisions (the so-called Tripp decisions) of 1956 and 1957 did not constitute arbitral awards. Thereupon the Court said that this does not mean that those decisions were not binding upon the rulers as administrative decisions, since "[t]he two Rulers, when consenting to the delimitation of their boundaries by

the British authorities, did specifically undertake to respect the decisions that would be forthcoming" (*Award, ILR,* Vol. 91, p. 577).

49. The situation in the *Dubai/Sharjah Border* case therefore differed in two respects from the present one. First, in 1954 the Rulers of the six Trucial States, through a resolution of the Trucial States Council, collectively and formally requested the British Political Agent to determine their respective boundaries. Second, both the Rulers of Dubai and Sharjah explicitly promised not to "dispute or object to any decision that may be decided by the Political Agent regarding the question of the boundaries" between the Emirates.

50. In the present case the situation is decidedly less clear-cut. The background is completely different. It was Great Britain, which had reserved for itself the final say as regards granting oil concessions, that — at the instigation of the Bahraini authorities — came to the conclusion that it was necessary to determine whether the Hawar Islands belonged to Bahrain or Qatar and thus initiated a procedure to settle the question. It may have done so for very good reasons and the decision, which it eventually took, may have been sound and correct, but all this can hardly be called a procedure initiated by the Parties themselves. At that time (three years before the decision was taken and two years before the procedure was formally started) Qatar was not even aware of the existence of a dispute and of the intentions of the other party to the dispute and of the self-acclaimed conciliator/arbiter.

51. I now come back to the exchange of letters of May 1938 between the Ruler of Qatar and the British Political Agent in Bahrain. In a letter dated 10 May 1938, the Ruler of Qatar, who at that moment did not yet know that two years earlier the Ruler of Bahrain had formally laid claim to Hawar, complained about Bahrain making interferences at Hawar. He expressed his confidence that the Political Agent, in order to keep the peace and tranquillity, would do "what is necessary in the matter".

52. By letter of 20 May 1938, the Political Agent replied that "by their formal occupation of the Islands for some time past" the Bahrain Government possessed a prima facie claim to them; he further informed the Ruler that the British Government was willing to give a contrary claim by Qatar the fullest consideration, but would not be prepared to prohibit or restrict the occupation by the Bahraini Government unless and until that contrary claim would be proved or accepted. He warned the Ruler not to do anything which might lead to hostilities with the subjects of Bahrain now in the Hawar Islands. Finally, he reminded the Ruler that the matter would be decided "in the light of truth and justice" by the British Government.

53. On 27 May 1938 the Ruler of Qatar wrote a letter in which he formally submitted his claim to the Hawar Islands, after having expressed

his gratitude for the promise that the British Government would decide the matter in the light of truth and justice. He concluded the letter, saying that he trusted that "His Majesty's Government will administer justice and equity".

54. It is beyond my comprehension how this last sentence can be interpreted as implying the (belated) consent of the Ruler of Qatar to a dispute settlement procedure. In my view, it should rather be seen as an appeal to the British Government to honour its commitments under the 1916 Treaty. Referring to his letter of 10 May, the Ruler wrote in the letter of 27 May:

> "As I considered this (the Bahraini interference in Hawar) an aggressive act, I deemed it incumbent on me to bring the matter first to your notice in view of the relations existing between us, and the right of His Majesty's Government to look into such matters."

55. After having been informed by the Political Agent that the British authorities would do nothing before he would have presented a formal claim to the Hawars, the Ruler of Qatar must have realized that he had little choice but to accept what was happening and to try to make the best of it. But that does not mean that on the basis of free consent he asked the British Government to settle a dispute which had arisen between himself and the Ruler of Bahrain. On the contrary, what actually activated the dispute was the fact that Great Britain realized that in all probability there would be reciprocal claims.

56. Nor is there any indication that the Ruler of Qatar considered the "award" to be a decision which was unassailable. Even after he had been informed that the British decision was final, he expressed the hope that the British Government would reconsider its position on the Hawar Islands and he did so again in a letter of 21 February 1948, after Britain's division of the sea-bed in December 1947.

57. In the light of all these events my conclusion can only be that there was neither consent on the part of the Ruler of Qatar before the procedure was started nor acceptance or acquiescence afterwards. Only by giving a rather imaginative interpretation of these events can the Ruler of Qatar be said to have given his consent, but even then it is difficult to call this free consent given in a timely fashion, as a result of which the outcome of the procedure is opposable to him in spite of the protests he made. I feel that the Court has largely disregarded the political context which, in view of what had already been occurring, gave the Ruler of Qatar hardly any choice but to request the Protecting Power to comply with its treaty-based commitments "in the light of justice and equity".

58. In my opinion this does not mean that the 1939 decision is without legal relevance. To give only one example, Bahrain cannot be said to have acted illegally with regard to the Hawar Islands as long as it acted in

conformity with rights attributed to it. But such a decision is not immune from legal scrutiny (nor does the Court so claim) if the party which was wronged and whose consent was flawed, expressed its opposition to the decision in a timely fashion and regularly reserved its rights; this is what Qatar has done. I cannot agree with Bahrain's claim that Qatar's subsequent attitude implies that Qatar has acquiesced in Bahrain's sovereignty over the Hawar Islands. Before as well as after independence Qatar has sufficiently indicated that it does not renounce its claim to the islands.

59. The Court would, therefore, in my view have been fully entitled to determine the issue of sovereignty over the Hawar Islands had it decided that Qatar did not give its consent. Taking account of the criteria for territorial sovereignty which have been established in international law the Court should, in my view, have determined which of the Parties has a better claim to the islands, just as it was requested to do with regard to Zubarah, which was not the subject of an administrative decision. The 1939 decision is no more than a fact, which of course has to be taken into consideration. Whether it was validly or invalidly taken in the context of the relationship between Protecting Power and protected States is not a matter for the Court to decide.

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60. The dispute over the Hawar Islands is different from that over Zubarah in that it arose only after the region had become economically interesting because of the increasing importance of oil. From the very outset therefore, the dispute, was placed in a modern setting.

The (Western-based) oil companies wished to have concessionary rights over lots which were clearly defined and wished to obtain them from an authority which had — preferably undisputed — territorial sovereignty over such lots. If disputes arose between the entities which could grant a concession for the exploitation of natural resources, such disputes were about the precise course of boundaries or about sovereignty over well-defined pieces of territory and such disputes lend themselves in principle to settlement in conformity with rules and principles of contemporary international law.

61. It should be kept in mind, however, that although the dispute itself may have a typical twentieth-century appearance, the origins of the claims go far back in time. In the present case both Parties base their territorial claims on arguments which are often related to concepts of modern international law. For example, they either maintain or refute that certain acts, performed in the nineteenth or the first decades of the twentieth century, are evidence of possession *à titre de souverain*. In weighing up these arguments one should, however, constantly bear in mind that, as the Court of Arbitration in the *Dubai/Sharjah* case said, "to apply these

rules (of international law), in their contemporary form, to peoples which have had, until very recently, a totally different conception of sovereignty would be highly artificial" (*Award, ILR*, Vol. 91, p. 587).

62. As already indicated, it is an anachronism to construe the 1868 Agreement concluded by Great Britain with the Al-Thani chief in Doha, as providing him with a title to the whole of the peninsula, including the Hawar Islands. It simply cannot be maintained that the Hawar Islands were part and parcel of Qatar right from its purported inception as a sovereign State in 1868 and that Bahrain has to provide evidence of preceding long-standing possession of the islands *à titre de souverain* in order to get its claim recognized as the better one.

63. Even if it is assumed, *arguendo,* that Qatar has original title by virtue of the 1868 Agreement read in conjunction with the agreements of Britain with Bahrain, this would not in itself be sufficient to defeat a claim of Bahrain based on a long-standing display of authority, unless Qatar itself could prove that it actually exercised some authority on the islands. As Judge Huber said (with regard to occupation) in the *Island of Palmas* case:

> "The growing insistence with which international law . . . has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right." (United Nations, *Reports of International Arbitral Awards (RIAA),* Vol. II, p. 839.)

64. Qatar, however, has not been able to establish any facts which would provide evidence of continued effective maintenance of the right vested in its purported original title. Yet it has argued that its original title to the Hawar Islands is confirmed by the principle of proximity or contiguity. And it certainly cannot be denied that from a geographical point of view the Hawar Islands belong to — or are even part of — the peninsula, not only because they are very close to it, but also because they form a fringe following the course of the coastline.

65. The principle of contiguity, although not unknown in international law, is, however, no more than a presumption. To quote again Judge Huber in his award in the *Island of Palmas* case:

> "As a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State." (*RIAA,* Vol. II, pp. 854-855.)

66. Much has been made of the fact that in the paragraph just quoted from, Judge Huber seemed to refer only to islands situated outside territorial waters, which would allow for an *a contrario* interpretation with regard to islands situated within a State's territorial waters. Huber's reasoning, however, is as pertinent to islands lying within territorial waters. It is the display of State activities in order to exclude claims of other States which is the decisive factor.

This also seems to be the view of the Arbitral Tribunal in the *Eritrea/Yemen* case, which stated:

> "there is some presumption that *any* islands off one of the coasts may be thought to belong by appurtenance to that coast unless the State on the opposite coast has been able to demonstrate a clearly better title" (*Award, Phase One*, p. 119, para. 458; emphasis added).

67. In support of its claim to the Hawar Islands, Qatar also relies on cartographic evidence. It has submitted an impressive amount of maps and other cartographic evidence, the greater majority of which convincingly indicates that, for a considerable period of time preceding the 1939 British decision, the Hawar Islands were considered to belong to what eventually became the State of Qatar. The cartographic evidence submitted by Bahrain is, to put it mildly, sparse and rather ambiguous.

68. It does not seem necessary to recall in great detail what the Chamber of the Court had to say about the value of map evidence in the case concerning the *Frontier Dispute* (*Burkina Faso/Republic of Mali*), viz., that maps cannot constitute a territorial title but are usually merely extrinsic evidence which may be used, along with other circumstantial evidence, to establish or reconstitute the real facts (*I.C.J. Reports 1986*, p. 582, para. 54). Since Qatar has in my view not been able to demonstrate that it has title to the Hawar Islands based on the display of authority — even in the most limited way — in combination with a legally recognized mode of acquisition, the cartographic evidence must in my view be discarded.

69. The latter conclusion does not mean that it might not be desirable to try to find an explanation for the indeed remarkable consistency with which the maps seem to apportion the Hawar Islands to Qatar; even if this consistency can partly be explained by the fact that cartographers often refer to already existing maps and in certain respects copy them, this certainly cannot be the only explanation.

70. Of more relevance may be the fact that most cartographers of that period were Westerners who were used to drawing their maps on the basis of generally available information, which could be supplemented by their own expertise and research, and on the assumption of the existence of clearly defined territorial units. If maps have to be drawn of an area where precise boundaries do not exist, and where the emanations of

governmental power do not in the first place rest on territorial exclusivity, it is only logical to assume that islands which are only sparsely and/or temporarily inhabited and which are situated close to the coast of the mainland, are part of that mainland. In such a case, however, the map is more a reflection of the geographical than of the political situation for the simple reason that the political situation is too opaque to reproduce it in a traditional and readily recognizable way.

71. It therefore seems useful to take to heart the words of Judge Huber in the *Island of Palmas* case:

> "If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they are." (*RIAA*, Vol. II, p. 853.)

It is therefore necessary now to deal with the list of *effectivités* submitted by Bahrain in order to see whether Judge Huber's statement holds true for the present case.

72. Just as with regard to its claim to Zubarah, it is the existence of ties of allegiance between the Ruler of Bahrain and the tribes which had settled on Hawar Island, in particular the Dowasir, which forms the core of Bahrain's argument. It has given itself great pains not only to prove these ties of allegiance but also to present the *effectivités* which evidence the "genuine display or exercise of authority".

73. In the period before 1936 — the starting-point of the dispute — these *effectivités* are nebulous and ambiguous at most, and often rest on hearsay recorded by foreigners. It is, however, beyond doubt that links existed between the main island of Bahrain, in particular the town of Zellaq (the main centre of population of the Dowasir) and Hawar, to which these Dowasir regularly moved. Whether this translated itself into "ties of allegiance" towards the Ruler of Bahrain is less clear from the evidence submitted to the Court, although it is certainly not unthinkable since their main residence was in Bahrain and there was no other ruler in the area to whom they could feel allegiance, certainly not the Ruler in Doha, of whose existence they well may have been unaware considering that the coastal area opposite the Hawars was uninhabited.

74. It is true that such ties were not continuous and that they were sometimes temporarily interrupted, as was regularly the case with such ties in the region. In the 1920s, for instance, a conflict arose between the Ruler of Bahrain and the Dowasir of Zellaq, as a result of which the latter moved from Bahrain Island to the Arabian peninsula, returning to Bahrain only after a number of years. It is highly improbable, however, that the inhabitants of Hawar, which could hardly be called a hospitable

place, were able to carry on without a basis of support on Bahrain Island and there was no other place for them to turn to.

75. However, it is the *effectivités*, presented as evidence of a display of authority, which are less persuasive. It is by now quite clear that Hawar was inhabited, at least on a periodic basis, as proved by the existence of cisterns, houses, cemeteries, etc. There is also no reason to doubt that from time to time measures were taken by Bahraini officials with regard to events which had taken place on Hawar. What is much less clear, however, is whether this is a reliable indication that the Ruler of Bahrain considered the Hawars to be part of his domain; no evidence is provided of a *continuous* display of authority nor of the fact that the people in Hawar turned on their own initiative to the Ruler of Bahrain when they felt they needed help.

Illustrative in this respect is that, before 1936, no mention is made of Hawar in the Annual Reports produced by the Bahraini authorities.

76. At first sight, therefore, the *effectivités* presented by Bahrain seem hardly sufficient to provide conclusive evidence of what the Permanent Court of International Justice in the *Eastern Greenland* case called two elements, each of which must be shown to exist, namely "the intention and the will to act as sovereign and some actual exercise of or display of such authority" (*P.C.I.J., Series A/B, No. 53*, pp. 45-46), even if it is considerably more than has been presented by Qatar. These two concepts, however, must be appraised in relation to the legal and political context of the relevant period and of the region concerned. And these concepts had at that time definitely a different connotation in the Gulf area than they had in the relations between Western and European States. It would, therefore, in my opinion be wrong in the present case to draw a parallel with the Court's finding in the *Kasikili/Sedudu Island (Botswana/Namibia)* case to the effect that — in spite of the fact that links of allegiance might have existed between the Masubia tribe and the Caprivi authorities — it had "not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities" (*Judgment, I.C.J. Reports 1999 (II)*, p. 1105, para. 98). In that case the authorities concerned were the authorities of European colonial powers which were well acquainted with notions of sovereignty and exclusive jurisdiction.

77. Much more appropriate for the present case seems to be the Permanent Court's finding in the *Eastern Greenland* case that

> "It is impossible to read the records of the decisions in cases on territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, *provided that the other State could not make out a superior claim.*" (*P.C.I.J., Series A/B, No. 53*, p. 46; emphasis added.)

The correct conclusion in my opinion is that one can be "satisfied with very little in the way of the actual exercise of sovereign rights" by Bahrain, since the other State, Qatar, "could not make out a superior claim". *Tertium non datur* according to the submissions of both Parties.

78. To put it in other words, 1916, the year of the final withdrawal of the Ottomans from the peninsula and of the establishment of a special relationship with Great Britain, may be seen as the year of Qatar's coming-of-age, providing it with a potential comprehensive legal title to the whole of the peninsula. Whereas Qatar, both before 1916 (when that potential title was not yet complete because of Ottoman sovereignty) and after, succeeded in consolidating its authority in the Zubarah part of the peninsula, it never even tried to do so with regard to the Hawars. The rather meagre *effectivités*, built up in that period by Bahrain, must be deemed to prevail over Qatar's potential title to the islands, since there was not even a vestige of display of authority by that State.

79. It is for these reasons that I concur with the Court's finding in paragraph 2 of the operative part of the Judgment that Bahrain has sovereignty over the Hawar Islands. I have found it necessary to set out the reasons which brought me to that conclusion, since I disagree with the Court's reasoning.

VII. The Question of Janan

80. The question to which of the Parties Janan Island belongs is a rather peculiar one. Bahrain based its claim to the island on the fact that it was not *excluded* from the Hawar group when the British Government decided in July 1939 that the Hawar Islands belonged to Bahrain. Qatar, for its part, bases its claim on the fact that Janan was explicitly not *included* in the Hawar group when Great Britain gave its "decision" on the division of the sea-bed between the Parties in December 1947.

81. These different interpretations of the position of the British Government are apparently the main — if not the only — reason why sovereignty over Janan has been presented as a separate issue. On more substantive matters, the Parties invoke the same arguments as they do with regard to the Hawar group as a whole; Qatar bases itself primarily on the principle of proximity, Bahrain on its alleged display of sovereignty. There is no reason whatsoever to diverge from my views on these issues with respect to the Hawar Islands in general when it comes to Janan Island in particular.

82. The only remaining problem, therefore, is how to deal with the ostensibly incongruous position taken by the British Government in 1939 and 1947 respectively. What are the legal implications involved?

83. In the letters to the Rulers of Bahrain and Qatar of 11 July 1939 reference was only made to "the ownership of the Hawar Islands". No reasoning was given for the decision to award them to Bahrain.

Of more relevance is the fact that in the letter from the Political Agent in Bahrain, Sir Hugh Weightman, to the Political Resident in the Gulf, which contained the arguments for the British decision, no mention was made of a special position with respect to Janan Island (Judgment, para. 128). From the history of the oil concessions negotiated during the 1930s, it is, however, evident that Janan was considered part of the Hawar group. This is confirmed by a letter from Colonel Hay, Political Resident in the Gulf, to the India Office, written in 1947. In this letter, in which he gave his recommendations with regard to the division of the sea-bed, he wrote: "I must call attention to the point that Janan was definitely included in the area for which Petroleum Concessions Limited were negotiating with the Bahraini Government in 1938-39".

84. In my view, Bahrain had every reason to believe that the British decision included Janan in the Hawar group, and that, accordingly, it had sovereignty over it. Neither was there any reason for the Ruler of Qatar to believe that it was *not* included and in his various letters and protests from that period, no specific mention of Janan was made.

85. The letter of 23 December 1947 to the Rulers of Bahrain and Qatar, containing the views of the British Government on the delimitation of the sea-bed, was the very first document which made specific mention of Janan Island, excluding it from the Hawar group. Its legal status is not very clear. In the introductory paragraph, it is stated that "apart from any other considerations" (which are not further indicated) a delimitation of the sea-bed is deemed necessary because of the operations of the oil companies in the territories of Bahrain and Qatar".

86. Although paragraph 3 of the letter makes reference to "this decision", the words and expressions used make clear that it only reflects the views of the British Government on the sovereign rights the Parties already have. It can therefore not be seen as an instrument which attributes such rights. In paragraph 4 it is explicitly stated that the Sheikh of Bahrain *is recognized* as having sovereign rights in the Hawar Islands, it being added that "Janan Island" is not regarded as being included in the islands of the Hawar group. At best, therefore, the letter can be seen as a (belated) interpretation of the 1939 decision by the British authorities, and not as a rectification of it with binding effect.

87. The reasons why Janan was detached from the Hawar group can be found in the advice of the Political Agent in Bahrain of 31 December 1946 and is summarized in a letter of the Political Resident in the Persian Gulf of 18 January 1947. I do not find these arguments very persuasive. The decisive factor seems to have been that the channel between Hawar (the main island of the group) and Janan was the main access to the landing place of the PCL oil company in Zakarit (Zukrit) Bay, off mainland

Qatar. It was considered undesirable that Bahrain would be able to block this access, which it could do if it had sovereignty over both Hawar and Janan. The decision, therefore, was taken on the basis of political considerations which, moreover, did not yet play a role in 1939 when Great Britain awarded the Hawar group to Bahrain.

88. The conclusion seems justified that, until 1947, Janan was considered by the British authorities, as well as by both Bahrain and Qatar, to be part of the Hawar group. In this respect, it may be observed that, when Bahrain beaconed Janan Island after the 1939 decision, the British authorities did not protest, although they had been informed. Even if the display of governmental authority by Bahrain must be deemed rather weak with regard to the main island, there does not seem to be any reason to detach one of the smaller islands from the group, unless Qatar could demonstrate that it has a stronger claim to that particular island. Since this is not the case, Janan should be seen as part of the Hawars and consequently as being under the sovereignty of Bahrain. Whether this is an application of the principle of the natural or physical unity of a group of islands is in my opinion not relevant, since this principle is at best a rebuttable presumption which in itself is not creative of title. Of decisive importance is that, when in the 1930s the dispute over the Hawars arose, both Parties as well as the Protecting Power never considered Janan Island as separate from the group. Since Janan must be considered part of the Hawars over which Bahrain has sovereignty, I have voted against operative paragraph 3 of the Judgment.

CONCLUDING REMARK

89. Although I fully agree with the Court's reasoning on the maritime delimitation, and although I have also voted for paragraph 6 of the operative part of the Judgment, it scarcely needs explaining that I cannot agree with that part of the single maritime boundary that runs westward between Jazirat Hawar and Janan. Since in my view Janan is part of the Hawars and thus belongs to Bahrain, the boundary should run southwestward between Janan and the coast of the peninsula. However, as the Court ruled that Janan belongs to Qatar and drew the maritime boundary in conformity with that finding, I saw no reason to express my slight disagreement by casting a negative vote.

(Signed) P. H. KOOIJMANS.