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The PRESIDENT: Please be seated. The sitting is open and I give the floor to Professor Eric David.

Mr. DAVID: Thank you, Mr. President. Mr. President, Members of the Court, this morning I broke off at the point when I had just started to deal with the second item of this presentation concerning the basis of Qatar's title to Zubarah and had shown you that the basis of this title is bound up with the establishment of Qatar's title to the whole of the peninsula. The presentation I am about to make is limited to the highly unlikely case in which it is considered that that title has not yet been established and that Zubarah has a status separate from that of the rest of the peninsula. Six years are important, namely those from 1873 to 1878. And I shall now start with 1873.

A. 1873

13. In 1873, when Bahrain, relying on its authority over the Naim, for the first time presented the British with a claim to Zubarah¹ because the Turks had claimed the submission of the Chief of the Naim to them, the British immediately expressed doubt as to the reality of the rights Bahrain claimed to have over either Zubarah, the Naim or the rest of the peninsula². Major Grant, First Assistant to the Political Resident, wrote in August 1873 concerning the Ruler of Bahrain's claim over the Naim, that, after an investigation:

"he had no means of forming an opinion on the claim advanced by the Bahrein Chief to sovereignty over the Naim tribe, but from verbal information he inferred that any power exercised by Bahrein of late years over that tribe had been merely *nominal, if it existed at all*"³.

Thus the British, who had been in the region for half a century — the first Political Residents in the Gulf date from 1822-1823⁴ — stated that they knew nothing of the ties that the Ruler of Bahrain claimed existed between himself and the Naim, and all they would concede, on the basis of

¹Memorial of Qatar, para. 8.16.

²Memorial of Qatar, para. 8.17.

³Memorial of Qatar, Ann. II.8, Vol. 4, p. 188 (emphasis added).

⁴Memorial of Bahrain, p. 311.

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information gathered at that time, was that if Bahrain did have any authority over that tribe, it was purely nominal.

The Political Resident fully confirmed this view and in his reply dated 28 August 1873 emphasized the uncertain character of Bahrain's rights: "the Bahrein Chief *had not the power*, if he wished, to protect tribes residing in Katar, and . . . he could not expect Government to interfere where the rights were involved in *uncertainty*"⁵.

Mr. President, Members of the Court, I have read these quotations because they lie at the origin of the position that the British were to maintain consistently at the time, and for nearly a century afterwards⁶, namely their refusal to endorse Bahrain's claim to Zubarah.

Let us turn to the second important period, 1874-1875.

B. 1874-1875

14. In 1874 the Chief of a rival branch of the family of the Rulers of Bahrain, Nasir bin Mubarak, fled to the mainland to place himself under the protection of the Turks. With a troublesome tribe, the Beni Hajir, he threatened to attack Bahrain from the coast of Qatar but was dissuaded by the presence of British vessels and also, it should be noted, by the orders of, among others, Sheikh Mohammed bin Thani⁷.

15. At the end of the year the Ruler of Bahrain was afraid that Nasir bin Mubarak would attack the Naim of Zubarah, and he requested authorization from the British to be allowed to help them. The Government of India reiterated on this occasion the statements made in 1873 to the effect that the Ruler of Bahrain had no possessions on the mainland and that his rights there were at best uncertain⁸, and, consequently, he should not interfere on the mainland in any way. "Not interfere on the mainland", Mr. President, that was the *leitmotiv* that the British repeated constantly to the Ruler of Bahrain throughout 1875⁹ and in 1877¹⁰, some examples of which you can see on the screen.

⁵Memorial of Qatar, Ann. II.8, Vol. 4, p. 188 (emphasis added).

⁶*Ibid.*, Reply of Qatar, Ann. III.4, Vol. 3, p. 29; Memorial of Qatar, Ann. III.287, Vol. 8, pp. 427 *et seq.*

⁷Memorial of Qatar, Ann. II.7, Vol. 4, pp. 59-60.

⁸Memorial of Qatar, Ann. II.8, Vol. 4, p. 192.

⁹Memorial of Qatar, Anns. III.30, III.32 and III.33, Vol. 6, pp. 147, 155 and 159.

¹⁰Memorial of Qatar, Anns. II.7 and II.8, Vol. 4, pp. 67 and 195.

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In sum, the British consistently maintained the same position they had held two years earlier, i.e., the lack of any foundation for Bahrain's claims to Zubarah. And in 1878 not only was this point confirmed, but also the authority of the Al-Thani in Zubarah.

C. 1878

16. In this year, 1878, the British, having learnt that some people from Zubarah had committed acts of piracy, requested the Turks to punish those at fault. Meanwhile, the people of Qatar, who had also had cause to complain of raids and acts of piracy by the Naim of Zubarah, laid siege to the Murair fort alongside the ruins of Zubarah under the leadership of Jassim bin Thani and Nasir bin Mubarak. When the Political Resident learned of the siege he offered not the slightest opposition, despite the Ruler of Bahrain's renewed request for intervention on the side of the Naim. The Turks were also present. They sent a gunboat, not to prevent Bahrain from intervening, but, on the contrary, to prevent the Qataris from subsequently attacking Bahrain. The Turks then negotiated the surrender of the Naim, most of whom were transferred to Doha. What must be stressed is that both the British *and the Ruler of Bahrain* believed at that time that the best solution for ensuring the security of Bahrain was for the Turks to occupy Zubarah permanently¹¹.

17. In other words, even if one were to make the extraordinary assumption that Zubarah's legal status was still not bound up with that of the rest of the peninsula, the fact remains that the events of 1878 confirm its integration with the peninsula. The standard conditions for the acquisition of sovereignty were fulfilled: first, the intention to act in the capacity of sovereign authority and the effective exercise of such authority¹² are apparent in the siege of Zubarah by Sheikh Jassim and the surrender of its occupants, i.e., the Naim; second, the relevant authorities, i.e., both the British and the Ruler of Bahrain, accepted, without any reservation as regards sovereignty or other rights, that Zubarah should thenceforth be occupied by the Turks. This event is obviously of the utmost importance.

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18. After 1878, however, the Turks did not occupy Zubarah, and subsequently the British did not accept Zubarah's being occupied by them when they wanted to appoint representatives there.

¹¹Memorial of Qatar, Ann. II.5, Vol. 3, pp. 224-225; Ann. II.8, Vol. 4, p. 199; Counter-Memorial of Qatar, para. 5.17 (2); Reply of Qatar, para. 6.8 (c).

¹²*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45-46.

However, this in no way alters the fact that Sheikh Jassim Al-Thani exercised his authority at Zubarah in 1878, that Bahrain itself accepted the Turkish presence there without reservation of rights and that Article 11 of the Anglo-Ottoman Convention of 1913, confirmed by that of 1914, stipulates, in a phrase with which you will be familiar, that "the peninsula will be governed as in the past by the shaykh Jasim-bin-Sani and his successors". In speaking of the "peninsula" as a whole, the British confirmed that their opposition to the Turkish presence in Zubarah did not in any way entail recognition of the rights claimed by Bahrain.

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19. Accordingly, Mr. President, Members of the Court, there are four purely factual aspects whereby the period from 1873 to 1878 can be distinguished — even summed up — namely:

- Britain's complete scepticism as regards the rights claimed by Bahrain in Zubarah;
- its opposition to any interference by Bahrain in Zubarah alongside the Naim;
- the exercise of authority by Sheikh Jassim in Zubarah in 1878;
- the acceptance by both Bahrain and the British that Zubarah should be controlled by the Turks.

And how does Bahrain deal with each of these points? Let us, if you will permit, take them one by one.

20. Regarding British scepticism about Bahrain's supposed rights in Zubarah, Bahrain's Memorial, Counter-Memorial and Reply have very little to say. The Counter-Memorial merely quotes a passage in which Saldanha speaks of the uncertainty of the British concerning feudal rights between tribes and the Ruler of Bahrain's inability to protect tribes living in Qatar. Bahrain then concludes that this feeling of uncertainty on the part of the British quickly gave way to the conviction that the Naim were a Bahraini tribe¹³. In actual fact, all that Bahrain manages to show is that the British found that on several occasions the Ruler of Bahrain made gifts to the Naim or their Chief — without, moreover, any significant benefit in return¹⁴ — but they did not infer from this that Bahrain had any sovereign title over Zubarah.

¹³Counter-Memorial of Bahrain, para. 46.

¹⁴Counter-Memorial of Bahrain, para. 51.

21. Bahrain's Memorial is silent on the subject of British opposition to any Bahraini intervention alongside the Naim, and it is not until the Counter-Memorial that Bahrain admits that this opposition existed. In Bahrain's view, it stemmed from the anxiety of the British not to be caught up in a war with Turkey¹⁵. This explanation is true, but only partially: what Bahrain omits to say is that the British desire to avoid complications with Turkey was also determined by the uncertain or nominal character of Bahrain's supposed rights to Zubarah.

22. We now come to Jassim bin Thani's siege of Zubarah in 1878: Bahrain views this event — and here I reproduce almost word for word what Bahrain says in its Memorial — Bahrain views the siege of Zubarah as an example of a British refusal to allow the Al-Thani and the Turks to exercise authority in Zubarah¹⁶.

Mr. President, Members of the Court, when it is recalled that this siege took place before the very eyes of the British, it is somewhat difficult to agree with Bahrain when it asserts that the British opposed this action. It is of course always possible to deny the obvious and say that a cat is not a cat, but this will deceive only those who have problems with their sight and are not allergic to cats.

23. As regards the acceptance by both the British and the Ruler of Bahrain that Zubarah should be occupied by the Turks¹⁷, in neither its Memorial, nor its Counter-Memorial nor its Reply has Bahrain anything to say on this point.

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24. Bahrain thus has no serious response to the arguments put forward by Qatar regarding Qatar's initial title to Zubarah, a title that was acquired in the middle of the nineteenth century at the same time as Qatar acquired title to the peninsula and, if Zubarah's status is believed to have differed from that of the peninsula, at the latest in 1878.

¹⁵Counter-Memorial of Bahrain, paras. 98 *et seq.*

¹⁶Memorial of Bahrain, paras. 167 *et seq.* and para. 172.

¹⁷Memorial of Qatar, Ann. II.5, Vol. 3, p. 225.

We shall now show that Qatar's title to Zubarah was continually confirmed in the years that followed. This brings me to the third part of my statement.

III. CONFIRMATION OF QATAR'S SOVEREIGN TITLE TO ZUBARAH

25. The confirmation of Qatar's title to Zubarah stems on the one hand from Qatar's exercise of authority in Zubarah, and on the other from the general recognition of this title by other States. My treatment of these two points will be succinct and condensed, the details having already been given in Qatar's written pleadings. I shall begin with Qatar's exercise of authority in Zubarah after 1878.

A. The exercise of authority by Qatar in Zubarah after 1878

26. The best-known examples of Qatar's exercising authority in Zubarah occurred in 1889, 1892, 1895, 1911, 1935 and 1937.

- 1889: Sheikh Jassim gave a follower of the Al-Khalifah permission to reside in the fort of Murair, near Zubarah, and later expelled him as a result of a dispute¹⁸.
- 1892: A Turkish document reveals that Jassim levied taxes on pearl-fishermen throughout the peninsula, including the administrative sub-divisions (*nahiyes*) of Zubarah and Udeid¹⁹.
- 1895: The episode of Jassim's harbouring in Zubarah the Al-bin-Ali tribe who had left Bahrain following a conflict with its Ruler. It will be recalled that the episode ended swiftly when the British decided to destroy Jassim's dhows — his boats, that is — not because of any supposed rights of Bahrain to Zubarah, but solely in order to prevent the possibility of Jassim's forces invading Bahrain²⁰. In its Memorial Bahrain does not hesitate to assert that the British reaction was motivated by the Ruler of Bahrain's title to the region. Bahrain writes — and I quote: "citing as its motivation the Ruler's title to the Zubarah region, Britain dispatched a warship to Zubarah . . ." ²¹ (*«mettant en avant [le] titre [du souverain] sur la région [de Zubarah], la Grande-Bretagne envoya un navire de guerre à Zubarah»*).

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¹⁸Reply of Qatar, para. 6.8 (e).

¹⁹Reply of Qatar, para. 6.8 (f).

²⁰Memorial of Qatar, para. 8.24; Reply of Qatar, para. 6.8 (g).

²¹Memorial of Bahrain, para. 179.

Mr. President, Members of the Court, we have not found either in the documents relied upon by Bahrain or in our own documents any indication whatever that the British reaction was motivated by any "Ruler's Title to the Zubarah region" («titre du souverain sur la région de Zubarah»). On the contrary, Qatar has quoted a number of texts showing that the sole concern of the British was simply to ensure Bahrain's security and thus to prevent Bahrain from being attacked by sea²². The question of Bahrain's title to Zubarah did not arise.

— 1911: The Ruler of Bahrain himself requested from Sheikh Jassim, through the British Political Agent at Bahrain, permission to rent the site of Zubarah for an annual payment of 10,000 rupees, an offer Jassim flatly refused [judges' folders, No. 60]²³. According to Bahrain, this proposal is no proof that Qatar controlled the whole peninsula because, first, Abu Dhabi had made a similar offer regarding the region to the south and east of Doha and, second, the British were merely hoping to obtain Jassim's *de jure* recognition of a *de facto* situation²⁴. In all honesty, Bahrain's reasoning is somewhat beyond us: first, the fact that Abu Dhabi made the Ruler of Qatar the same offer as Bahrain made for Zubarah implies nothing other than recognition that the territory which it was sought to rent belonged to Qatar — one rents a property from its owner or his agent, not from a third party; second, if, as Bahrain says, the British wanted legal confirmation of a situation that pertained in fact, then Qatar's refusal to rent Zubarah to Bahrain, and the acceptance of this refusal by both the British and Bahrain, entail, in the very terms used by Bahrain, *de jure* recognition of Zubarah's status, that is, its belonging to Qatar.

15 — 1935: The concession granted by Qatar to APOC covers the whole peninsula as shown in the map annexed to the agreement; it therefore constitutes an act of sovereignty *par excellence*²⁵. Since this point has already been dealt with in detail by my learned colleagues, Mr. Shankardass and Sir Ian Sinclair, I need say no more on the subject.

²²Counter-Memorial of Qatar, para. 5.19 (7-9); Reply of Qatar, para. 6.8 (g).

²³Memorial of Qatar, para. 8.26.

²⁴Counter-Memorial of Bahrain, para. 121.

²⁵Memorial of Qatar, paras. 6.26 and 8.29; Reply of Qatar, para. 6.8 (p).

— Finally, 1937: The Ruler of Qatar's action, aimed at asserting his authority over the Naim in Zubarah²⁶, is again a typical act of sovereignty, but Bahrain does not hesitate to describe this action as an act of "aggression" incompatible with the law of the League of Nations and the Briand-Kellogg Pact²⁷. I shall not dwell on the merits of this description either, since, despite what Bahrain suggests, the "aggression" never even attracted the attention of the League of Nations.

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27. To conclude, Mr. President, the facts I have just put forward confirm that Qatar exercised sovereignty in Zubarah unopposed by the British. Given the social context and geographical conditions of a Gulf Sheikhdome at this period, the presence of Qatari authorities in Zubarah bears full witness to this exercise of sovereignty. In any case Bahrain has no analogous evidence of acts of sovereignty over Zubarah to rely on. In this regard, its only argument rests on the presence of the Naim, an issue which will be dealt with later.

B. Recognition of Qatar's title to Zubarah by other States

28. Qatar's title to Zubarah has been recognized on many occasions, both by Bahrain itself — a point which will be developed by Mr. Shankardass — as well as by the British, the Turks and other nations.

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1. The British position

29. As far as the British are concerned, they recognized that Zubarah belonged to Qatar each time the question arose. Among the more important examples, apart from those already mentioned, including the maps presented by Mr. Bundy, are Article 11 of the Anglo-Ottoman Convention of 1913, confirmed by that of 1914, and the Treaty of 1916 between Britain and the Ruler of Qatar. It

²⁶Memorial of Qatar, paras. 8.39 *et seq.*

²⁷Memorial of Bahrain, para. 31.

has already been remarked that these treaties recognized the Ruler of Qatar's authority over the whole peninsula²⁸.

Later, at the time of the 1937 events, the British repeated in every way possible that the Ruler of Qatar had a perfect right to act as he did with regard to the Naim.

30. From 1937 onwards, the sole concern of the British was to find a solution which might improve relations between Bahrain and Qatar without opening up the question of Qatar's sovereignty over Zubarah. It was with this in mind that Great Britain brokered the agreement of 24 June 1944 [judges' folders, No. 61]²⁹, which provided for the restoration of friendly relations between the two Rulers and contained a mutual undertaking to do nothing that might affect the existing situation, including that of the oil concession granted by Qatar.

According to Bahrain, this agreement, which will shortly be dealt with in more detail by Mr. Shankardass, obliged Qatar to withdraw the guards from the fort which had been built at Zubarah. Qatar consented to withdraw the guards from the fort but stationed them nearby. Bahrain protested against the presence of the guards and also against a number of other actions carried out at Zubarah. Significantly, on no occasion did the British oblige Qatar to put an end to the disputed actions³⁰.

31. In 1947, the British carried out a delimitation of the two Sheikhdoms' maritime areas³¹, taking no account of Bahrain's claims to Zubarah and notably without offering Bahrain any maritime area off Zubarah, which would have been required had Zubarah belonged to Bahrain. What is more, Bahrain never protested on this particular issue.

32. In 1950, Qatar accepted a new arrangement allowing a limited number of Bahrain's subjects to go to Zubarah. To the British it was clear that Bahrain was not making any claim to sovereignty over Zubarah and they notified Qatar to this effect [judges' folders, No. 62]³².

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²⁸Memorial of Qatar, paras. 8.27-8.28; Reply of Qatar, para. 6.8 (*m*) and (*n*).

²⁹Memorial of Qatar, Ann. I.I.240, Vol. 8, p. 183.

³⁰Memorial of Qatar, Anns. III.244, III.247, III.254, III.261 and III.267, Vol. 8, pp. 201, 214, 257, 297 and 325.

³¹Memorial of Qatar, Ann. III.256, Vol. 8, p. 267.

³²Memorial of Qatar, Ann. III.266, Vol. 8, p. 317.

However, following incidents in 1952, Qatar prohibited access to the site of Zubarah, without any objection on the part of the British³³.

33. In 1954, the British sought to propose a new arrangement which, with some alterations, accorded with previous agreements, but again without success³⁴.

34. Finally, following a new request by Bahrain on 13 June 1957, in which it explicitly asked the British to decide upon its rights in Zubarah and *Bahrain committed itself in advance to abide by their decision*, the British replied formally, on 10 August 1957, that they had never supported any Bahraini claim to sovereignty over Zubarah and that Qatar was at liberty to control access to it as it pleased³⁵.

Bahrain made a determined attempt to resurrect its claim in 1961, but the British maintained the position which they had taken in 1957³⁶.

35. What is Bahrain's response to all this? In substance, its thesis is that the British position was a political rather than a legal one and that the British had always hesitated as to what position to take³⁷. This argument can only be upheld if we turn a blind eye to the innumerable British documents that officially reject Bahrain's claims and fasten on to certain British statements in which the author, without knowledge of the facts in their entirety, expresses his uncertainty. Nevertheless it remains true that the final decisions, reached after a thorough study of the question, reveal that from 1873 to 1961 the British rejected Bahrain's thesis *in full awareness of the issues involved*.

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2. The Turkish position

36. That Turkey claimed sovereignty over the whole Qatar peninsula, including the site of Zubarah, is very clear from the fact that it was the exercise of this sovereignty over Zubarah that was at the origin of the problem; it was because the Turks wished the Naim to submit to them in 1873 that the Ruler of Bahrain then announced his claims to Zubarah. The Turks were further

³³Memorial of Qatar, Anns. III.270 and III.272, Vol. 8, pp. 343 and 351.

³⁴Memorial of Qatar, Anns. III.276 and III.283, Vol. 8, pp. 369 *et seq.* and 403 *et seq.*

³⁵Memorial of Qatar, Ann. III.284, Vol. 8, pp. 411-412.

³⁶Memorial of Qatar, Ann. III.287, Vol. 8, p. 425.

³⁷Counter-Memorial of Bahrain, paras. 98 *et seq.*

present in Zubarah in a military capacity at the time of the events of 1878 and 1895, each time sending a warship³⁸.

37. On a number of occasions, as Dr. Ali Al-Meri showed last week, the Turks, in internal documents, described Zubarah as a subdivision of the *kaza* of Qatar (1891, 1892, 1896, 1903) and planned to appoint an official there (1888, 1889, 1903, 1909)³⁹.

The British opposed this — and not always unequivocally — not because of Bahrain's supposed rights to Zubarah, but out of concern, as always, for Bahrain's security. Finally, Article 11 of the Anglo-Ottoman Convention of 1913, referred to in that of 1914, confirms that the Turks and of course the British were in agreement that Al-Thani authority extended throughout the whole peninsula⁴⁰.

Bahrain has relied on Great Britain's refusal to accept the presence of *mudirs* at Zubarah in order to assert that the British recognized Bahrain's rights over Zubarah⁴¹, whereas — forgive me for the repetition — this position was taken only out of the concern on the part of the British to prevent Bahrain from being attacked from Zubarah⁴².

3. The positions of other States

38. Qatar has presented an enormous quantity of maps originating in States which are not parties to the present dispute, either official State maps (Turkish, British, Russian, French and Italian), or from publishing houses renowned for their geographical expertise; not a single one of these maps shows all or part of Zubarah included in Bahrain's territory⁴³.

As Mr. Bundy has demonstrated, the very few maps which Bahrain has managed to present show nothing to contradict that assertion⁴⁴.

³⁸Memorial of Qatar, para. 8.16; Memorial of Qatar, Ann. II.5, Vol. 3, pp. 224-225 and 331; Memorial of Qatar, Ann. II.8, Vol. 4, p. 228.

³⁹Counter-Memorial of Qatar, paras. 5.17 (5-7) and 5.22; Reply of Qatar, para. 6.8; Reply of Qatar, Anns. III.6, III.9, III.10, III.13, III.21, III.22, III.23, III.24, III.25, III.26, III.30, etc., Vol. 3, pp. 37, 55, 64, 79, 117, 121, 127, 133, 139, 145, 177, etc.

⁴⁰Memorial of Qatar, para. 8.27; Counter-Memorial of Qatar, para. 5.21.

⁴¹Counter-Memorial of Bahrain, paras. 111 and 115.

⁴²Counter-Memorial of Qatar, para. 5.19.

⁴³Reply of Qatar, paras. 6.10-6.12.

⁴⁴Supplemental Documents of Bahrain, Anns. 14-22.

And this, Mr. President, brings me to my final point: the basis of Bahrain's claim, namely its tribal links with the Naim.

IV. THE BASIS OF BAHRAIN'S CLAIM: ITS TRIBAL LINKS WITH THE NAIM

39. Bahrain tries to base its claim to sovereignty over Zubarah on assertions to the effect that the region had always been frequented by the Naim tribe and that this tribe owed allegiance to the Ruler of Bahrain. It will be seen that, even if such an argument could be accepted, in the present instance it is founded neither in the law applicable in this case, nor in the facts. I shall begin with tribal ties in the law applicable in the present case.

A. Tribal ties in law

40. Bahrain bases its claim to sovereignty over Zubarah on the tribal ties supposedly existing between its Ruler and the Naim tribe who frequent the area of Zubarah. In Bahrain's view⁴⁵, international jurisprudence, as reflected in the *Western Sahara* (1975) and *Dubai/Sharjah* (1981) cases, accepts that ties of allegiance can form the basis for sovereignty. This interpretation is correct, provided that this allegiance fulfils four conditions, which are set forth not only in these two cases, but also in the recent cases of *Eritrea/Yemen* (1998) and *Botswana/Namibia* (1999); those conditions are the following:

- the ties of allegiance are clearly real⁴⁶;
- the ruler has real control over the tribe⁴⁷;
- the tribe exercises functions of State authority over the area it is staying in, in the name of its ruler⁴⁸;
- allegiance is recognized as a basis of title in the area⁴⁹.

As will now be seen, the relations between the Naim and the Ruler of Bahrain fulfil none of these conditions.

⁴⁵Memorial of Bahrain, para. 74.

⁴⁶*Western Sahara, I.C.J. Reports 1975*, p. 44, para. 95.

⁴⁷*Ibid.*

⁴⁸*Botswana/Namibia, I.C.J. Reports 1999*, para. 98; and implicitly in *Eritrea/Yemen*, 9 October 1998, para. 315.

⁴⁹*Western Sahara, I.C.J. Reports 1975*, p. 44, para. 95.

1. The reality of ties of allegiance

41. Bahrain carefully avoids specifying a time by reference to which the reality of these supposed ties of allegiance has to be determined. The only time at which these ties could have been significant would have been in the nineteenth century at the time of the separation between Bahrain and Qatar, first, because it was in 1873 that Bahrain raised the issue of Zubarah for the first time, and second, because the jurisprudence just cited recognizes that they were of greater importance at that time than now. But we have seen that in 1873 the reality of the ties of allegiance between the Naim and the Ruler of Bahrain was very doubtful in the opinion of the British, since they considered such ties, if they existed at all, to be purely nominal.

42. Furthermore, at the time of the events of 1868, the Naim tribe formed part of the coalition of Qatari tribes that went to war against the Ruler of Bahrain. In the *Dubai/Sharjah* case, the arbitrators, despite giving fairly wide scope to the concept of allegiance, nevertheless considered a tribe's going to war against its sheikh as a termination of this allegiance; in fact they concluded that although a change of alliance from one sheikh to another did not entail a change of allegiance, they added that this was only "provided war was not waged against the Ruler to whom allegiance was owed"⁵⁰. But this is precisely what the Naim did as regards the Ruler of Bahrain when they allied themselves with other Qatari tribes to fight against Bahrain in 1868. By fighting against Bahrain, they terminated their allegiance under the criteria developed from the *Dubai/Sharjah* case. Even supposing such allegiance had been renewed in 1868, the British considered the events of 1878 as constituting a transfer of the Naim's allegiance to Sheikh Jassim⁵¹.

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There are other facts that show that the allegiance of the Naim to the Ruler of Bahrain was very theoretical.

43. One of the classical criteria for whether allegiance is real or not is the imposition of taxes on the tribe that owes allegiance. Regarding this the Political Resident wrote in 1937 that "[t]he Bahrain Government, however, admit that they do not administer or take taxes at Zubarah"⁵², in

⁵⁰*ILR*, 91, p. 637.

⁵¹Memorial of Qatar, Ann. III.283, Vol. 8, p. 403.

⁵²Memorial of Qatar, Ann. III.126, Vol. 7, p. 128.

contrast to the Al-Thani in the nineteenth century, according to a Turkish document that we have already mentioned⁵³.

44. Finally, it should be remembered that following the confrontation in 1937, the Chief of the Al-Jabr section of the Naim undertook to submit to the Ruler of Qatar when he was on the peninsula⁵⁴. Thus, we see that the reality of ties of allegiance to the Ruler of Bahrein has not been established, far from it.

2. Control by the ruler over the tribe

45. The arbitrators in the *Dubai/Sharjah* case emphasized that the criterion of allegiance had far less weight in the twentieth century than it did in the nineteenth and that the closer the disputed territories were to the centres of power the more significant the criterion of control⁵⁵. In the present case the Ruler of Bahrain had no control over the Naim, in contrast to the Ruler of Qatar, who, as we have seen, particularly in regard to the events of 1878 and 1937, was perfectly capable of exercising control over the area.

3. The exercise of acts of State authority

46. We know of no example of the Naim's performing acts of State authority at Zubarah in the name of the Ruler of Bahrain. Once again the only acts of *imperium* performed at Zubarah were by the Ruler of Qatar.

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4. Allegiance as basis of title under the local law

47. Several pieces of evidence show that the habitual frequenting of a territory by a tribe that is not under the authority of the sheikh to whom the territory belongs does not in any way imply appropriation of such territory by the tribe or by its overlord. Both Qatar and the British noted that tribes that were not under the Ruler's authority frequented the territory of Qatar; this in no way implied loss of the Ruler of Qatar's sovereignty over his territory. Thus in the case of the Dowasir when they emigrated to Saudi Arabia in the 1920s, the Political Resident wrote that the allegiance of the Dowasir to the Ruler of Bahrain "naturally gives no claim to the Shaikh of Bahrain to the

⁵³Reply of Qatar, para. 6.8 (*ff*).

⁵⁴Memorial of Qatar, Ann. III.138, Vol. 7, p. 191.

⁵⁵*ILR*, 91, p. 589.

part of Hasa occupied by them [the Dowasir]"⁵⁶. Twenty-five years later, in 1948, the Political Agent in Bahrain, analysing the customary law applicable in this part of the world, explained that tribes moved freely within a sheikh's territory without this entailing the tribe's submission to that sheikh or, inversely, transfer of the sheikh's territory to that tribe⁵⁷. All else being equal, it could hardly be argued that the Naim's frequenting of the Zubarah area constituted a loss of the Ruler of Qatar's sovereignty over this area.

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48. In conclusion, Mr. President, although ties of allegiance can in certain cases form the basis of a title to sovereignty, the jurisprudence, conscious of the extreme fragility of this criterion, has hedged it about with strict conditions, none of which are fulfilled in the present case. Any attempt nevertheless to rely on ties of allegiance in the case of Zubarah must encounter problems of a purely factual nature.

Let us consider tribal ties in the specific case of the Zubarah Naim.

B. Tribal ties *in casu*

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49. The ties of allegiance asserted by Bahrain can have no relevance in the present case, given the composition of the Naim tribe, their actual presence in the area and the inconstancy of their allegiances.

1. The composition of the Naim tribe

50. As Bahrain admits, the Naim tribe consisted of several sections. These sections did frequent the Zubarah area, but not all of them owed allegiance to Bahrain and not all of them were found in Zubarah proper. Thus Bahrain relies on the allegiance of the Al-Jabr, at the same time recognizing that another section, the Al-Ramzan, owed allegiance to the Ruler of Qatar. Independently of what has already been said, this fact alone is enough to destroy the whole of

⁵⁶Memorial of Qatar, Ann. III.126, Vol. 7, pp. 131-132.

⁵⁷Supplemental Documents of Qatar, doc. 16. See also, *ibid.*, doc. 14; Memorial of Qatar, Ann. III.138, Vol. 7, pp. 191-192.

Bahrain's claim to Zubarah, since this claim is based on the allegiance of the Naim in general, even though only one section of them is supposed to have maintained its allegiance to the Ruler of Bahrain⁵⁸.

51. The claim to Zubarah based on the allegiance of the Al-Jabr to the Ruler of Bahrain is even less admissible in that the map submitted by Bahrain in support of its claim shows that it was not the Al-Jabr but other sections of the Naim that had their quarters close by Zubarah⁵⁹ [judges' folders, No. 63], and that, in any case, in July 1937 the Al-Jabr yielded to the Ruler of Qatar⁶⁰. Bahrain's pleadings, moreover, do not contest these facts.

2. The presence of the Naim in the area

52. The presence of the Naim at Zubarah was not at all constant. While Bahrain recognizes that it is impossible to prove that the Naim were continually present at Zubarah throughout the last two centuries⁶¹, it asserts that Qatar has not, on the other hand, proved their absence. However, Mr. President, evidence is not lacking:

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- in 1811, Zubarah was destroyed and Lorimer mentions the reoccupation of the "deserted site of Zubarah" for only a few months in 1842⁶²;
 - the fact that the Naim were expelled *manu militari* from Zubarah in 1878 is not contested by Bahrain;
 - British reports of 1879-1880 and 1888 described Zubarah as uninhabited⁶³;
 - in 1903 a Turkish document noted that Zubarah was uninhabited⁶⁴;
 - in 1908 Lorimer made the general point that the Naim would go to Zubarah in winter, but that in summer they lived in Bahrain or, in the case of some of them, in Doha. He also said that

⁵⁸Counter-Memorial of Qatar, paras. 5.53-5.57.

⁵⁹Memorial of Bahrain, Ann. 229, Vol. 4, p. 983 (a).

⁶⁰Memorial of Qatar, para. 8.43.

⁶¹Reply of Bahrain, para. 256.

⁶²Reply of Qatar, para. 6.34.

⁶³*Ibid.*; Memorial of Qatar, Ann. II.8, Vol. 4, p. 220.

⁶⁴Reply of Qatar, para. 6.34.

there were no Naim settled in Qatar at that time. Bahrain does not challenge these observations⁶⁵;

— in 1934 a British report stated that Zubarah was "now a ruin without one inhabitant"⁶⁶.

In sum, it can hardly be said that the Naim were an established presence in Zubarah.

3. The inconstancy of the Naim's allegiances

53. It has already been seen how only some of the Naim, but not all of them, paid allegiance to the Ruler of Bahrain. Furthermore, it has been seen how this allegiance was broken off in 1868. Although it seems to have been renewed subsequently, the reality of this allegiance remains doubtful. In 1908 Lorimer observed that the Naim acted as mercenaries for both Bahrain and Qatar and that their loyalty was very uncertain⁶⁷. All Bahrain can say to this is that a distinction must be made between the Naim of the north-west of Qatar and those who are supposed to have emigrated to Wakra in the mid-nineteenth century⁶⁸. So now we have two kinds of Naim! Not only must we distinguish the Zubarah Naim from those found in other parts of the peninsula, but we must also distinguish the "good" Naim of Zubarah, (i.e., according to Bahrain, the Al-Jabr who allegedly paid allegiance to the Ruler of Bahrain), from the other Naim who also frequented Zubarah (such as the Al-Ramzan who paid allegiance to the Ruler of Qatar, and about whom Bahrain does not speak)! This distinction between the Naim of the north-west of the peninsula and other Qatar Naim is sufficient to show, once more, that a claim to title based on such imprecise ties of allegiance is unworkable.

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54. As to the fickle loyalty of this tribe, Bahrain has nothing to say on this subject — and with good reason: 40 years after Lorimer⁶⁹, in 1948 the British noted once again that the Naim,

⁶⁵Memorial of Bahrain, Ann. 74, Vol. 3, pp. 395-396.

⁶⁶Memorial of Bahrain, Ann. 101, Vol. 3, p. 576.

⁶⁷Counter-Memorial of Qatar, paras. 5.19 (1) and 5.47; Reply of Qatar, para. 6.46.

⁶⁸Reply of Bahrain, para. 255.

⁶⁹See footnote 90.

more than any other Bedouin tribe, were known from Bahrain to Oman for changing allegiance every time it suited them⁷⁰ [judges' folders, No. 64].

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55. In conclusion, Mr. President, Members of the Court, if certain ghosts do linger in the desert, they remain ghosts, surviving only in the minds of those who believe in ghosts. The basis for Bahrain's claim to Zubarah belongs more to the realm of fantasy than to legal reality, and it derives no weight from the simple fact of being an old claim. Indeed, it may well be asked whether the Court, in all the territorial disputes brought before it, has ever been presented with a claim as insubstantially based as this one: a claim to sovereignty by a State that has renounced it before, a claim whose basis was always rejected even by the protecting Power, i.e., Britain, a claim upheld by not one *single* serious cartographic document from third parties, a claim based on ties of allegiance, whose reality is uncertain as is even the identification of the tribe concerned, and a claim put forward in terms that are at times so extravagant — and here I would respectfully refer the Court to paragraph 272 of Bahrain's Reply, which is a masterpiece of absolute denial of the reality — and so exaggerated, that one gets the impression that even the authors do not believe in it, except to believe, as did Alice in Wonderland, that when so many out-of-the-way things have happened, very few things indeed are really impossible⁷¹.

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Mr. President, Members of the Court, I am most grateful to you for your kind attention, and I would ask you now to give the floor to Mr. Shankardass.

The PRESIDENT: Thank you, Professor David. Je donne maintenant la parole à M. Shankardass.

⁷⁰Supplemental Documents of Qatar, doc. 16.

⁷¹Lewis Carroll, *Alice in Wonderland*.

M. SHANKARDASS : Monsieur le président, Madame et Messieurs de la Cour,

Les dénis de souveraineté sur Zubarah : Zubarah ne fait pas l'objet d'un litige sérieux

1. Il m'incombe de montrer rapidement à la Cour que de nombreux éléments de preuve historiques attestent que Bahreïn a abandonné tout droit de souveraineté sur Zubarah et à certaines occasions a expressément nié en avoir et qu'en conséquence, sa revendication en la matière ne constitue pas une véritable question litigieuse en l'espèce.

2. M. Eric David vous a déjà montré que la revendication de souveraineté de Bahreïn sur Zubarah ne repose sur aucun fondement juridique et qu'elle n'a jamais été reconnue, ni par les Britanniques, ni par qui que ce soit.

3. Le premier événement qui indique que Bahreïn renonce à toute prétention de souveraineté sur Zubarah est, bien entendu, l'accord de 1868 entre la Grande-Bretagne et Bahreïn¹ : le souverain de Bahreïn était sanctionné pour avoir agressé Qatar et il avait été convaincu de s'engager par écrit à ne plus intervenir sur la péninsule de Qatar en violation de la paix maritime. Il s'agissait là de l'exécution et de la confirmation des obligations incombant à Bahreïn en vertu de la convention d'amitié de 1861². La Cour se rappelle que cette convention visait à contenir les activités de Bahreïn compromettant la paix maritime de même qu'à assurer sa sécurité³. Ainsi, le souverain de Bahreïn s'engageait à «*s'abstenir de commettre tout type d'agression maritime, et de se livrer en mer à la guerre, à la piraterie et à l'esclavage tant qu'[il] recevr[ait] le soutien du Gouvernement britannique visant à garantir la sécurité de [ses] possessions*».

4. La Cour se rappelle que lorsque le souverain de Bahreïn apporta en 1874 son soutien aux Naim de Zubarah, les Britanniques ont formulé une mise en garde : pour bénéficier de leur protection, il ne devait ni être l'agresseur ni prendre des mesures qui l'entraîneraient dans des complications et que le Gouvernement britannique jugeait inopportunes⁴. La réponse du souverain à l'époque, telle que le résident politique britannique, le colonel Ross, l'a rapportée

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¹ Mémoire de Qatar, annexe II.26, vol. 5, p. 75.

² Mémoire de Qatar, annexe II.20, vol. 5, p. 45.

³ Mémoire de Qatar, par. 5.3-5.4.

⁴ Mémoire de Bahreïn, annexe 70, vol. 2, p. 294.

le 19 décembre 1874 au Gouvernement des Indes, était très clairement un déni de souveraineté sur Zubarah. Le souverain aurait dit qu'«en envoyant de l'aide à Zubarah, il entendait *défendre sa propre île*, et non empiéter sur ses voisins, mais [qu'il] était prêt à se laisser guider par la politique du gouvernement»⁵ (les italiques sont de nous).

5. Dans ses écritures, Qatar a donné des exemples, dont certains ont été expliqués par M. David, qui établissent que, bien qu'à plusieurs reprises le souverain de Bahreïn ait prétendu avoir différents droits sur le territoire continental, il a en fait accepté la condition posée par les Britanniques de ne pas intervenir à Zubarah pendant plus de cent ans. Ainsi, il s'est acquitté des obligations qu'il avait souscrites en vertu des traités conclus avec les Britanniques afin de bénéficier des avantages liés à la protection offerte par ces derniers.

6. Le fait que le souverain de Bahreïn lui-même ne prenait pas trop au sérieux sa revendication sur Zubarah et qu'il se contentait d'y avoir recours à certains moments à des fins politiques ressort clairement d'un exemple particulièrement révélateur. Il s'agit du procès verbal du 17 janvier 1920 d'une conversation entre l'héritier du trône de Bahreïn et l'agent politique relative à une proposition faite par Bahreïn tendant à ce que les Britanniques approuvent l'ouverture d'un port à Zubarah. Au cours de cet entretien, l'agent politique de l'époque, dans la logique des observations qu'il avait lui-même déjà faites à ce sujet, estimant que le souverain de Qatar verrait dans cette proposition une «menace mortelle»⁶, déclara au prince héritier qu'il était peu probable que les Britanniques approuvent une telle proposition; il poursuit son rapport de la façon suivante :

«A mon grand étonnement, Abdullah a pleinement reconnu le poids de mes arguments, puis, faisant calmement volte-face, a déclaré : «Nous ne voulons pas réellement «Zubarah» à ce point-là, mais nous voulons en revanche faire valoir un titre sur le continent et y obtenir un port de façon que, si Bin Saud aménageait lui-même un port à Al Jubail (au nord de Qatif), nous ne soyons pas complètement ruinés...»⁷

⁵ *Ibid.*, p. 295.

⁶ Mémoire de Qatar, annexe III.64, vol. 6, p. 310.

⁷ Mémoire de Bahreïn, annexe 87, vol. 3, p. 524.

Le prince héritier déclara alors très franchement que le cheikh Isa «se ferait un plaisir de ne plus revenir sur la question de Zubarah si le gouvernement de Sa Majesté lui promettait de ne jamais autoriser Bin Saud à aménager un port à Al Jubail»⁸.

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7. En fait, ce n'est pas avant 1937 que le souverain de Bahreïn transforma en «crise» «l'incident de Zubarah» survenu au cours de cette année-là, dont M. David a montré qu'il ne s'agissait de rien d'autre que de l'exercice, par le souverain de Qatar, de son autorité à Zubarah. Comme nous l'avons démontré, le souverain, sans aucune raison, se sentit offensé. Il entreprit alors plusieurs actions peu judicieuses consistant notamment à imposer des restrictions à la circulation des personnes et des biens entre Qatar et Bahreïn, auxquelles Qatar répondit par la pareille. Les autorités britanniques sont donc intervenues pour détendre les relations entre les deux Etats. Leurs différentes démarches en 1944, 1950 et 1954 ne furent couronnées que d'un succès relatif. Bien que Bahreïn soutienne dans son mémoire⁹ que, depuis 1937, il n'a jamais «renoncé» à ses revendications sur Zubarah, il ressort au contraire du dossier qu'au cours des tentatives de médiation britanniques, le souverain de Bahreïn, tout en revendiquant parfois certains droits privés à Zubarah, a expressément et de façon répétée dénié toute souveraineté sur Zubarah. C'est ainsi que le 9 décembre 1943, le résident politique a rapporté, à la suite d'une discussion avec le souverain de Bahreïn, que celui-ci craignait bien plus de perdre la face que de perdre des biens, qu'il était certain que, sous une forme ou une autre, un arrangement était possible et qu'il faisait confiance aux Britanniques pour le mettre au point¹⁰.

8. C'est sans doute l'accord de juin 1944 entre les souverains de Qatar et de Bahreïn, en fait le seul accord jamais conclu entre les deux souverains, auquel ils étaient parvenus avec l'aide des Britanniques, qui représente sous sa forme la plus officielle le déni de toute souveraineté bahreïnite sur Zubarah et la reconnaissance de la souveraineté de Qatar. Ce bref accord, qui est le document n° 61 dans votre dossier, est libellé dans les termes suivants, qui apparaissent maintenant à l'écran :

«Le souverain de Bahreïn et le souverain de Qatar conviennent de rétablir entre eux des relations aussi amicales qu'elles l'étaient dans le passé. Le souverain de Qatar s'engage à ce que Zubarah demeure en l'état, sans que rien n'y soit fait qui n'existait

⁸ *Ibid.*

⁹ Mémoire de Bahreïn, par. 31.

¹⁰ Mémoire de Qatar, annexe III.232, vol. 8, p. 147.

pas dans le passé, cela par égard pour Al Khalifah et en son hommage. Pour sa part le souverain de Bahreïn s'engage à ne rien faire qui puisse porter atteinte aux intérêts du souverain de Qatar. Le présent accord n'affecte pas l'accord avec la compagnie pétrolière opérant à Qatar dont les droits sont protégés.»¹¹

9. La Cour remarquera que tout ce que le souverain de Qatar accepte aux termes de cet accord, c'est «que Zubarah demeure en l'état, sans que rien n'y soit fait qui n'existait pas dans le passé». Autrement dit, il se contentait de laisser la vieille ville de Zubarah, et non pas la région de Zubarah, quelle que soit celle-ci, à l'état de site archéologique, ce qui est encore le cas aujourd'hui. En revanche, la renonciation du souverain de Bahreïn à toute revendication de souveraineté sur Zubarah est manifeste dans la disposition particulière protégeant les droits reconnus à Qatar par l'accord de concession pétrolière qatarienne de 1935.

10. Bahreïn tente de démontrer dans son mémoire¹² que la Grande-Bretagne a admis en 1961 au plus tard que son refus de reconnaître la souveraineté de Bahreïn sur Zubarah était dénué de fondement et cite à l'appui de son affirmation un compte rendu du Foreign Office¹³. Le passage choisi illustre parfaitement la stratégie que Bahreïn adopte dans la présente affaire, qui consiste à fausser les éléments présentés à la Cour en ne citant, dans les documents invoqués, que les extraits qui appuient sa thèse. La Cour jugera très intéressant le paragraphe précédant le passage cité par Bahreïn. Voici ce qui est dit dans le compte rendu du Foreign Office au sujet de cet accord de 1944 :

«Comme la politique adoptée est de détruire l'argument principal du souverain de Bahreïn selon lequel le *statu quo* en 1944 signifiait notamment que Bahreïn avait souveraineté sur Zubarah, je propose de modifier le projet de texte de la manière que j'ai indiquée.»

L'auteur précise que les modifications ont pour objet «d'indiquer clairement que nous n'acceptons pas l'argumentation du souverain de Bahreïn».

11. Que la revendication de Bahreïn à l'égard de Zubarah fût surtout une question de prestige et non de souveraineté, c'est ce qu'a répété le souverain de Bahreïn quelques années plus tard, en 1946, au cours d'une conversation avec le résident politique qui en a consigné la teneur comme suit :

¹¹ Mémoire de Qatar, annexe III.240, vol. 8, p. 183.

¹² Mémoire de Bahreïn, par. 334.

¹³ Mémoire de Bahreïn, annexe 220, vol. 4, p. 925.

«Si je l'ai bien compris, il a déclaré qu'il ne revendiquait pas la souveraineté sur Zubarah, mais voulait uniquement avoir accès à ses pâturages et à son eau. Lorsque je lui ai fait remarquer qu'il ne pouvait tirer aucun profit de Zubarah, il a répondu qu'il ne s'agissait pas de profit car il savait qu'il n'y avait rien de valeur à Zubarah, mais de prestige.»¹⁴

Il a également déclaré au résident politique que l'incertitude lui était insupportable et qu'il désirait une décision, dans un sens ou dans l'autre, fût-elle défavorable.

12. Je me permets de rappeler en outre à la Cour un certain nombre d'autres cas, mentionnés dans les écritures de Qatar, où des fonctionnaires britanniques ont pris acte du fait que le souverain de Bahreïn a chaque fois démenti exercer une souveraineté quelconque sur Zubarah¹⁵.

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13. La renonciation définitive du souverain de Bahreïn à exercer tous droits éventuels à Zubarah trouve confirmation dans les démarches qui ont suivi la décision britannique de décembre 1947, dont mon collègue, M. David, a parlé et par lesquelles les souverains de Bahreïn et de Qatar ont été avisés de la délimitation des fonds marins entre leurs Etats. Il est clair que la Grande-Bretagne a considéré que Zubarah faisait partie de Qatar et a tenu compte de la côte de celui-ci pour fixer la ligne de 1947. Bahreïn a rejeté la décision pour divers motifs, mais n'a émis aucune réserve ni protestation au sujet de droits qu'il aurait le cas échéant à Zubarah ou sur celle-ci. La prétention maximale que formule Bahreïn en refusant d'accepter «la ligne de 1947» était «que toute l'étendue d'eau située entre nos côtes jusqu'à et y compris Dibal et Jaradah doit être incluse dans la mer sur laquelle nous avons des droits souverains»¹⁶.

14. Par la suite, le souverain de Bahreïn, tout en niant souvent expressément revendiquer une souveraineté quelconque sur Zubarah, n'a réclamé que des droits de nature privée¹⁷. Dans la lettre qu'il a adressée le 24 juin 1948 au ministre britannique des affaires étrangères, Ernest Bevin, le souverain a dit de sa revendication qu'elle concernait certains terrains à Zubarah et que son intention était de «conserver pour toujours à titre de propriété privée les terrains ainsi indiqués». Il a précisé qu'il n'avait jamais revendiqué et ne revendiquait pas de droits sur le pétrole à Zubarah et

¹⁴ Mémoire de Qatar, vol. 8, annexe III.247, p. 211.

¹⁵ Mémoire de Qatar, par. 8.49-8.50; contre-mémoire de Qatar, par. 5.38.

¹⁶ Mémoire de Qatar, annexe IV.118, vol. 10, p. 83.

¹⁷ Mémoire de Qatar, annexe III.258, vol. 8, p. 273.

que tous les profits liés à ces droits appartenaient entièrement au cheikh de Qatar¹⁸ et cela dans une lettre qu'il a adressée au ministre britannique des affaires étrangères.

15. En janvier 1950, l'agent politique à Bahreïn a expressément confirmé dans une lettre adressée au souverain de Qatar que le cheikh de Bahreïn ne revendiquait pas la souveraineté sur Zubarah ni sur aucune autre partie du territoire de Qatar et ne revendiquait pas non plus de droits sur le pétrole; il tenait simplement à pouvoir envoyer les sujets dont il avait la charge faire paître leurs troupeaux à Zubarah¹⁹.

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16. Lorsque Bahreïn a de nouveau soulevé la question de Zubarah en 1957, le résident politique a fait savoir au ministre britannique des affaires étrangères — il s'agissait de M. Selwyn Lloyd — que «le sentiment du cheikh Salman à propos de Zubarah ne semble être partagé par personne d'autre à Bahreïn» et il a ensuite confirmé que les Britanniques n'avaient jamais donné aucun signe d'encouragement ni d'appui à la revendication de souveraineté de Bahreïn sur Zubarah²⁰. Aussi rappela-t-on au souverain en août 1957 que Bahreïn n'avait pas souveraineté sur Zubarah ni aucun autre droit à y faire valoir²¹.

17. A partir de juillet 1961, Bahreïn a purement et simplement oublié pendant un certain nombre d'années ses revendications sur Zubarah et ne cite aucun autre document après cette date indiquant que le différend relatif à Zubarah fait l'objet de nouvelles discussions ou d'un nouvel échange de correspondance avec le Gouvernement britannique. La seule fois où il en fait état c'est dans une brochure sur Bahreïn qu'il a fait distribuer en 1966, lors d'une session de la conférence générale de l'Unesco, brochure dans laquelle il indique que la région de Zubarah fait partie de l'Etat de Bahreïn et contre laquelle, comme Bahreïn le signale lui-même, Qatar a dûment protesté²².

18. Mon collègue, M. Salmon, vous parlera dans un exposé ultérieur de certaines des négociations qui se sont déroulées entre les souverains de Qatar et de Bahreïn en 1961, 1967 et 1969 en vue de régler la question de la frontière maritime. Bahreïn n'a jamais soulevé de revendication quelconque à l'égard de Zubarah au cours de ces négociations dont les participants

¹⁸ Mémoire de Qatar, annexe III.260, vol. 8, p. 291.

¹⁹ Mémoire de Qatar, annexe III.266, vol. 8, p. 320-321.

²⁰ Mémoire de Qatar, annexe III.283, vol. 8, p. 405.

²¹ Mémoire de Qatar, par. 8.53 et 8.54; mémoire de Qatar, annexe III.287, vol. 8, p. 425.

²² Mémoire de Bahreïn, par. 335; mémoire de Bahreïn, annexe 224, vol. 4, p. 935.

ont toujours adopté pour principe que Zubarah faisait partie du territoire de Qatar. Il n'a pas été non plus question de Zubarah lorsque Qatar et Bahreïn ont étudié en 1965 la proposition qui tendait à les faire recourir à l'arbitrage pour régler leurs différends.

19. Comme la Cour le sait déjà, il a été convenu, une fois que la présence britannique à Qatar et à Bahreïn eut pris fin en 1971, que le roi d'Arabie saoudite jouerait le rôle de médiateur entre Qatar et Bahreïn pour les aider à régler leurs différends. Qatar a déjà montré que le premier principe du cadre de règlement pour la médiation saoudienne ne visait que les questions en litige concernant «des îles, des frontières maritimes et des eaux territoriales» sans qu'il y fût fait mention de Zubarah. En outre, Bahreïn a prétendu au cours de la phase relative à la compétence et à la recevabilité dans la présente affaire que «[l]a preuve que [la question de Zubarah] continue de préoccuper Bahreïn se trouve dans un mémorandum que Bahreïn a adressé à l'Arabie saoudite en 1986...»²³ Or, ce mémorandum n'a jamais été produit.

20. Permettez-moi de faire état ici de quelques autres éléments de preuve qui, je pense, situeront le prétendu différend relatif à Zubarah dans la perspective voulue.

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21. Le premier élément est une observation officielle figurant dans le rapport annuel de Bahreïn lui-même pour l'année 1937-1938, donnant la version bahreïnite des événements survenus à Zubarah en juillet 1937, qui se trouve reproduite intégralement dans votre dossier sous la cote 65. On y trouve la phrase suivante qui s'affiche maintenant à l'écran : «Zubarah, l'objet de cette querelle, est un endroit qui ne présente apparemment aucun intérêt. La ville est totalement en ruines...»²⁴ Il n'est pas ici non plus question d'une région. Le rapport relève que les Al-Khalifah considèrent Zubarah comme leur foyer ancestral, se souviennent que leurs ancêtres ont construit Zubarah et y sont enterrés et conclut que :

«même si, au cours des dernières années, les cheikhs Al-Khalifah se sont rarement rendus à Zubarah, ... ils en veulent pourtant à Qatar de prétendre que Bahreïn n'a pas de droits sur Zubarah. Que l'objet de la querelle soit une question de principe et de sentiment fait qu'il est d'autant plus difficile de s'entendre.»²⁵

²³ Contre-mémoire de Bahreïn (compétence et recevabilité), par. 2.11.

²⁴ Réplique de Qatar, annexe III.59, vol. 3, p. 368.

²⁵ *Ibid.*

La Cour estimera certainement que de tels sentiments ou ressentiments ne sauraient guère être le fondement d'une revendication de souveraineté.

22. Ensuite, lorsque Bahreïn, en 1938, engage des négociations avec les deux sociétés pétrolières en vue de l'octroi d'une concession sur son secteur non attribué qui porterait donc sur le reste de Bahreïn tel que je l'ai décrit dans mon exposé précédent, il n'est jamais question de Zubarah. En réalité, lorsque Belgrave adresse, le 8 juin 1938, une lettre à l'agent politique (à présent soumise à la Cour dans les documents supplémentaires de Bahreïn)²⁶ avec, en annexe, une carte indiquant les territoires du souverain, la Cour relèvera que la carte en question englobe manifestement les îles Hawar mais pas Zubarah.

23. Dans mon exposé précédent, j'ai déjà parlé à la Cour de l'article de Belgrave publié en 1928 dans le *Journal of the Central Asian Society* qui décrit la superficie de Bahreïn. Cet article ne fait pas mention de Zubarah (ni, comme je l'ai souligné, des îles Hawar). Nous disposons à présent des notes consignées au fil de nombreuses années dans le journal personnel de Belgrave, qui prouvent clairement que la question de Zubarah n'était rien d'autre qu'une idée fixe du souverain lui-même à laquelle ni sa famille ni la population de Bahreïn ne croyaient réellement. La Cour me pardonnera de lire quelques brefs extraits de ces notes. Si je le fais, c'est parce que je les considère comme révélatrices de la portée véritable du prétendu différend concernant Zubarah. C'est ainsi que, le 1^{er} mai 1954, Belgrave note ce qui suit :

«Me suis rendu à Jufair avec Son Excellence et, de 9 h 30 à 13 h 30, avons parlé essentiellement de Zubarah... Il ne s'est pas montré aussi déraisonnable que d'habitude mais a affirmé avec insistance qu'il parlait au nom de sa famille et du peuple de Bahreïn, *alors qu'aucun d'eux ne s'en soucie, étant tous lassés de la querelle avec Qatar et de Zubarah.*»²⁷

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24. Une autre note de ce journal, à la date du 21 février 1957, soit trois ans plus tard, dit ceci :

«Sh Abdullah est venu et nous avons discuté de l'*attitude de Son Excellence au sujet de Zubarah qui, tous en conviennent, est déraisonnable.* Il semble que ses fils aient rencontré Sh Ali de Qatar au cours d'une chasse; il s'est montré très amical et les a invités à dîner à son campement. Toutefois, Son Excellence persiste à détester les Qatariens et à avancer ses revendications, *qu'il est le seul à prendre au sérieux.* Nous

²⁶ Documents supplémentaires de Bahreïn, annexe 9.

²⁷ Extrait du journal personnel de Belgrave, du 1^{er} mai 1954. Voir la réplique de Qatar, par. 6.67.

*avons perdu des journées, des semaines et des mois à en parler — ou plutôt à écouter Son Excellence parler à ce sujet.»*²⁸

25. Enfin, voici l'observation que Belgrave formule à l'intention de M. Al Baharna lors d'un entretien — et je cite à nouveau, en vous priant de m'excuser :

«Pour le monde extérieur, il s'agissait d'une affaire sans importance ... mais pour les cheikhs de Bahreïn, elle mettait en jeu leur dignité, leur prestige et leur honneur, et c'est ce qui compliquait tellement la conclusion d'un accord, quel qu'il fût.»²⁹

Permettez-moi, Monsieur le président, de faire encore une citation et cette fois, c'est M. Al Baharna qui parle et dit ceci :

«L'explication ci-dessus montre que la question de Zubarah, dans son état actuel, n'entre dans aucune catégorie juridique. Il ne s'agit pas, en réalité, d'une revendication territoriale; il s'agit d'une revendication de juridiction sur les sujets d'un Etat qui se trouvent dans un autre territoire.»³⁰

Monsieur le président, Madame et Messieurs les Membres de la Cour, ces observations, quand nous les lisons avec le jugement que Bahreïn porte officiellement dans son rapport annuel sur l'incident de 1937 que je viens d'évoquer et avec ce que disait le prince héritier en 1920, tout cela démontre simplement, sans le moindre doute possible, que la question de Zubarah n'est pas une question litigieuse opposant sérieusement les Parties.

Monsieur le président, nous sommes à la fin des conclusions que formule Qatar dans ce premier tour en ce qui concerne les questions territoriales. Permettez-moi de vous exprimer ma vive gratitude pour l'attention que vous m'avez accordée et de vous prier respectueusement d'inviter mon éminent collègue, M. Quéneudec, à commencer d'exposer nos conclusions relatives à la délimitation maritime. Je vous remercie.

The PRESIDENT: Thank you. Professor Quéneudec, would you prefer to begin your presentation now — or for the Court to adjourn at this point — and for your presentation to break off after 15 minutes?

²⁸ Extrait du journal personnel de Belgrave, du 21 février 1957. Voir la réplique de Qatar, par. 6.67.

²⁹ Mémoire de Qatar, annexe III.297, vol. 8, p. 491.

³⁰ *Ibid.*

Mr. QUENEUDEC: I am in your hands.

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The PRESIDENT: Very well. We shall hear you for a quarter of an hour and then adjourn.

Mr. QUENEUDEC: Mr. President, Members of the Court, it is an honour and a pleasure to appear before the Court again. Now we move to a different setting.

1. My presentation will set forth the essential elements of the State of Qatar's case on maritime delimitation in its dispute with the State of Bahrain.

In doing so, it will identify the factual and legal aspects with regard to which the Parties are in fundamental disagreement on this subject. The specific question of the course of the line of delimitation will be dealt with in a subsequent presentation.

During this presentation and the one that follows, various illustrations will be shown on the screen, taken for the most part from maps submitted with the written pleadings. Since these pleadings are in English, on most of the illustrations we have retained the titles and indications that appear on them in English, but some illustrations (too few, unfortunately) have been given a title in French. We hope that the Court will understand that it is for purely technical reasons that this has been done, however annoying it may be for French speakers.

2. Mr. President, while the territorial questions dividing Qatar and Bahrain are rooted principally — but not exclusively — in the history of the two countries, in the case of the question of the maritime delimitation the issue is above all dominated by geographical factors.

Any process of maritime delimitation is of course subordinated to a consideration of the geographical setting of the area in which the delimitation is to take place. And this geographical setting is determined first and foremost by the characteristics of the respective coasts of the States involved, since it is the coasts of the two States concerned that determine the geographical framework of the delimitation.

Thus, when the maritime delimitation line claimed by one of the States appears from the outset to be extraordinary or unreasonable, this is above all in relation to the coastal geography.

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This is precisely the situation with Bahrain's claim in the present case. This claim is manifestly extravagant in that, in contrast to the line claimed by Qatar, it ignores the true coasts of the two States (illustration 1).

3. As may be seen from a simple glance at the map, the disagreement between Qatar and Bahrain concerning the maritime delimitation is patently clear. Their complete disagreement on this point finds expression in the presentation of two delimitation lines which are radically different and which represent two fundamentally contrasting perceptions of the geography in question.

In accordance with Article 60 of the Rules of Court, I will limit myself to addressing only what is strictly necessary for a proper presentation of the position of the State of Qatar, with a particular emphasis on those points on which Qatar disagrees with the other Party's arguments on the maritime delimitation.

4. Six points of disagreement may be identified in this respect, it being understood, however, that the maritime delimitation may also be influenced by the Court's decisions concerning the Hawar Islands and Zubarah.

These six points of disagreement are the following:

- First of all, there is clear disagreement between the Parties concerning the appropriate delimitation process;
- Second, and above all, there is a fundamental difference with regard to the determination of the relevant coasts for purposes of the delimitation;
- In addition, of course, there is the dispute concerning the status and ownership of the low-tide elevations of Fasht Dibal and Qit'at Jaradah;
- Additionally, there is complete disagreement with regard to sovereignty over Janan Island;
- Furthermore, there are totally opposing views as to whether it is appropriate to take into account various physical anomalies in the maritime area in question, which Bahrain describes as "maritime features" and as being in all cases under its sovereignty;
- Finally, there is a particular aspect of the dispute, concerning the question of archipelagic status raised by Bahrain.

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5. For purposes of convenience and clarity of presentation, I will group these different points in the following manner:

- First, we shall examine the perception of delimitation, to which the first two points of disagreement indisputably relate;
- Second, we shall deal with the specific problems concerning, on the one hand, the low-tide elevations of Fasht Dibal and Qit'at Jaradah, and on the other, Janan Island;
- Third, and finally, we shall seek to demonstrate the irrelevant character of certain pretensions put forward by Bahrain in its claim, relating both to a whole group of "maritime features" and to its alleged inherent character as an archipelago.

Before addressing these three points in turn, I would like to mention that the discussion of the relevance or irrelevance of various other circumstances will be treated in a separate presentation by Professor Salmon.

First, therefore, the perception of delimitation.

I. THE PERCEPTION OF DELIMITATION

6. The Parties to this dispute perceive delimitation differently, not only in their approach to the process itself, but also in their reference to the coasts they consider relevant.

1. The approach to delimitation

7. With regard to the *approach to delimitation* that is to result in the drawing of a single maritime line, a clear distinction must be made between appearances and reality — a distinction necessary in both the application of the rules of law and the understanding of the geographical setting of the maritime area concerned.

(a) *The disagreement on the application of the rules of delimitation*

8. First, behind what might appear to be an agreement of the Parties on the applicable law, there lies deep disagreement concerning the implementation in this case of the rules governing maritime delimitation between States.

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It is evident from the written pleadings submitted by Bahrain that it intends to have the principles and rules of maritime delimitation applied in a manner which is so peculiar that it cannot be accepted.

9. This is the case, in particular, with the implementation of the principle of non-encroachment [*«non-empiétement»*], whereby a maritime delimitation line must not have the effect of cutting off the maritime projection of one of the States in such a way as to deprive that State of its rights in a maritime area located immediately off its coasts. And the line claimed by Bahrain produces just such a cut-off effect [*«effet d'amputation»*].

10. The same is true with regard to the principle prohibiting the wholesale refashioning of geography, with which Bahrain seems to want to take certain liberties. Bahrain invents for itself an artificial coast whose projection is practically limitless, in so far as no account is to be taken in practice of the western front of the Qatari peninsula. According to Bahrain, the west coast of Qatar is, so to speak, of no use; this, it must be admitted, is a strange way not only of refashioning geography, but also of rewriting a rather unusual version of "West Side Story".

11. Moreover, one may be surprised at the role, or rather the absence of any role, played by the concept of proportionality in the written pleadings of the other Party, despite the fact that an evident disproportion between coastal lengths and the extent of maritime jurisdictions is, according to well-established jurisprudence, a factor required to be taken into account when weighing the reasonableness of a delimitation.

Qatar has already had occasion to draw the Court's attention to this point in its Counter-Memorial and Reply (Counter-Memorial of Qatar, para. 8.16; Reply of Qatar, paras. 9.5-9.10). It is therefore unnecessary to dwell on this point here.

(b) *The disagreement as to the division of the delimitation area*

12. Second, while both Parties have adopted an apparently identical approach to the actual delimitation, by identifying two distinct sectors within the delimitation area, it must be recognized that the division of this area — undertaken by each of them — is made on the basis of two different views of the geography.

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13. It is true that the dividing line between the two sectors can only be a purely imaginary line, since its sole purpose is to distinguish between areas with different geographical characteristics. Taking into account the reason why such a line is established, however, it cannot

be drawn in a purely artificial manner, but must, on the contrary, take into consideration the true geographical setting and must, in particular, reflect the coastal geography.

The dividing line adopted by Qatar has been drawn in this manner, taking account of this requirement, in order to clearly distinguish between the southern sector bordered by opposite coasts, and the northern sector where, strictly speaking, the maritime area is no longer located between the coasts of the two States (illustration 2).

14. The same cannot be said of the dividing line that Bahrain has tried to establish between a point located off the northern tip of the Qatar peninsula and an unspecified point on the low-tide elevation of Fasht Dibal (illustration 3).

While this has never been clearly stated by the other Party, by all indications this dividing line runs between a point on the low-water line on the north of Ras Rakan and the northernmost point of Fasht Dibal.

The totally artificial character of the dividing line thus drawn by Bahrain is blatant. This has been amply demonstrated in Qatar's written pleadings (Counter-Memorial of Qatar, paras. 6.71 *et seq.*). It is therefore unnecessary to develop this point.

Let us simply point out that the apparently identical approach adopted by the two States on this subject is materialized in fact by a quite real divergence. And it is nothing if not puzzling to read what Bahrain says on the point in its Counter-Memorial: given that the dividing line proposed by each of the two States is situated at a latitude of 26° 10' to 26° 20' N, "the Parties' respective divisions between the two sectors do not diverge greatly" [*«il n'y a pas de grande différence entre les divisions opérées respectivement par les Parties entre les deux secteurs»*] (Counter-Memorial of Bahrain, para. 462). It is not surprising, Mr. President, that linguists sometimes make a distinction between *«litotes»* and "understatement"!

If you wish, Mr. President, we might break at this point.

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The PRESIDENT: Thank you. The Court will adjourn for a quarter of an hour.

The Court adjourned from 4.30 p.m. to 4.50 p.m.

The PRESIDENT: Please be seated. The sitting is resumed and I give the floor to Professor Quéneudec.

Mr. QUENEUDEC: Thank you, Mr. President. Mr. President, Members of the Court, I dealt earlier with the difference between the two States in their approach to the delimitation process, given their disagreement both on the application of the rules of delimitation and on the division of the delimitation area. I now come to the principal point of disagreement: the identification of the relevant coasts.

2. The identification of the relevant coasts

15. The principal point of disagreement, however, concerns the *identification of the relevant coasts*, in other words, the determination of the coasts that have to be taken into account for purposes of the delimitation in each of the two sectors. First there must be an understanding of what the words mean — what is meant by the word "coast". Some clarification would seem necessary at this point.

In this regard, it may be helpful to begin by recalling the obvious, as Bahrain's attitude is a perfect illustration of Paul Valéry's adage: "The obvious is generally what disappears from view first". The obvious, let us remind ourselves, can be expressed like this: in order to be considered relevant, a "coast must first be a coast" [*«une côte doit d'abord être effectivement une côte»*].

(a) *The notion of a coast*

16. As an essential element in any delimitation process, *the coast* is the general designation for the zone of contact between the sea and the land. As such, the word "coast", taken in a geographical sense, can be considered as synonymous with "shore" [*«rivage»*] or "littoral", the latter including both "the foreshore" [*«l'estran»*] and "the backshore" [*«l'arrière-côte»*]. It is also said that the coast marks the separation between the land territory and the maritime zones belonging to a coastal State.

17. In more precise terms, when international law makes use of the notion of the coast (the word in itself having no particular legal meaning), it is referring rather to the hydrographic notion of "coastline" [*«trait de côte»*]; in other words, the coast is reduced to a line representing the

separation between land and sea. The coastline as indicated on nautical charts corresponds to the high-water mark (the expression "*laisse de pleine mer*", incidentally, is preferable to "*laisse de haute mer*" since it obviates any confusion with the juridical notion of "*haute mer*" (the high seas)). In fact, the high-water mark designates the separation between zones that may be covered by the sea at the highest astronomical tide and zones which, in principle, the sea never reaches.

This is the meaning of the word coast, i.e., the coastline, that has been adopted by the United Nations Convention on the Law of the Sea, where in Article 5 a normal baseline of the territorial sea is defined as the "low-water line along the coast" [*«la laisse de basse mer le long de la côte»*]. In even clearer terms, when Article 7 of the Convention defines the conditions in which straight baselines can be drawn, the English text refers expressly to the coastline: "In localities where *the coastline* is deeply indented and cut into" [*«Là où la côte est profondément échanquée et découpée»*] —"Where . . . *the coastline* is highly unstable" [*«Là où la côte est extrêmement instable»*].

18. But if the coast is thus considered to be the same thing as the coastline or high-water line, the inevitable consequence is that, in places where no high-water line exists, it is not possible to speak of a coastline. This means, as a result, that a low-tide elevation cannot be considered as representing a coast *stricto sensu*, since it is defined in both Article 11 of the 1958 Convention on the Territorial Sea and Article 13 of the 1982 Convention on the Law of the Sea as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". Accordingly, in particular, Fasht Dibal is by no means a coast and even less so a Bahraini coast opposite the coast of Qatar. Similarly, the other low-tide elevations existing in the area cannot be assimilated to a coast of any kind.

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19. It is doubtless for this reason that Bahrain has sought another stance and relied on the idea of what it calls an "*international legal coast*", presented as corresponding to the notion of a baseline for the territorial sea. This has allowed it to assert that, for purposes of maritime delimitation, the coast is represented by the baselines used for measuring the breadth of the territorial sea. Furthermore, according to Bahrain, since the low-water line on a low-tide elevation can be used as a baseline if the low-tide elevation is located wholly or partly at a distance from land

not exceeding the breadth of the territorial sea, this clearly means that the low-tide elevation can be held to represent the coast of that particular State.

Whereas this assertion is strictly accurate with regard to the determination by a State of the outer limits of its different national maritime zones (territorial sea, contiguous zone, exclusive economic zone, continental shelf), it is not necessarily correct with regard to a maritime delimitation between States, and in particular with regard to a delimitation between States carried out by a court or international tribunal, as Qatar has already shown.

In this respect, we would respectfully request the Court to refer in particular to the discussion of the distinction made by the jurisprudence between baselines for a territorial sea and basepoints for a delimitation line, a discussion which is to be found in Qatar's Counter-Memorial and Reply (Counter-Memorial of Qatar, paras. 7.33-7.38; Reply of Qatar, paras. 8.7-8.13).

With this in mind, the identification of the coasts of the two States for purposes of the delimitation then appears relatively simple, in both the southern sector and the northern sector of the area to be delimited.

[Illustration 4]

(b) *The coasts in the southern sector*

20. With regard to the *southern sector*, a careful look at the map of the area will suffice to show us that the portion of the western coast of Qatar that is relevant in the present case is the coast located directly opposite Bahrain, extending approximately between Ras al'Uwaynat in the south and Ras Rakan in the north.

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With regard to the Bahraini coast that must be taken into account, this is obviously the coast located opposite Qatar's coast, comprising the eastern coastal front of the islands of Bahrain, Sitrah and Muharraq, in other words, encompassing the coast running between Ras al Barr in the south and the northern tip of Jazirat al Muharraq.

It is also obvious from the map that the relevant coast of Qatar is substantially longer than the relevant coast of Bahrain, the ratio between the lengths of the two coasts being 1:1.59 in favour of Qatar, as previously stated.

It is also obvious that in this southern sector of the delimitation area, the general geographical configuration is that of a maritime space lying between opposite coasts, an area which, since the extension of the territorial seas of the two States to 12 nautical miles, is a maritime space consisting almost entirely of overlapping territorial waters, except in a small triangular portion north of Qit'at Jaradah.

[Illustration 5]

21. It cannot therefore be accepted that the Bahraini coast which is to be taken into consideration in the southern sector is represented by a series of artificial lines linking various low-tide elevations. This is, nonetheless, what Bahrain has not hesitated to do.

[Illustration 6]

As one can see on this map, which is map 14 from Bahrain's Memorial, the other Party considers that the Bahraini coast which faces the coast of Qatar is constituted by a line (which we have added to this map) linking Fasht Bu Thur in the south to Fasht Dibal in the north, and passing through several points located on Qita'a el Erge, Qit'at ash Shajarah and Qit'at Jaradah.

This illustration, which Bahrain presents as its relevant coast, has obviously nothing to do with the true coastal front of Bahrain as depicted by the coastline appearing on all the maps. This in fact is a totally artificial "line" and as such cannot be taken into consideration. Indeed, the construction made by Bahrain of this alleged "coastline" suffers from several shortcomings.

Not only is it based exclusively on low-tide elevations that are clearly detached from the true Bahraini coast (which in itself already invalidates it) but it also harbours a fundamental defect because it uses low-tide elevations which, purely owing to their location, will be under Qatar's sovereignty, as will be seen later. What is more, it creates some confusion, to which Qatar has already drawn the Court's attention (Counter-Memorial of Qatar, para. 6.83): the shoal of Qit'at ash Shajarah is here depicted as physically attached to the shoal of Fasht al Azm, whereas the official Bahraini nautical charts, in particular charts 5001 and 5005, demonstrate quite clearly that these are two distinct shoals separated by an expanse of sea (on this point, it will suffice simply to refer to maps Nos. 99 and 100 of the Map Atlas annexed to the Reply of Qatar).

22. But this is not all, for Bahrain has asserted that the shoal of Fasht al Azm itself constitutes an integral part of Sitrah Island and that its eastern edge should therefore be considered as an extension of the Bahraini coast opposite the Qatari coast in this sector. According to Bahrain, Qatar ventured into fanciful conjecture by alleging that Fasht al Azm was naturally separate from Sitrah, prior to the time when Bahrain undertook reclamation works in 1982 for the construction of a petrochemical plant. According to Bahrain, no natural separation existed between Fasht al Azm and Sitrah Island before 1982 and, therefore, again according to Bahrain, the works carried out at that time did not lead – in contrast to what Qatar alleges — to the creation of an artificial link between the island of Sitrah and the shoal of Fasht al Azm (Reply of Bahrain, paras. 309-315).

Unfortunately for Bahrain's thesis, this statement has nothing to do with reality.

23. As is indisputably demonstrated by the report prepared by Professor Thomas Rabenhorst of the University of Maryland, submitted by Qatar to the Court last March, a natural channel separating Fasht al Azm from Sitrah Island existed prior to the works carried out by Bahrain in 1982, and it was these works that resulted in the creation of an artificial link between Sitrah and Fasht al Azm.

24. To arrive at this conclusion, the expert consulted by Qatar based his study in particular on the examination of a large-scale map published in 1977 by a British firm on behalf of the Government of Bahrain and to be found in the United States Library of Congress.

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[Illustration 7]

On the enlargement of that map it can be seen beyond any doubt that in 1977, i.e., before the works undertaken by Bahrain, Fasht al Azm was not naturally attached to the island of Sitrah. Quite to the contrary, Fasht al Azm was separated from Sitrah by a passage having all the characteristics of a natural channel permanently accessible to small boats, presumably fishing boats, at all states of the tide. This was a navigable channel, as is evident from the leading marks or other markers on its banks that are visible on this further enlargement of the relevant portion of the map.

[Illustration 8]

It is, to say the least, curious that this information was not used by Commander Carleton in the expert report which he prepared at the request of the other Party and which is annexed to Bahrain's Reply (Reply of Bahrain, Ann. 14). The reason is doubtless that Commander Carleton may not have been informed by the Government of Bahrain of the existence of the map it had itself commissioned in 1977.

25. Whatever the reason, when compared to the first edition of 1977, the second edition of this same map, published in 1987, shows clearly that the works carried out by Bahrain in 1982 resulted in the artificial attachment of Fasht al Azm to the island of Sitrah by the partial filling-in of the pre-existing natural channel.

(Illustration 9.) This is probably what drove the Bahraini authorities to dredge an artificial replacement channel further east on Fasht al Azm. Otherwise, if a natural channel had not existed previously, why would it have been necessary to dredge an artificial channel precisely at the time embankment and reclamation works were being carried out in this location?

26. By all indications, therefore, the attachment of Fasht al Azm to Sitrah Island is purely artificial. Under these circumstances, since Fasht al Azm is not naturally linked to Sitrah Island, it cannot be regarded as forming an integral part of that island. In contrast to what Bahrain has alleged, Fasht al Azm is by no means an extension of the coast of Sitrah Island. Furthermore, in the past, Fasht al Azm was never considered as part of the Bahraini coast, either when the 1947 line was established or when a line was drawn in 1948 which was to become known as the Boggs-Kennedy line from the names of its two authors, one of whom was at the time the State Department Geographer and the other an officer of the Royal Navy attached to the Hydrographic Office of the British Admiralty. These two persons sketched out the various delimitation lines that it was appropriate to draw in the Gulf.

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There is therefore no reason whatsoever to take Fasht al Azm into account when attempting to identify the relevant coast of Bahrain in the southern sector. The relevant coast remains the coastline constituted by the eastern facades of the islands of Bahrain, Sitrah and Muharraq, respectively.

(c) *The coasts in the northern sector*

27. Let us now turn to the identification of the relevant coasts in the *northern sector*, in other words, in the region located north of an imaginary line drawn between the northern tips of Muharraq Island (point MQ) and the northern tip of the Qatar peninsula (point RK) (illustration 10). We see immediately that the area to be delimited is no longer confined within a comparatively narrow stretch of sea, as in the southern sector, but extends seawards from the coasts of the two States towards the centre of the Arabian/Persian Gulf.

In other words, the area to be delimited in the northern sector is located "off, rather than between, the coasts of the two countries", to borrow the words used by the Anglo-French Court of Arbitration in its Award of 30 June 1977 (para. 233).

28. In addition, in this sector, the coasts of the two States abutting the maritime area to be delimited are extremely short (illustration 11).

Indeed, on the Qatari side, only a small portion of the coast, between Ras Abu Amran and point RK, actually faces the maritime area in question. On the Bahraini side, an even smaller segment of the coastline of Muharraq Island is involved.

The geographical setting here is a situation where two small portions of coast bear a lateral relationship to each other — but without being adjacent or bordering coasts — and abut the same maritime area, an area which extends beyond those coasts as far as the line in the middle of the Gulf determined by the Parties' agreements with Iran. The resulting configuration is thus not, as Bahrain maintains, a configuration of adjacent coasts (Reply of Bahrain, para. 388).

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29. The highly artificial nature of Bahrain's claim to make the dividing line between the two sectors the relevant coast in the northern sector is immediately apparent. Bahrain has not hesitated to say that: "In the present case, the relevant coast in the northern sector is the dimension created by the sectoral line" (Reply of Bahrain, para. 388). Yet for this to be so, the dividing line between the two sectors must be taken to represent the coastlines in the southern sector, on condition, however, that that dividing line is based on the real coasts.

This was what was done, for example, by the Arbitral Tribunal for the delimitation of the maritime areas between Canada and France in 1992. It drew a straight line across the Cabot Strait

at the mouth of the Gulf of St. Lawrence. Then, it stated that "the closing line across the Cabot Strait represent[ed] coastlines inside the Gulf" (Decision of 10 June 1992, para. 29).

However, Bahrain has criticized Qatar for taking into account all the relevant coasts of both States, including those in the southern sector, in order to verify whether the line of delimitation is equitable, in particular in the northern sector. According to Bahrain, the same coast should not be used twice when the delimitation area is divided into two separate sectors. Bahrain states in its Reply: "when one sectoralizes, one does not 'double-count'" (Reply of Bahrain, para. 388).

I must admit that it is difficult to grasp Bahrain's "logic" in this regard, since Bahrain itself claims that the dividing line between the two sectors — its own, artificial line — represents the relevant coast in the northern sector. Moreover, it does so, we reiterate, by relying upon a dividing line that is wholly artificial and clearly arbitrary.

Mr. President, Members of the Court, I now come to the specific issues of the low-tide elevations of Fasht Dibal and Qit'at Jaradah and the island of Janan, which make up the second part of my statement.

II. The specific issues of the low-tide elevations of Fasht Dibal and Qit'at Jaradah and the island of Janan

0 4 7 30. Although these are distinct issues, each with its own specificity within the collection of disputes of which the Court is seised, these two issues nevertheless have one feature in common: in both cases, the ownership of the low-tide elevations or the island is at issue. Indeed, Qatar has requested the Court to declare that Dibal and Jaradah are under its sovereignty and that Bahrain has no territorial sovereignty over the island of Janan.

1. Fasht Dibal and Qit'at Jaradah

31. There is no common ground between the Parties with regard to Fasht Dibal and Qit'at Jaradah. The dispute concerns the legal characterization of Qit'at Jaradah and the ownership of the two shoals.

(a) *The legal characterization of Qit'at Jaradah*

32. The status of Fasht Dibal is not problematic with respect to its characterization, as Bahrain is in agreement with Qatar that it qualifies as a low-tide elevation.

33. The position adopted by Bahrain concerning the status of Qit'at Jaradah appeared initially hesitant. As Sir Ian Sinclair pointed out in his first oral statement, Map No. 2 annexed to Bahrain's Memorial tended to show that Bahrain had agreed to consider Qit'at Jaradah a low-tide elevation, just like Fasht Dibal. Then, having incidentally yet expressly admitted in its Counter-Memorial that it was a low-tide elevation (Counter-Memorial of Bahrain, para. 468), Bahrain attempted in its last written pleading to show that Qit'at Jaradah was a true island and that Qatar's contention to the contrary had been contradicted by recent observations and surveys. In particular, Bahrain submitted a very brief report by Professor Alexander who, on the basis of six site visits between April and November 1998, concluded that Jaradah was an island within the definition given by Article 121 of the United Nations Convention on the Law of the Sea.

0 4 8 Qatar has had this report examined by two experts who concluded that the results of the observations and conclusions of Professor Alexander may not have been entirely reliable, owing to various approximations found in his report. The experts consulted by Qatar could not be certain of the exact nature of Qit'at Jaradah. Preferring to refer to it as a "sand feature" or "sandbar" [*«banc de sable»*], they considered that the surveys conducted in 1998 did not provide a basis for a definitive determination whether it is an islet [*«îlot»*] or a low-tide elevation [*«haut-fond découvrant»*]. Likewise, they deemed it problematical to make any definite prediction or prognosis concerning the natural evolution of this "sandbar" in the future. Allow me to refer you to the report by Professors Murphy and Prescott that Qatar submitted to the Court on 1 March.

34. Faced with the conflicting views of experts, is the Court in a position to come to sound conclusions concerning the characterization of Qit'at Jaradah? Or should the Court sustain the position it adopted in 1985 in the *Continental Shelf (Libya/Malta)* case when a difference of opinion had arisen between eminent geology experts:

"The Court is unable to accept the position that in order to decide this case, it must first make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data." (*I.C.J. Reports 1985*, p. 36, para. 41.)

If unable to make a choice between scientific explanations that might not appear necessarily conclusive, can the Court not simply rely on elementary considerations of common sense? As foreseen by Jeremy Bentham in his "Treatise on Judicial Evidence", is not a judge's ultimate

benchmark common sense and ordinary usage and reasoning? Moreover, is this not what the Court already does with regard to interpretation when it gives words their ordinary meaning, as provided for in the Vienna Convention on the Law of Treaties?

With this in mind, I believe it is possible to formulate three observations which at least have the advantage of simplicity.

35. First of all, it may be noted that in essence the current debate concerning Jaradah's status as an islet or as nothing more than a low-tide elevation merely perpetuates the hesitancy of the British authorities during their time of authority in the Gulf. It will be recalled that when the now familiar 1947 line was drawn, and in subsequent years, the Admiralty, the Foreign Office and the British Resident in the Gulf expressed different views on this question, at different points in time, as evidenced by several of the documents produced as annexes to Qatar's Memorial and Counter-Memorial, to such an extent that it may well be asked whether the debate and hesitancy are not simply a reflection of the changes and variations that Jaradah may have undergone, and is doubtless still undergoing, with regard to its physical characteristics, its height, extent, shape or orientation, under the effects of winds, currents and tides. This would explain why it is impossible to settle definitively the question as to whether Jaradah is permanently above water at high-tide, or whether it has been permanently above water during certain periods only. (See also Memorial of Qatar, App. 5, Vol. 15, pp. 135-141.)

36. This question is associated, in certain respects, with the second observation I would like to make, which concerns the six photographs found in the report by Professor Alexander submitted by Bahrain (Reply of Bahrain, Vol. 2, Ann. 13 (a)).

Examining these photographs, which we are told were taken at high-tide, during the spring tides of April, June, August, September, October and November 1998, one can see what seems to be nothing more than a sandbank barely protruding above the water. This bank is fairly small (scarcely a few square metres) and its size, while always small, seems to vary quite considerably from one photograph to another, without any indication as to whether these variations result from differences in the coefficients of the tides for the dates indicated, or from the fact that the photographs were not all systematically taken at the same stage of the tide (final phase of the flood, slack of high-tide, or beginning of the ebb).

In three of these photographs, individuals are standing on the sandbank and, in at least two of them, they appear to have their feet in the water. It is quite likely that rescue boats were standing by, ready to spring into action when these photos were taken. At least, I hope so. This suggests that the sandbank is only really exposed and dry at low tide.

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This gives the impression that such a protuberance cannot be characterized as an island, or even as an islet, but is closer to what are called, in legal terms, low-tide elevations, which are distinguished from true islands on nautical charts.

37. This interpretation, apparently one of common sense, is reinforced by our third observation, after scrutiny of the most recent British Admiralty charts. It is generally acknowledged that British nautical charts of this region of the Gulf are the most dependable ones. These Admiralty charts indicate that Qit'at Jaradah is a simple low-tide elevation, depicted on the chart in the same manner as the neighbouring shoal of Fasht Dibal or the shoals bordering the northern part of the Qatari peninsula (see in particular, British Admiralty Chart No. 3790). The intrinsic value of the information furnished by a nautical chart undeniably confirms the common sense interpretation.

38. Such an interpretation remains unaffected by an examination of the 26 other photographs Bahrain has annexed to its Reply (Reply of Bahrain, Vol. 2, Ann. 25). As is obvious from the 15th photograph, they were taken from a helicopter on 7 May 1999, at an unspecified time; but there is every reason to believe that it was at low-tide. By themselves, these photographs prove nothing with regard to the exact nature and status of Qit'at Jaradah. More specifically, they prove only one thing: the ability of the Bahraini authorities to organize a gathering in this location of a small armada of sailing craft and pleasure boats, one Friday, at low-tide, in an attempt to rescue its faltering case.

We do not doubt for one instant that the Court has fully appreciated the Bahraini allegation that these photographs show that the sandbank, Qit'at Jaradah, is traditionally used by Bahrainis as a "weekend retreat for recreational purposes" [*«[d[es habitants de Bahreïn avaient . . . coutume . . . de venir se détendre les week-ends à Qit'at Jaradah]»*] (Reply of Bahrain, para. 336). It is obviously not Disneyland, but judging by the photographs, neither is it the ideal place for a retreat, even if for only a few moments, at low water.

0 5 1 39. On a more serious note, taking a common sense view, it would appear obvious that, despite Bahrain's efforts to demonstrate the contrary, Qit'at Jaradah is nothing more than a natural protrusion that is exposed at low-tide and practically covered at high-tide. This has already been demonstrated by, for example, a satellite photograph that showed Qit'at Jaradah, like Fasht Dibal, as entirely covered by water when the photograph was taken on 30 December 1984 (see Reply of Qatar, Ann. IV.31, Vol. 4, p. 187). This was also revealed by Bahrain's attempt, in 1985, to modify the structure and foundations of these low-tide elevations in order to transform them into artificial islands. This attempt is surely the best conceivable confirmation that Qit'at Jaradah is a low-tide elevation. It might therefore seem strange, and, in point of fact abnormal, to use Qit'at Jaradah for any reason whatsoever in a maritime delimitation process.

(b) *The ownership of the two shoals*

40. Let us now consider the other aspect of the issue of Qit'at Jaradah and Fasht Dibal: whether the right to claim these two shoals falls to Qatar or to Bahrain.

It would appear that the Court has been amply informed of the opposing views of the Parties on this point. Therefore, we need only present a few elements in order further to clarify the debate.

41. Let us begin by recalling that disputes between States relating to a right or title to low-tide elevations are not commonplace in international legal proceedings. It appears, in fact, that this is the first case in which such an issue has been directly raised.

0 5 2 Bahrain believes however that it has found a precedent in the recent arbitration between Eritrea and Yemen, and more specifically in the Award of the Arbitral Tribunal of 9 October 1998 in the first stage of the proceedings (Reply of Bahrain, para. 353). In the first stage, the Tribunal ruled upon the question as to which of the two States had sovereignty over some islands and groups of islands located between their respective coasts. These groups of islands comprised not only true island formations but also, apparently, some low-tide elevations associated with them. The Award states, therefore, that the islands, islets, rocks and low-tide elevations forming a particular group come under the territorial sovereignty of one State or the other (Award, para. 527), without identifying such low-tide elevations other than by their appurtenance to a group of islands; in other words, without designating them by name.

In that arbitration the affirmation of sovereignty therefore did not directly concern low-tide elevations, which, in any event, neither of the parties claimed as such. Territorial sovereignty over them was declared only because the Tribunal considered they formed part, a dependency as it were, of a group of islands. As a result, it is difficult to transpose the solution adopted by the Arbitral Tribunal in the *Eritrea/Yemen* dispute to the question of the ownership of two low-tide elevations that are designated by name: Fasht Dibal and Qit'at Jaradah.

Likewise, no solution is to be found in the Court's Judgment of 24 February 1982 in the *Continental Shelf (Tunisia/Libya)* case, which also involved a group of islands, islets and low-tide elevations. At the time, the Court did no more than mention the situation of the Kerkennah islands and the low-tide elevations surrounding them as a material point (*I.C.J. Reports 1982*, pp. 63-64, para. 79); but the Court did not deal specifically with the low-tide elevations, and was not called upon to decide on their appurtenance, which, in any event, was not contested.

42. If this issue has now arisen between Qatar and Bahrain, and comes before the Court for the first time, it is because, in laying down the seabed boundary between Qatar and Bahrain, the letter dated 23 December 1947 from the British authorities to the Rulers of the two countries contained the following statement:

"His Highness the Shaikh of Bahrain is recognised as having sovereign rights in (i) the areas of the Dibal and Jaradah shoals which are above the spring tide low-water level. After a full examination of the position under international law, His Majesty's Government are of opinion that these shoals should not be considered to be islands having territorial waters." (Qatar Application, Ann. 3, p. 32)

It should be recalled in passing that what was presented as an exception in the 1947 letter was not immune to criticism, owing to a glaring contradiction: while it expressly stated that these were not islands having their own territorial waters, and therefore recognized implicitly that they were mere low-tide elevations, the British Government nonetheless considered that these two shoals, although situated on the Qatari side of the line dividing the seabed, generated sovereign rights attributable to Bahrain. Such a position was incompatible with the doctrine on the continental shelf which was then being consolidated and which would be officially established shortly afterwards.

43. Nevertheless, on the basis of this exception, Bahrain now claims that Fasht Dibal and Qit'at Jaradah form an integral part of its territory and that they are perfectly capable of appropriation, like any piece of emerged land, under the rules concerning the acquisition of land

territory. It is in this spirit, and to this end, that Bahrain relies in particular on various «*effectivités*» presented as proof of Bahrain's exercise of sovereignty over these shoals. Irrespective of the fact that these allegations are not always supported by any evidence or that they relate to conduct or events that occurred during an irrelevant period, the alleged «*effectivités*» put forward by Bahrain are quite simply inadmissible, as they are not applicable in this case.

Indeed, Bahrain feigns to forget two things that are nonetheless essential. First, from a strictly physical, practical point of view, a low-tide elevation is hardly something that can be appropriated, in the sense that an actual taking of possession is difficult to imagine. This is what drove Bahrain, in 1985 I would remind you, to attempt artificially to transform the two shoals of Dibal and Jaradah, before being obliged to remedy the matter and to restore the *status quo ante* under the auspices and control of the Gulf Cooperation Council. And it should be added in passing that the restoration work was carried out by the Dutch company that had undertaken the transformation work on Bahrain's behalf and not by "Qatari bulldozers", contrary to what Bahrain has always wrongly alleged (see Counter-Memorial of Qatar, paras. 6.87-6.91).

Second, and most importantly, in international law a low-tide elevation cannot in principle be subject to sovereignty unless it is located wholly or partly within the territorial waters of a territory which is itself capable of appropriation.

44. In the *Minquiers and Ecrehos* case, which concerned sovereignty over two groups of islets each comprising two or three inhabitable islets, several smaller islets and a large number of rocks, the Court was requested in the Franco-British Special Agreement to "determine the sovereignty over the islets and rocks (in so far as they are capable of appropriation)". Interpreting this wording in the Special Agreement, the Court declared, in its Judgment of 17 November 1953:

"These words must be considered as relating to islets and rocks that are physically capable of appropriation" (*I.C.J. Reports 1953*, p. 53) (the English text being authoritative) [*«matériellement susceptibles d'appropriation»*].

Echoing the wording of its 1953 Judgment, and applying it to the small island of Meanguerita in the Gulf of Fonseca, an island with a surface area of barely 26 hectares, in 1992 the Chamber of the Court seized of the case concerning *Land, Island and Maritime Frontier Dispute* stated unambiguously: "That Meanguerita is 'capable of appropriation' . . . is undoubted; it is not a low-tide elevation . . ." (*I.C.J. Reports 1992*, p. 570, para. 356). This passage from the Judgment of

11 September 1992 cannot be clearer. It means that, because it is not a low-tide elevation, Meanguerita is capable of appropriation. This implies, *a contrario*, that if Meanguerita had been classified as a low-tide elevation, it would not have been declared "capable of appropriation".

45. In other words, according to the Court's own jurisprudence, a low-tide elevation is not in itself "capable of appropriation". Therefore, if it is to be considered as falling under the territorial sovereignty of a State, this is solely as a consequence of its location within a maritime area already under that State's sovereignty, in other words, within that State's territorial sea.

As the Court will recall, Fasht Dibal is located 9.3 nautical miles from the nearest point on the low water line on the coast of Qatar and 13.7 nautical miles from the nearest point on the low water line on the coast of Bahrain. For Qit'at Jaradah, the distances are, respectively, 9.4 nautical miles from the low water line on Qatar's coast and 10.8 nautical miles from the low water mark on Bahrain's coast (Memorial of Qatar, paras. 9.11-9.12).

The former is therefore located, at least in part, within the territorial waters of Qatar, but is beyond the limit of Bahrain's territorial sea. The second, admittedly, is located within the territorial waters of both States, which overlap at this point, but it is closer to Qatar's coast than it is to Bahrain's, and it would be, in any event, located entirely within the territorial waters of Qatar were a median line drawn by strict application of the equidistance principle to delimit the respective areas of territorial sea of the two States.

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This is why the State of Qatar, in the present case, is justified in requesting in its Submission that the Court declare Dibal and Jaradah to be low-tide elevations under Qatar's sovereignty.

2. The island of Janan

46. Coming now to consideration of *Janan*, one thing is certain: in contrast to Dibal and Jaradah, this is clearly an island under international law, albeit a very small island. Its surface area barely measures 12 hectares. Janan is therefore half the size of the island of Meanguerita in the Gulf of Fonseca, which I have just mentioned. Janan is also an arid, uninhabited island, located within Qatar's territorial waters: it was located partially within those waters when the limit was 3 nautical miles and has been located wholly within them since the extension to 12 miles. Lastly, it

is an island capable of appropriation and subject to the territorial sovereignty of the State of Qatar, which Bahrain now challenges (illustration 12).

47. In support of its claim to sovereignty over this island, Bahrain puts forward two sets of arguments. First, Bahrain contends that Janan forms part of the Hawar Island group awarded to it by Great Britain in 1939. Second, independently of the British decision of 1939, Bahrain relies on various activities it has carried out on the island, supposedly displaying its sovereignty. Neither argument, however, withstands scrutiny.

(a) *The alleged appurtenance of Janan to the Hawar Group*

48. In order to uphold its allegation that the island of Janan belongs to the Hawar group and to conclude that its sovereignty over the island was thus recognized by the British decision of 1939, Bahrain alleges that it has always considered the island to be part of that group, as evidenced in particular by the various lists it submitted to the British authorities in 1936, 1937, 1938 and 1946.

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Sir Ian Sinclair has already demonstrated the inconsistency of this argument with regard to the definition, composition and location of the Hawar Islands. I will therefore simply make a few additional remarks.

49. First of all, it must be pointed out that by submitting to the Court the whole of the dispute as circumscribed in what the Doha Agreement of 25 December 1990 called the "Bahraini formula", the State of Qatar, in its "Act" of 30 November 1994, adopted the very terms put forward by Bahrain at the meeting of the Tripartite Committee of December 1988. This is why the first issue in the statement of issues submitted to the Court was worded as follows: "The Hawar Islands, including the island of Janan" (see Judgment of 15 February 1995, *I.C.J. Reports 1995*, p. 12, para. 19 and p. 25, para. 47). It goes without saying that, in using these words, the State of Qatar did not intend to say or imply that the island of Janan might be considered as part of the Hawar Islands group. The word "including" quite evidently did not mean that, for Qatar, the island of Janan was "included" within the Hawar group. The wording was used only in order to make it clear that the dispute concerned not only the Hawar Islands but the island of Janan as well.

50. Second, in 1939, when the British Government wrongly decided that the Hawar Islands belonged to Bahrain and not to Qatar, the letters addressed to the respective Rulers of the two

States by the British Political Resident in the Persian Gulf contained no indication as to what the expression "Hawar Islands" meant. (See Qatar Application, Ann. 2.) No definition, description or enumeration was offered. It was only in 1947, at the time of the determination of a seabed delimitation, that the British circumscribed the Hawar Islands group by drawing an enclave that left Janan on the outside. Furthermore, the British decision announced in the letters of 23 December 1947 contained the following statement: "It should be noted that Janan Island is not regarded as being included in the islands of the Hawar group" (Qatar Application, Ann. 3, p. 34). That position was later confirmed by a letter dated 30 April 1949 from the British Political Agent to the Ruler of Bahrain (Memorial of Qatar, Ann. IV.133, Vol. 10, p. 179). In the eyes of the British Government, matters were quite clear: in deciding in 1939 upon the attribution of the Hawar Islands, they had in no way recognized Bahrain's sovereignty over Janan Island. The clarification they provided on this point in 1947, in their eyes, prolonged their earlier decision, as it were.

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Therefore, Bahrain cannot argue both that the British decision awarding the Hawar Islands to Bahrain was well-founded but that the express exclusion by the British of Janan Island was not well-founded.

Even assuming the 1939 decision to be well-founded, which Qatar has demonstrated to be untrue, Bahrain cannot claim sovereignty over Janan Island.

51. Admittedly, Bahrain challenges the exclusion of Janan from the Hawar island group by criticising the British authorities for relying, in making this exclusion, on the list established by Belgrave in his letter of 29 May 1938. According to Bahrain, in formulating this list, Belgrave did not intend to identify all the islands in the Hawar group, but simply to list those on which beacons had been placed. In particular, Bahrain stresses the fact that the list drawn up by Belgrave was preceded by the words: "The beacons are numbered as follows" [*«les balises portent les numéros suivante»*] (Counter-Memorial of Bahrain, para. 327). Yet Bahrain fails to mention that, in the previous sentence, Belgrave expressly stated: "On each of the islands there is a stone beacon" (Memorial of Bahrain, Ann. 261, Vol. 5, p. 1110).

If each of the Hawar Islands bore a beacon, it would not matter whether the list was a list of the islands or of the numbers of the beacons. Janan had not been "beaconed" at the time, at that

date, and therefore was not on the list. As Belgrave's letter stated that each island in the Hawar group had been beacons, and listed those islands or those beacons, this must mean that Janan Island was not considered, at the time the British were about to take their decision, as part of the Hawar Islands group. The decision of 1947, therefore, merely confirmed in this regard a fact accepted in 1938-1939.

52. Therefore, one cannot fail to be surprised by the peremptory statement made by Bahrain, when submitting its Supplemental Documents in March, that, in 1938, during the negotiations for the granting of oil concessions in the previously unallotted area, Britain recognized Bahraini sovereignty over Janan Island.

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It is rather curious that Bahrain supports this contention by producing a letter from Belgrave dated 8 June 1938, to which was annexed a map indicating a proposed division of the area in question between the two companies BAPCO and PCL. And Bahrain adds the following comment: "This map recognises Janan Island as an integral part of the Hawar Islands" (Supplemental Documents of Bahrain, Ann. 9, p. 88).

But far from being evidence of British recognition, as Bahrain alleges, this document is nothing more than a Bahraini claim to Janan Island — a claim that was never recognized by the British.

The way in which this document is presented provides, however, as the Court will have noted, an illustration of the tactic frequently employed by Bahrain of mixing up different things and deliberately creating confusion.

(b) Bahrain's so-called "acts of sovereignty"

53. There remains the other argument put forward by Bahrain, according to which its sovereignty over Janan Island derives in any event from various actions carried out there by Bahrain. And it specifically invokes, as an indication of the assertion of its sovereignty, the beaconing of Janan Island.

54. The main objection that may be raised concerning the argument derived by Bahrain from the beaconing of Janan is that this kind of activity cannot in itself be considered as a manifestation of sovereignty. It can generally only be taken into account as a kind of superfluous, as it were,

consideration. According to the most well-established international jurisprudence, probative value can attach only to activities relating to the exercising of State functions: legislation, administration, jurisdiction.

One cannot infer from the installation of lights, beacons or buoys [*«balises», «bouées»*] that the State carrying out such installations was acting as the territorial sovereign.

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Thus, in the *Minquiers and Ecrehos* case, the French Government argued, *inter alia*, that it had acted alone for three-quarters of a century in the lighting and buoying of the Minquiers, without any objection being made by the British authorities. The Court considered, however, that these acts were insufficient to demonstrate French sovereignty over these islets. As a result, it rejected acts of buoying as being "sufficient evidence of the intention of that Government to act as sovereign" and specified, furthermore, that "nor [were] those acts of such a character that they [could] be considered as involving a manifestation of State authority in respect of the islets" (*I.C.J. Reports 1953*, p. 71).

More recently, in the Award of 9 October 1998 in the dispute between Eritrea and Yemen, the Arbitral Tribunal had occasion to point out in very clear terms that activities of this type, essentially carried out with a view to ensuring safe navigation, did not normally have the effect of creating territorial title. The Tribunal stated that:

"[t]he operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty" (Award, para. 328) [*«[a]ssurer le fonctionnement ou l'entretien de phares et d'aides à la navigation est normalement lié à la sécurité de la navigation et n'est normalement pas considéré comme un critère de souveraineté»*]. [*Translation by the Registry*]

Therefore, Bahrain has no grounds for asserting that the fact that it erected a beacon on Janan is sufficient to prove that it was acting as territorial sovereign on this island.

55. Nor can the fact that Bahraini subjects used Janan for fishing activities in waters around it serve as an indication of sovereignty. Given the usage and customs in force in the Gulf region for many years, there is every reason to believe that the Bahraini fishermen were doubtless not the only ones to periodically visit Janan Island. Furthermore, these visits were temporary and intermittent and occurred only during the fishing season. Above all, these visits to Janan by Bahraini fishermen were for purely private economic purposes, without being associated in any

way with any act of authority being exercised by Bahrain. Can one seriously believe that the Bahraini fishermen visiting this island had to obtain prior authorization from the Ruler of Bahrain in order to put up huts or simple shelters to protect themselves from the sun? This is, however, what Bahrain has not hesitated to argue in its Reply (Reply of Bahrain, para. 169), relying exclusively on the words of the Ruler of Bahrain himself in the letter he addressed to the British Political Agent in December 1947 (Memorial of Qatar, Ann. IV.118, Vol. 10, p. 83).

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In these circumstances, one might paraphrase here what the Court said in its Judgment of 13 December 1999 concerning the presence of Masubia on Kasikili/Sedudu Island. In particular, it can be said that there is nothing to show that visits to Janan Island by Bahraini fishermen had any link with territorial claims by the Bahraini authorities (see *Kasikili/Sedudu Island*, Judgment, para. 74).

56. Thus in sum, the arguments Bahrain believed it could rely on as a basis for its claim of sovereignty over Janan are therefore totally groundless, and there is no evidence to refute Qatar's sovereignty over this island.

Thank you, Mr. President. Thank you, Members of the Court.

The PRESIDENT: Thank you, Professor. The Court will adjourn until tomorrow morning at 10 a.m.

The Court rose at 6 p.m.
