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of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2000

Public sitting

held on Tuesday 13 June 2000, at 3 p.m., at the Peace Palace,

President Guillaume presiding

*in the case concerning Maritime Delimitation and Territorial Questions between
Qatar and Bahrain (Qatar v. Bahrain)*

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le mardi 13 juin 2000, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

*en l'affaire de la Délimitation maritime et des questions territoriales entre Qatar et Bahreïn
(Qatar c. Bahreïn)*

COMPTE RENDU

Present: President Guillaume
 Vice-President Shi
 Judges Oda
 Bedjaoui
 Ranjeva
 Herczegh
 Fleischhauer
 Koroma
 Vereshchetin
 Higgins
 Parra-Aranguren
 Kooijmans
 Rezek
 Al-Khasawneh
 Buergenthal
 Judges *ad hoc* Torres Bernárdez
 Fortier

 Registrar Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Oda
Bedjaoui
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buerghenthal, juges
MM. Torres Bernárdez
Fortier, juges *ad hoc*
M. Couvreur, greffier

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Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole au nom de l'Etat de Bahreïn à Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Thank you, Mr. President and Members of the Court.

MAPS

1. It falls to me to respond to Qatar's case on the maps. I shall be relatively brief. It is true that Bahrain has not presented many maps to the Court and that, in contrast, Qatar has produced a handsome atlas, perhaps more elegant than potent, containing some 102 maps. But the explanation of that difference is that Bahrain does not really need maps to support its case, while Qatar needs to introduce every shred of material it can in an attempt to support its position.

2. There are two issues in the territorial part of the case to which Qatar suggests that the map evidence could be relevant. Both are expressed in one sentence of Mr. Bundy's statement on 31 May (CR 2000/7, p. 23, para. 69):

"maps have an important role to play in this case in so far as they constitute confirmatory evidence of an historical nature pointing to a widespread recognition, or general repute, that the political entity of Qatar covered the entire peninsula including the Hawar Islands and Zubarah".

Thus the two issues are: first, the political status of Qatar; second, the question whether the Hawar Islands have been regarded as belonging to Bahrain or Qatar.

3. In relation to both of them I would invoke the highly pertinent observation of Judge Huber in the *Palmas* case. "If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be." (*UNRIAA*, Vol. II, pp. 852-853; judges' folders, tab 1, top of p. 853.)

4. The same consideration is implicit in the well-known observations of the Chamber of this Court in the *Burkina Faso/Mali* case (*I.C.J. Reports 1986*, pp. 582-583, paras. 54-56), recently recalled by the Court as a whole in the *Kasikili* case (*Botswana/Namibia, I.C.J. Reports 1999*, para. 84).

5. Bahrain's contention is that there is more than a sufficiency of legally relevant facts available in this case to establish Bahrain's title, and Qatar's lack of title, to the Hawars without the

use of maps. Equally devoid of factual support is Qatar's claim to any significant status as a "political entity" in the nineteenth century and the earlier part of the twentieth century. In consequence, even granting the maps a relevance and quality they do not possess, they cannot deprive Bahrain of the legal title to the Hawar Islands that it has had since the eighteenth century and has maintained by possession and control ever since. As regards the status of Qatar, many of the maps produced by Qatar not only do not support its position but indeed flatly contradict it.

6. Before going further, I should respond to one highly questionable statement made in Mr. Bundy's opening remarks. He mentioned the date 1868, "by which time", he said, "the separate entities of Qatar and Bahrain had been recognized". This statement appears intended to convey the impression that in some way from 1868 onwards Bahrain and Qatar were entities of equal status. Even though my colleagues have already stated that that is a gross exaggeration of Qatar's position in the nineteenth century, the repetition of the point requires the repetition of its rejection. In 1868 Qatar was in no way comparable to Bahrain as an entity. Bahrain was an established political authority with which Britain had some seven years previously, in 1861, concluded a Friendly Convention and whose territorial authority Britain had politically recognized by undertaking to support the Ruler in the maintenance of the security of his possessions. Qatar, by contrast, was not an entity but at best a geographical area of a size which varied according to whatever map one might look at. The treaty which Britain made with the Chief of El Katr in 1868 and on which Qatar now relies as recognition of its status as an independent State really does little more than tell the Chief to return to Doha "and reside peaceably in that port". It does not acknowledge any right on his part to move about freely within the peninsula: go home and stay there, is what it really says.

7. I must also observe preliminarily that virtually all of the commercial maps produced by Qatar, and even the official ones, have been on a very small scale. Whereas maps adduced in territorial and boundary disputes are normally on a large scale in the range of 1:5000 to 1:50000, the bulk of the maps in the Qatari Map Atlas attached to its Reply range between 1:4 million and 1:16 million. So small is the scale that 81 out of 102 maps in the Atlas require massive enlargement if even the sharpest judicial eye is to identify their supposedly relevant content; and this enlargement can carry with it a distortion of colour which renders the maps totally untrustworthy. With the computer techniques now used to make enlargements, variations in

colours creep in almost inescapably in the process of enlarging or copying the maps. I shall return to this matter towards the end of my argument. Here I need only observe that the Tribunal in the *Eritrea/Yemen* case thought it necessary to enter a qualification as to the evaluation of the colour of maps (First Award in the *Eritrea/Yemen* case; para. 370).

8. In drawing their maps on a very small scale, it is improbable in the extreme that any map-maker, commercial or official, would have had sought or come across sufficient information to lead him to deal specifically with the question of title to the Hawars. The only exception might have been the Ottoman and the British map-makers. As regards the Ottomans, Qatar presents one large-scale map which has turned out to be a forgery. Bahrain has produced Izzet's map of 1878 (Memorial of Bahrain, Vol. 1, pp. 6-7), the probative value of which Mr. Paulsson discussed last Friday. The other large-scale map already presented to the Court has been the 1935 Oil Concession Map, the effect of which was also explained to the Court by Mr. Paulsson last Friday.

9. That said, I can turn to some of the maps, spoken of by Mr. Bundy on 31 May. As you will see, most of these, far from showing a political entity called Qatar, in fact show no more than the geographical area corresponding to the peninsula now called "Qatar" under a variety of names as a westward and north-westward extension of an area called "Oman".

10. Take the first map put up by Qatar, 1875, Justus Perthes Institute, said to have been drafted by Augustus Petermann (Reply of Qatar, Map Atlas No. 5). This was presented to support the view that Qatar and Bahrain were "distinct entities" (CR 2000/7, paras. 18-22), with Qatar being shown by colour coding as encompassing the entire peninsula and as including the Hawars. Perhaps the map does show this, but at a scale of 1:7.5 million it cannot in itself be particularly significant. However, whatever significance it may have is considerably reduced when it is compared with the next map adduced by Qatar, on the same scale, also attributed to the expert hand of Augustus Petermann. This is referred to in Mr. Bundy's statement as having been made in 1884, 16 years after Qatar's alleged promotion to statehood. No reference was given by Mr. Bundy for this map but presumably it is the only one of that year listed in the Qatar Map Atlas. So it must be No. 11 there. I do not dispute that it again distinguishes Bahrain and a peninsula which at its southern end carries the word "Katar". But what this map shows that its predecessor does not show is the word immediately below "Katar", which in capital letters is "OMAN". There is no boundary

drawn between "OMAN" and "Katar". The inescapable inference is that in the view of Augustus Petermann "Katar" was no more than a part of a larger entity called "OMAN". This manifestly does not support the idea that as a matter of general repute, Qatar was as a result of the 1868 Treaty a separate, recognized State.

11. The picture looks even bleaker for Qatar when we examine the next map invoked by Qatar, the 1890 edition of the *Atlas de Géographie Moderne*, published by Librairie Hachette of Paris, described by Qatar as a highly reputable institution — a description which there is no good reason to contradict. This is Map 13 in the Qatar Map Atlas. Once more, it is on the miniscule scale of 1:7.5 million. And what you see in front of you, of course, is not the original map but the enlargement that appears normally on the left-hand side of the Map Atlas when it is opened out. Qatar says that the Hawar Islands appear in the same green colour as Qatar, in contrast to the grey colouring of Bahrain. I confess that I do not recognize this differentiation in the basic size version of the map which appears in the Map Atlas. The enlargement on the opposite page in this respect leaves much to the imagination. Qatar has provided no explanation of the hint of yellow that appears to have washed up the southern portion of the Qatar peninsula's west coast.

12. However, colour is not alone what matters here. What does attract attention is the fact that, because the map extends a lot more to the south than Petermann's map of 1884, it shows "Katar" even more clearly as an unseparated part of "OMAN". Furthermore, it is worth reading the legend on the map: "*Les Capitales d'Etat sont soulignées deux fois. Les chefs-lieux de province une fois*". I can see no Doha underlined. Nor is "El Bidda" — sometimes confused with Doha — underlined. So Doha or El Bidda, is neither a capital of a State nor the chief place of a province. Yet, according to Mr. Bundy, Qatar became a State 22 years previously and Doha was its capital.

13. It is true that as regards Bahrain, no underlining appears below Manama. Thus it appears that in the eyes of Librairie Hachette, Manama was no more significant than El Bidda. But there are nonetheless two differences between Bahrain and Katar. First, Bahrain is for a reason not explained given its own separate colour which is not so visibly distinct from that of the Hawar Islands. Second, and more to the point, that very separateness of colour that distinguishes Bahrain both from the Qatar peninsula and from the territory to the west described and misspelt as "El-Ahsa", demonstrates that Bahrain was acknowledged as having a quite distinct and independent

status from that of Katar which was again seen as part of Oman. There was no equality of status between Bahrain and Qatar. The absence of underlining below Manama does not downgrade Manama to the level of El Bidda. It merely demonstrates the map-maker's lack of knowledge of the political details of the area.

14. The next map introduced by Qatar is the Russian map of 1894 on a scale of 1:3.6 million (CR 2000/7, p. 13, para. 28; Reply of Qatar, Map Atlas No. 20). Mr. Bundy suggested that "Russian officials at this time recognized Qatar and Bahrain as distinct political entities and that the territorial extent of Qatar matched that as described in Qatar's pleadings". That Bahrain is distinct from Qatar is quite clear, but the suggestion that Qatar was a political entity and that its territorial extent matched the description in Qatar's pleadings is clearly wrong. The Russian words that describe Qatar have been translated by Qatar on the face of the enlargement not as "Qatar" but as "Qatar Peninsula" — obviously a geographical not a political description. The politics of the situation, as understood by the map-maker, are shown in the treatment of the peninsula again as a westward extension of Oman. The colour of Bahrain can hardly be distinguished from the colouring of the Hawar Islands.

15. Qatar's next citation is to a Polish map of 1904, on a scale of 1:8 million (CR 2000/7, p. 14, para. 30; Reply of Qatar, Map Atlas No. 32). While Bahrain is coloured and the Hawars are not, the interesting aspect of this map is that yet again it includes Qatar in the westward extension of Oman.

16. Qatar follows this map with an English one by George Philip on a scale of 69.16 miles to 1 degree, which is about 1:4 million. Though there is a difference in colouring between Bahrain and the Hawars, the map runs against Qatar's case for two reasons. First, Qatar is again represented as a westward extension of Oman. Secondly, the Hawar Islands are called "Wardens Islands". Now the earliest source in which Philip could have found that name recorded for the islands would have been in the report of Lieutenant Brucks and his chart of 1829. There, it will be recalled, Brucks said that the islands belonged to Bahrain. So, on a correct interpretation, this map, by implication, shows the Hawars as being Bahrain's.

17. Mr. Bundy then turned to official maps. He devoted special attention to a map which, he stated, had been included in a memorandum prepared in 1920 by the British Foreign Office. This

is described on its face as a portion of Chart 748-B of 1917 (Reply of Qatar, Anns., Vol. 3, Ann. III.38, p. 215; Reply of Qatar Map Atlas, Map No. 58, scale 20 sea miles to 1 inch). The map is now up on the screen. Mr. Bundy used it to support his contention that "the Hawar Islands . . . were located inside the [red] line and thus were considered to appertain to the adjacent mainland" — in other words, to Qatar. He continued:

"Bahrain, as is clear from the map, was carefully and specifically excluded from this definition by virtue of the fact that it was carefully enclaved by a separate red line which did not include the Hawar Islands, and this was emphasized by underlining, although it is difficult to read, the word 'Bahrain' in red, there on the map. There can thus be no doubt [I am still quoting Mr. Bundy] that Britain considered the Hawar Islands and Zubarah to form part of Qatar's territory at the time." (CR 2000/7, p. 16, paras. 40-41.)

18. I must ask the Court to bear with me while I enter into sufficient detail to demonstrate that there must be serious doubts as to whether this map can, or even was intended to, carry the interpretation which Mr. Bundy places upon it.

19. It is necessary to study this map in conjunction with the British Foreign Office memorandum to which it was alleged to relate (Reply of Qatar, Ann. III.38, Vol. 3, p. 217).

20. I may say in passing that Mr. Bundy's statement (CR 2000/7, p. 16, para. 38) that the memorandum in question "included" (that was the verb he used) a map is not borne out, so far as I can make out, by anything in the text of the memorandum itself. There is a draft Treaty relating to the settlement of the Arabian peninsula which is attached to the memorandum. Article 2 of this Treaty contains references to various Admiralty charts in the description of the line said to embrace Arabia. However, the numbers of these charts do not correspond with the number 748B that appears on Map No. 58 in the Qatari Map Atlas and Map 36 in the Qatari judges' folders. Nor has the original been deposited with the Registry.

21. But I return now to the Foreign Office Memorandum in which Mr. Bundy said the map was included (Reply of Qatar, Vol. 3, p. 215, Ann. III.38; Bahrain judges' folder, tab 61). There is a document entitled "Foreign Office Memorandum on Arabian Policy". Although it bears no date, the date of 1920 suggested for it by Qatar would appear to be consistent with its content. The substantive importance of some of the content of the Memorandum has already been mentioned by Professor Reisman (CR 2000/12, p. 49, para. 17). But I want to look at it now to see if it provides

any explanation of the circle drawn around the main Bahrain Islands in such a way as to support Mr. Bundy's supposition that the circle represents a deliberate separation of the main Bahrain Islands from the Hawars and an attachment of the Hawars to Qatar.

22. As the Court will see, the Memorandum begins with a statement that a more detailed description of what is defined as the peninsula of Arabia will be found in its Appendix (A) (*ibid.*, para. 1). As I have already said, the Memorandum itself then continues with a list of the ten main sub-divisions of Arabia. The list includes Bahrain with an indication that the individual to be dealt with there is the Sheikh of Bahrain. The list does not include Qatar by name. Perhaps it was considered to be covered by the heading "Trucial Coast". In that case no single individual was named as the person to be dealt with. Instead there was a blanket reference to "Petty Chiefs". And this, we recall, was written in 1920, in the Foreign Office, by which year Qatar's counsel would have us think that Qatar had for 52 years been an independent State of equal status with Bahrain.

23. Attached to the Memorandum as Annex A was a draft treaty dealing with the settlement of the Arabian peninsula. Article 2 stated that for the "purpose of the treaty the Arabian Peninsula included (1) all territories other than the Kingdom of Hedjaz and the British Protectorate over Aden and its surrounding territorial zone; and (2) the islands, whether previously British or not, which lie within the line which is defined hereafter".

24. There then follows a description of the line in six sections, by reference to seven named points identified by their co-ordinates as they appear on British Admiralty charts. None of the numbers on these charts corresponds with the number on Qatari Map 58. There is no mention of a line around Bahrain and no explanation of it is given, either in the draft Treaty or in the Memorandum to which the draft Treaty is attached.

25. I will not speculate as to what the circle around Bahrain may signify. It is even open to question whether the circle was drawn at the same time, by the same hand or with the same pen as the line surrounding Arabia. But there is certainly no justification for Qatar's assertion that because the Hawar Islands were separated from Bahrain main island by the circle and were located inside the defined lines they "were thus considered to appertain to the adjacent mainland—in other words, to Qatar". The only reference in the draft to the effect of adjacency of islands is to be found in the final paragraph of the description of Arabia in Article 2 of the draft Treaty. The description

concludes thus: "The islands in the *Red Sea* lying within this line shall be placed under the sovereignty of the independent chiefs of the mainland, subject, however, to provisions of Article 8." [Emphasis added.] The fact that no such specific words appear in relation to the Persian Gulf islands (I use the terminology on the map) suggests that the draftsman saw the identification of sovereignty over those islands — and there were quite a number of them — as possibly being too complex a matter to be resolved by so simple a formula.

26. There remains one further point to be made in connection with this map which illustrates the strange, if not misleading, methodology followed by Qatar in the consideration of maps generally. The Court was told that "there is a further important point with respect to this map which, I (that is counsel for Qatar) would suggest underlines its significance in this case" (CR 2000/7, p. 17, para. 42). This point was that the same map had been furnished to the Tribunal in the *Eritrea/Yemen* proceedings. That Tribunal, it was stated, appeared to have observed the effect of the Red Line in attributing the islands lying to the east of it to Yemen, the then local chieftom. Qatar then went on to suggest "that exactly the same situation pertains here with respect to the Hawar Islands".

27. But counsel for Qatar failed to point to the paragraph accompanying the description of the Red Line in the 1920 draft Treaty which I read to you a moment ago and which states specifically in relation to the Red Sea that "The Islands in the Red Sea lying within the Red Line shall be placed under the sovereignty of the individual chiefs of the mainland". There was no comparable provision relating to the islands in the Persian Gulf; there was, therefore no basis on which Qatar could validly equate the two positions — at any rate not without explaining what it was doing and the likely limitation on the validity of its proposition.

28. Generally speaking, Mr. President, there is something odd about this Map 58, particularly the unmentioned and unexplained ring around Bahrain, as well as the failure of the numbers to tie up with those given in the Foreign Office draft Treaty. I hope that counsel for Qatar will in his reply be able to provide the Court with some explanations.

29. Qatar cited no other official map that takes matters any further than the maps that I have already considered.

BAHRAIN'S MAPS

30. So I turn now to maps supportive of Bahrain's position. As I have already suggested, Bahrain needs no maps to support its position. Mr. Bundy has said that Bahrain has asserted that its authority over the Hawars and Zubarah following the 1868 Agreement is said to be "well documented" and "overwhelming", and he continues that therefore: "one would expect such ambitious assertions to be backed up by the map evidence" (CR 2000/7, p. 19, para. 52). Why so, Mr. Bundy did not explain. In Bahrain's submission the facts speak for themselves. The accumulation — or, indeed, the absence — of supportive maps does not matter.

31. But there is one additional map that exhibits the positive qualities that should mark a map that is presented in support of a claim to title. It is a large-scale chart prepared by a qualified, competent and experienced surveyor, George Brucks, at that time a lieutenant in the East India Company Marine Service, and later a Captain in the Indian Navy, on the basis of knowledge acquired at first hand. Reference was made to the descriptive report of Capt. Brucks at two places in the Bahrain Memorial (paras. 116 and 415) and by Mr. Paulsson on 2 June; and in particular to Brucks' notes about the Hawar Islands, and they were referred to again today. The relevant parts of his descriptive memoir were reproduced in the Annexes to Bahrain's Memorial (Ann. 7, Vol. 2, p. 101) as well as at tab 6 and tab 27 of Bahrain's judges' folders. In 1829, Brucks placed the name "Wardens Islands" next to the Hawars. He describes the islands and states that they belonged to Bahrain. Due to an oversight, for which Bahrain apologizes, the chart which Brucks prepared was not reproduced in Bahrain's pleadings. But the map may now quite properly be produced since it is a public document that has been reprinted in a series that is readily available and that, in all likelihood, given Qatar's diligence, is already known to it. The series is called "*Historical Maps of Bahrain 1817-1890*", published by Archive Editions. An extract from the map in the original scale is in the Court's judges' folders, at tab 62. A copy of the map was deposited with the Registry on Friday and, as a matter of courtesy, was also then sent to the Agent of Qatar.

32. As the Court will immediately see, the chart is a fine example of early nineteenth century chart-making. It demonstrates in every respect a firsthand examination of the area, including a large number of depth soundings. Toward the south-east corner it shows the principal Hawar Islands, together with Janan, next to the name "Wardens Islands". As already stated, Brucks

expressly attributed the Warden Islands to Bahrain. Even making allowances for the fact that the chart did not accompany the Bahrain Memorial, it must be said that the Brucks survey received rather peremptory treatment in the Qatar Counter-Memorial. There it was dismissed with the entirely unsupported allegation that it was one of "many of the British surveys carried out at the time shown to have been imprecise if not inaccurate" and was said, without any supportive references, to be contradicted by "Lorimer and other British authorities . . . [and] also by the numerous Ottoman surveys" (Counter-Memorial of Qatar, para. 3.122). The identity of these other surveys was never stated. The Court can now see the inaccuracy and unfairness of those comments.

33. As I indicated at the beginning, Bahrain has not bombarded the Court with a large number of commercial or official maps supportive of its position. Mr. Bundy has said that "Qatar wishes to make it very clear that it does not rely on cartographic evidence as creative of its title to the Hawar Islands or Zubarah". And he was right to offer that disclaimer because the evidence that he has produced would certainly not support such a claim. The notion of "widespread recognition or general repute" that Qatar relies on (CR 2000/7, p. 23, para. 69) is one that has very limited scope. While it has had some support from Sir Gerald Fitzmaurice and is mentioned in the *Beagle Channel Award*, it must be recalled that the maps to which parties in other cases have in the past turned have been ones prepared by States that have had a specific interest in the issue and, above all, have been on a scale sufficiently large to indicate that those who prepared them had the specific issue in mind and were seeking to reflect, on the basis of knowledge actually possessed, what they objectively thought to be the correct solution. Of that approach, not one of the maps produced by Qatar can be cited as an example. "General repute", as fully acknowledged by Sir Gerald Fitzmaurice, can never replace real evidence of conduct on the ground.

34. May I conclude this consideration of maps, Mr. President, with what I would call a footnote to the few lines I expressed a few minutes ago regarding the colour of maps.

35. The Court will recall that in relation to virtually every map that Qatar displayed, it made the point that on the basis of differences in colour the Hawars could be seen as being part of Qatar and not part of Bahrain. I am bound to offer the Court a warning against reliance upon colour for

the purpose just stated. Colours undergo significant distortion in the process of copying, enlargement or reduction as the case may be. I give you four examples.

36. Take first the Librairie Hachette Map of 1890, Map No. 13 in the Qatar Map Atlas. The enlargement of the map on the left-hand page of the Atlas shows the sea in a lighter shade of blue than the smaller-scale map on the right-hand side. But when one uses the computer to match the blue on the enlargement more closely to the blue on the small-scale map, the effect is to give the Hawars a colour closer to that of Bahrain than to that of Qatar.

37. Take, as another example, the map in Qatar's judges' folders at tab No. 34, said to correspond to Map No. 49 (1919) in the Map Atlas in the Reply of Qatar. The difference between the colours in the version in the judges' folders and the two versions in the Map Atlas immediately springs to the eye. What is the explanation? It is that in the process of copying the various versions of the map, especially in enlarging them — and bear in mind the enormous amount of enlargement involved — there is scope for subtle variation or enhancement of depth of colour. Thus the differences in depth of colour of the border margins of El-Hasa and El Katar are much more pronounced in the judges' folders than they are in the Map Atlas version. The non-enlarged version is on so small a scale that it is impossible to be sure what are the colours of the Hawars and Bahrain and whether they are really different in colour.

38. As a third example we may look at the 1919 map of Arabia that appears as Map No. 8 in Qatar Memorial, opposite page 71. Compare it with the version that appears as Map No. 62 in the Qatar Map Atlas. They are both described as originally having been published by Geographia Ltd. On the version in the Memorial, the sea is coloured yellow-green. In the Map Atlas it is coloured blue. In the Memorial, Bahrain's colour is enhanced to red, in seeming contrast to the Hawars, while in the Map Atlas, small-scale version, Bahrain appears coloured pink. It is clear from a comparison of the rest of the map with the colour coding in the bottom left-hand corner that all the colours have not been uniformly reproduced. Indeed, on the large version of the map, on the right-hand side of the Map Atlas, the whole of Trucial Oman, of which Qatar is depicted as a part, seems not dissimilar in colour to Bahrain.

39. The final example is Map 41 in the Qatar Map Atlas. As the Court can now see, the enlargement shows both Katar and the Wardens Islands as being covered with the same rash of

dots, suggesting that the Wardens Islands belong to Katar. Now here is the same enlargement produced in a straightforward way on a Bahraini computer — no rash and a colour very similar to Bahrain. Is it magic or is it something else?

40. In short, Mr. President and Members of the Court, without the originals of the maps on which Qatar so heavily relies, my respectful submission is that you should pay these maps no attention at all. And even if the originals are produced, it is Bahrain's submission that they make no difference to the case.

41. Mr. President, Members of the Court, that concludes my presentation on the maps. I thank you for your attention and it would be appreciated, Mr. President, if you would now call upon Mr. Paulsson.

The PRESIDENT : Thank you very much, Sir Elihu. Je donne maintenant la parole à M. Jan Paulsson.

M. PAULSSON : Merci, Monsieur le président.

CARTES PETROLIÈRES

1. Il m'échoit aujourd'hui de traiter d'une *sous-catégorie* des éléments de preuve cartographiques, à savoir les cartes — ou parfois plutôt des ébauches gribouillées, si j'ose dire, sur le dos d'enveloppes — qui ont figuré, ici ou là, au cours des négociations entre Bahreïn, Qatar, et les explorateurs pétroliers.

2. Quelle en serait la pertinence ? Il s'agit de savoir si ces cartes, ou esquisses, reflètent une compréhension de l'étendue géographique de la souveraineté de Bahreïn ou de celle de Qatar. C'est un sujet d'apparence aride, mais dans notre affaire, vous le verrez, il recèle quelques surprises.

3. Je vous propose donc encore une fois, avec votre permission, un voyage dans le temps, l'espace peut-être d'une demi-heure, pour passer en revue la manière dont les deux groupes pétroliers concurrents se sont positionnés à l'époque.

Mon exposé se divise, j'allais presque dire évidemment, en deux parties, les années vingt et les années trente.

L'ÉTENDUE DES DROITS CÉDÉS PAR BAHREÏN DÈS AVANT 1930

4. Souvenons-nous de ce personnage fantasque, haut en couleur qui est le *Major* Frank Holmes, Néo-Zélandais qu'on a fini par surnommer «Abu ad Naft» — le père du pétrole. Sa société, la Eastern & General Syndicate, obtient sa concession en 1925 du cheikh Hamad de Bahreïn. Selon les termes de cette concession, la Eastern & General avait le droit de prospecter [I] «partout sur le territoire sous son contrôle» [*"throughout the whole of the territories under his control"*] (art. I, Bahrain Oil Concession, mémoire de Bahreïn, vol. 3, annexe 90).

5. Ce document ne se réfère à aucune carte.

6. Vous vous rappelez que le *Major* Holmes était mal vu des autorités anglaises. Il se faisait conspuer par les financiers à Londres. Il ne parvint pas à convaincre l'Anglo-Persian Oil Company à prendre une participation dans son entreprise, ce qui explique l'arrivée sur la scène de la Standard Oil of California, par l'entremise de sa filiale à 100 %, la Bahrain Petroleum Company (BAPCO).

7. La BAPCO représente donc — il faut s'en souvenir — des intérêts américains à 100 %.

8. J'ouvre une parenthèse. Sir Charles Belgrave, le conseiller des émirats de Bahreïn pendant trente et un ans, est arrivé à Bahreïn en 1926. Quelle fut son attitude à l'égard de la lutte d'influences dans cette nouvelle industrie pétrolière ? Ses mémoires ne laissent aucun doute à cet égard : «L'histoire des concessions pétrolières dans le golfe Persique est, du point de vue de la Grande-Bretagne, un triste récit.» [*"The history of the oil concessions in the Persic Gulf is, from a British perspective, a sad story."*] (Charles Belgrave, *Personal Column*, p. 79 (1960)).

9. Belgrave fut au courant du refus de l'Anglo-Persian Oil Company de s'associer avec le *Major* Holmes, et écrit que : «Holmes fut souvent traité comme *persona non grata* par les Britanniques» [*"Holmes was frequently treated as persona non grata by the British"*] alors que : «je n'ai jamais entendu une explication convaincante pourquoi les pétroliers britanniques étaient si peu enclins à entreprendre.»

10. En 1936, le cheikh Hamad de Bahreïn est en voyage officiel en Angleterre. L'émir rencontre lord Cadman, président de la Anglo-Persian Oil Company — la grande société pétrolière britannique, dont l'Etat détenait 51 % des actions, et qui devait par la suite être rebaptisée la British Petroleum Company. Belgrave est présent à l'entrevue. Cadman se livre à un "*non-stop*

monologue", une heure durant, sur les raisons pour lesquelles sa société ne s'est pas intéressée à la concession à Bahreïn, ce qui, comme Belgrave l'écrira plus tard, «fut certainement une chose bien difficile à expliquer» [*"certainly a very difficult matter to explain"*] (*ibid.* p. 108).

11. En prenant congé de lord Cadman, l'émir lui dit malicieusement — je cite toujours Belgrave : «avec presque un clin d'œil à mon intention : «un jour vous devriez absolument me dire pourquoi votre société n'a pas postulé pour la concession de Bahreïn» [*"with almost a wink to me: 'some day you must tell me why your company did not compete for the Bahrain concession'"*], (*ibid.*)

12. Comme nous allons le voir, la société Anglo Persian a préféré s'allier avec le consortium qui était alors le plus puissant du monde, l'Iraq Petroleum Company, et celui-ci a plutôt opté pour Qatar.

13. Fermons la parenthèse.

14. Jusqu'en 1932, lorsque la BAPCO, contre l'attente de nombreux spécialistes, fit la première découverte pétrolière du côté arabe du Golfe, les activités du concessionnaire américain de Bahreïn n'étaient qu'exploratoires.

15. La concession de 1925, qui régissait ces activités de la BAPCO, pouvait, selon ses termes, se convertir en licence d'exploitation, mais avec la contrainte que le concessionnaire devait se limiter à une zone de 100 000 acres (qu'il pouvait lui-même choisir).

16. Nos adversaires invoquent deux projets de cartes, tracés avant la négociation de la concession de Bahreïn, pour essayer de faire croire que les îles Hawar ne furent pas considérées comme faisant partie de Bahreïn.

17. Avant d'aller plus loin, j'exprimerai au nom de Bahreïn deux sérieuses réserves.

18. Premièrement, la Cour ne manquera pas d'être frappée par le caractère insolite de l'argumentaire de Qatar à ce propos.

19. Un homme vient avec un projet de contrat, carte de la zone convoitée comprise. Le conseil de Qatar croit utile de faire observer — comme si cela avait le moindre intérêt — que le projet de contrat est, de manière unilatérale, «dûment signé par Frank Holmes et sa signature authentifiée» (CR 2000/6, trad. fr., p. 15, par. 30)

20. Mais ce qui importe, c'est que le projet n'est pas accepté par le souverain de Bahreïn. Les années passent, les décennies aussi, et soixante-dix-sept ans plus tard on nous dit que ce projet de contrat, établi unilatéralement par un néo-zélandais — à l'égard duquel ce n'est pas une injure de dire que sa seule motivation fut commerciale — on nous dit donc qu'il convient de donner du poids à cette proposition jaunie et non retenue dans la détermination de l'étendue des frontières d'une nation arabe contemporaine. Si la litote était de mise, je dirais que ceci est plutôt déconcertant.

21. Deuxièmement, les hommes de l'or noir n'ont jamais eu la réputation d'être des enfants de chœur. Juger plutôt vous-mêmes de l'état d'esprit du fameux *Major* Holmes lorsqu'il écrit à un investisseur américain potentiel. Il s'agit de savoir si les autorités britanniques vont approuver une nouvelle concession à Bahreïn au-delà des 100 000 acres. Les Américains ne veulent pas montrer leurs cartes aux autorités anglaises. Holmes manifeste son désaccord comme suit :

«Il me paraît qu'il est préférable d'être très ouvert dans nos rapports avec le *Political Resident* du golfe Persique afin d'éviter toute suggestion que nous nous cachons, ou que nous avons quelque chose à cacher; on fera bien de se rappeler que ces fonctionnaires ne sont pas des gens techniques et que pour eux les cartes ne veulent pas dire grand chose. Ceci explique pourquoi je n'ai pas cherché à garder secrètes les cartes de Bahreïn.» (Lettre du 20 avril 1928, cité in T. E. Ward, *Negotiations for Oil Concessions in Bahrain, El Hasa, The Neutral Zone, Qatar and Kuwait*, p. 65 (1960)), *Bahrain Supplementary Documents submitted 1 March 2000*, p. 166.)

22. Bref, montrons nos cartes, ils n'y comprendront rien.

23. Mon propos est des plus sérieux. Est-ce qu'on peut imaginer une seconde que la souveraineté de l'Etat de Bahreïn doit dépendre de documents restés lettre morte, préparés par des hommes d'affaires dont l'opacité raffinée, semble-t-il, est une seconde nature — et qui ne furent absolument pas habilités à trancher des questions frontalières ? La question est bien évidemment rhétorique.

24. Ces réserves émises, poursuivons tout de même l'analyse de ce que Qatar essaye de faire accroire.

25. Le premier projet de carte qu'on vous a montré le 30 mai dernier (CR 2000/6, trad. fr., p. 15, par. 30) se trouve annexé à un projet de concession de 1923, que voici. Vous le trouverez également au numéro 67 du dossier d'audience.

26. Selon Qatar, la zone prévue pour la concession, telle que mise en relief ici, indique la non-appartenance des îles Hawar à Bahreïn.

27. Mais il n'en est rien. L'article 1 du projet de concession, reproduit dans votre dossier d'audience, explique que cette mise en relief avait pour fonction de définir une zone appelée "*The Bahrain Islands*". Rien ne prouve que Holmes avait ne serait-ce que songé aux îles Hawar; il serait absurde de prétendre qu'il avait une idée précise sur leur appartenance.

28. Deuxièmement, le Qatar se réfère à une carte presque identique qui porte la rubrique "*Map prepared by Major Holmes*". Vous en trouverez une copie au numéro 68 du dossier d'audience. Encore une fois, cette carte ne fait que montrer les limites d'une concession potentielle sur une partie du territoire de l'émir de Bahreïn. Elle n'avait pas pour but d'indiquer les limites territoriales de Bahreïn — et son auteur n'avait certainement pas l'autorité pour s'y aventurer.

29. Mais il y a bien plus grave. Le conseil de Qatar a déclaré devant cette Cour que cette carte fut «établie par Holmes en 1928, soit cinq ans plus tard» (CR 2000/6, trad. fr., p. 16, par. 31) que la première carte.

30. Puisque les deux cartes, selon Qatar, sont identiques (*ibid.*), il y aurait donc confirmation que l'étendue géographique de Bahreïn était comprise, *avant et après la signature* du contrat de concession en 1925, comme excluant les Hawar.

31. Je suis au regret de dire à la Cour que l'affirmation de Qatar est fausse. Cette deuxième carte n'était pas postérieure à la signature de la concession en 1925, mais bien antérieure. Elle date, en vérité, toujours, comme la première, de 1923. Dans son ouvrage *Arabia's Frontiers* (1991) M. Wilkinson établit la vérité d'une manière très nette et très simple. La carte en question est parue dans un livre publié en 1928 (n° 69 de votre dossier d'audience) (A. Rihani, *Ibn Sa'oud of Arabia* (I)), mais avec la mention explicite de son origine en 1923. Qatar présente donc de manière trompeuse la date de publication comme étant la date d'origine. Ce n'est pas, disons-le, très sérieux. De toute manière, comme on vient de le voir, ni l'une ni l'autre de ces cartes n'indiquent que les Hawar ne font pas partie de Bahreïn.

32. Si Qatar est ainsi absolument incapable de prouver que les signataires de la concession de 1925 avaient à l'esprit que les Hawar ne relevaient pas de Bahreïn, pour sa part, Bahreïn se

trouve dans la position avantageuse de pouvoir prouver le contraire, et ce grâce à un document tout à fait décisif.

33. Il s'agit d'une troisième carte, que Qatar s'est bien gardé de vous montrer, celle-ci reproduite dans un livre publié en 1965 par M. Thomas Ward sous le titre *Negotiations for Oil Concessions in Bahrain, El Hasa (Saudi Arabia), the Neutral Zone, Qatar and Kuwait (Bahrain Supplementary Documents submitted 1 March 2000*, p. 166). M. Ward fut un proche collaborateur du major Holmes à partir des années vingt. Il a notamment représenté ce dernier dans les négociations avec les sociétés pétrolières américaines qui ont fini par racheter sa concession. Le livre de M. Ward, long de 296 pages, démontre que sa collaboration avec le Major Holmes fut étroite et de longue durée. Ajoutons que M. Ward lui-même fut un éminent industriel américain, comme l'atteste le fait qu'il ait été élu membre du *Council of Foreign Relations* des Etats-Unis, ainsi que *The American Petroleum Institute*. Mais ce qui m'intéresse le plus, c'est qu'il fut également *Fellow* de la *Royal Geographical Society* d'Angleterre ou les Américains n'ont jamais été pléthoriques. Quant à la carte qui figure tout au début de son livre, vous la voyez ici (et également au n° 70 de votre dossier d'audience). Alors que les deux cartes précédentes indiquaient seulement que les îles Hawar ne devaient pas être concernées par la concession envisagée, *cette carte considère clairement que les îles Hawar font partie de Bahreïn*. Une notation sur cette carte nous explique que :

«Ceci est une copie de la carte originale utilisée au cours de la négociation des concessions pétrolières à Bahreïn, à Hasa (Arabie saoudite), la Zone Neutre, et le Koweït.» (Les italiques sont de moi.)

["This is a copy of the original map used in the course of negotiating, the Bahrain, Hasa (Saudi Arabia), Neutral Zone and Kuwait oil concessions."]

34. Ici une volonté d'indiquer l'appartenance des îles Hawar est manifeste. Elles apparaissent indiscutablement comme unies à Bahreïn; elles figurent sans aucun doute possible comme faisant partie d'une concession potentielle octroyée par Bahreïn. Vous avez pu observer le contraste entre les Hawar et la péninsule de Qatar.

35. Comme nos adversaires eux-mêmes le reconnaissent :

«Holmes connaissait intimement la région à cause de son activité dans le secteur pétrolier, et son opinion a par conséquent un poids considérable.»

["Holmes was intimately familiar with the area as a result of his work in the oil sector, and his views therefore have considerable weight."] (Reply of Qatar, para. 4.105).

36. Il est à peine nécessaire de souligner que l'on s'attachera plus volontiers à ce que les deux Parties avaient devant leurs yeux lorsqu'elles ont conclu la concession définitive, c'est-à-dire celle de 1925, celle-là même qui fut la pierre angulaire de toute l'industrie pétrolière de Bahreïn, qu'à ce que le *Major* Holmes tout seul aurait pu penser ou ignorer dans un premier temps, avant de négocier la concession.

37. Une petite parenthèse encore, mais celle-ci est d'une importance primordiale.

38. Qatar a osé affirmer que Bahreïn a seulement conçu l'idée de réclamer les îles Hawar à la suite de manœuvres dolosives de sir Charles Belgrave au milieu des années trente. Mais vous venez de voir la preuve que les îles Hawar étaient bel et bien considérées comme faisant partie de Bahreïn dix ans plus tôt à une époque où le jeune Belgrave n'avait pas encore foulé le sol de Bahreïn.

39. Ainsi sommes-nous confronté à trois cartes dont nous pouvons tirer une conclusion très peu surprenante : les zones d'une concession pétrolière ne correspondent pas nécessairement aux limites du territoire national.

40. En revanche, lorsque ceux qui «connaissent intimement» une région négocient avec l'idée qu'un groupe d'îles très distinct les îles Hawar peuvent faire partie d'une concession, ceci s'appelle une reconnaissance explicite que l'autorité auteur de la concession potentielle est bel et bien maître des lieux.

ENSEIGNEMENTS DES NÉGOCIATIONS DES ANNÉES TRENTE

41. La spectaculaire découverte de 1932 au centre de la grande île de Bahreïn — suscite évidemment bien des convoitises. Tout le monde comprend qu'il y a deux zones où l'on peut imaginer de nouvelles concessions :

- d'une part, bien sûr la presqu'île de Qatar, où le cheikh Abdullah Al-Thani se trouve rapidement en pourparlers avec l'Anglo-Persian Oil Company qui s'est réveillée;
- mais d'autre part, il y a également une opportunité intéressante à Bahreïn même, car la concession octroyée en 1925 au *Major* Holmes, et maintenant cédée à la BAPCO, ne couvrait pas la totalité de Bahreïn; le concessionnaire attiré devait choisir ses 100 000 acres, laissant

ainsi disponible tout le reste du territoire national ce que tout le monde a fini par appeler "the unallotted area" (indiquons que la grande île de Bahreïn à elle seule représente une superficie de 142 000 acres).

42. Nous voyons à présent surgir une Anglo-Persian Oil Company qui ne «traîne plus les pieds». Dans les quelques mois qui suivent l'éclatante découverte de la BAPCO à Bahreïn, l'Anglo-Persian obtient un droit exclusif d'exploitation du cheikh Abdullah de Qatar. Le personnel de l'Anglo-Persian ne se préoccupe pas trop des nuances frontalières. Le *Political Agent* britannique relève que :

«les explorateurs de la Anglo-Persian au Qatar ont examiné des endroits où le cheikh de Qatar n'avait aucun droit de les laisser aller»

["the explorers of Anglo-Persian in Qatar have examined places which the Ruler of Qatar had no right to allow them to go"]

alors que, comme il le note,

«il est dit que pas plus tard que l'an dernier (1932) le cheikh de Qatar a admis publiquement que certaines régions sur la côte de Qatar appartiennent à Bahreïn»

["it is said that as late as last year (1932) the Ruler of Qatar admitted in public that certain areas on the Qatar coast pertain to Bahrain"] (contre-mémoire de Bahreïn, par. 215; *ibid.*, vol. 2, annexe 59).

43. Quant à la "unallotted area" de Bahreïn, le cheikh Hamed entame des négociations avec la BAPCO. Mais en juin 1933, la société Anglo-Persian aussi déclare son désir de postuler pour cette zone disponible à Bahreïn.

44. Or, il est dans l'intérêt de la Grande-Bretagne que l'extension des droits de la BAPCO soit la plus réduite possible. Une façon de restreindre l'américaine BAPCO est d'exclure les îles Hawar de l'extension qu'elle envisage.

45. Le cheikh Hamad de Bahreïn accepte l'idée que la BAPCO pourrait être exclue des îles Hawar mais ne laisse aucun doute lorsqu'il fait observer à l'*Acting Political Agent* que : «ces îles sont des dépendances de Bahreïn» *["these islands are the dependencies of Bahrain"]* (message du 30 juillet 1933, mémoire de Qatar, annexe III.86, vol. 6, p. 445).

46. Personne ne demande alors à Bahreïn de confirmer son titre. L'idée que le régime des Al-Thani à Doha pourrait revendiquer les îles n'effleure personne, et ceci quand bien même la société Anglo-Persian aurait intérêt à ce qu'il le fasse. Après tout, elle s'apprête à acquérir des

droits sur l'ensemble du territoire Al-Thani. Elle a donc tout intérêt à faire admettre une étendue maximale du côté de Qatar — plutôt que d'être tributaire d'une négociation encore incertaine du côté de Bahreïn, où il y a une concurrente.

47. Nous arrivons à la fin 1933. Bahreïn n'a signé ni avec la BAPCO, ni avec l'Anglo-Persian pour la "*unallotted area*". Ainsi Bahreïn n'a-t-il encore octroyé aucun droit sur les îles Hawar.

48. Sur ces entrefaites, la BAPCO exerce son option selon la concession initiale — celle de 1925 — et choisit 100 000 acres, sans surprise, sur la grande île de Bahreïn où elle a déjà son gisement. La zone choisie par la BAPCO est celle-ci, que vous verrez également au numéro 71 du dossier d'audience. Le reste de la grande île se trouve toujours disponible en tant que "*unallotted area*" — mais ceci est vrai aussi, et surtout, pour les autres dépendances terrestres et maritimes de Bahreïn, y compris les îles Hawar.

49. En 1935, la société Anglo-Persian, présente sur le terrain à Qatar depuis deux ans, formalise sa concession avec le cheikh Abdullah Al-Thani de Doha. Il est instructif de placer cette concession dans son contexte géographique. J'attire l'attention de la Cour sur une note écrite par M. Rendel du Foreign Office en 1934 (21 février 1934, contre-mémoire de Bahreïn, annexe 67, vol.2, p. 220) que vous trouverez au numéro 72 du dossier d'audience.

50. Premièrement, à la page 221, nous voyons qu'il s'agit de «l'Anglo-Persian agissant pour IPC» (Iraq Petroleum Company).

51. Deuxièmement, à la même page 221, au paragraphe 4, M. Rendel note que les seuls dangers sont ceux que constituent d'une part Ibn Saud et d'autre part des tribus de l'intérieur.

52. Troisièmement, à la page 222, au cours d'une discussion sur les conséquences possibles si la Grande-Bretagne n'offrait pas sa protection au cheikh Abdullah, M. Rendel écrit :

«dans la pratique, il sera impossible pour lui [le cheikh Abdullah] de protéger la compagnie [pétrolière] de manière efficace à moins que nous le laissions développer des forces plus effectives que celles dont il dispose à présent. Ceci serait de toute manière impossible, car de ce que nous savons du cheikh il n'est guère qu'un grand marchand et son territoire est très faiblement habité par les tribus sur lesquelles il paraît exercer un contrôle très lâche.»

53. Ce n'est pas Bahreïn qui le dit — c'est M. Rendel. Et la description ne date pas du XIX^e siècle, mais de 1934. Quoi qu'il en soit, la conclusion se trouve à la fin de cette note :

«dans l'ensemble des circonstances [*"in all the circumstances"*], la meilleure approche serait d'autoriser le *Political Resident* du golfe Persique à proposer au cheikh une protection intégrale en contrepartie de la concession d'IPC [Iraq Petroleum Company] selon la proposition initiale».

54. Voici sous quelle condition Qatar signe en 1935. Or, ce contrat de concession ne se limite à aucune zone spécifique mais se réfère à «l'ensemble de la zone sous l'autorité du cheikh ainsi qu'indiqué au nord de la ligne tracée sur la carte annexée au présent contrat» [*"the whole area over which the Shaikh rules and which is marked on the north of the line drawn on the map attached to this Agreement"*] (mémoire de Bahreïn, vol. 3, annexes 104 et 105).

55. Voici la carte annexée que vous avez déjà vue plus d'une fois. Elle est remarquable à deux titres. D'abord, la seule frontière est tracée au sud de la péninsule. Or, seule cette frontière a été négociée entre la Grande-Bretagne et les Al-Thani, auxquels le Gouvernement britannique a promis sa protection contre toute attaque d'Ibn Saud en contrepartie — justement — du choix du concessionnaire britannique.

56. Au nord de cette ligne, la concession est définie comme couvrant le "*area on which the Sheikh rules*". Or, que je sache, les Al-Thani ne furent maîtres ni du Koweït, ni de l'île principale de Bahreïn — pourtant tous deux se trouvent au nord de cette ligne — et pas non plus maîtres des îles Hawar. Cette observation fut d'ailleurs aussi celle de M. Rendel de l'India Office lorsqu'il a répondu à M. John Skliros, le *General Manager* du concessionnaire britannique lorsque celui-ci voulait faire admettre en 1936 que les Hawar faisaient partie de sa concession à Qatar; vendredi dernier je vous ai lu la réponse sèche de M. Rendel :

"its object [of the map attached to the Qatar Concession] was to define the southern boundary of the Concession. Incidentally it marks the Bahrain Islands as well as Hawar" (mémoire de Bahreïn, annexe 248, vol. 5, p. 1076).

57. Deuxième aspect qui retiendra notre attention à propos de cette carte, le réseau routier y figurant confirme d'une manière nette que la partie habitée de Qatar était concentrée sur la côte est du Qatar loin de Zubarah, loin des îles Hawar.

58. La société Anglo-Persian cède presque immédiatement sa concession à une filiale de la puissante Iraq Petroleum Company — basée à Londres — où sont réunies principalement d'abord l'Anglo-Persian elle-même, ainsi que la Royal Dutch Shell, la compagnie française de pétroles, et un groupe américain. Cette filiale de l'Iraq Petroleum Company s'appellera Petroleum

Concessions Ltd. (ou PCL), c'est donc ce vocable «PCL» qui figure très souvent dans les documents à partir de 1935.

59. Retenons que les seuls intérêts anglais sont du côté de PCL, la BAPCO étant à 100 % américaine.

60. A en croire les documents de l'époque, le *General Manager* de PCL, à savoir M. Skliros, devait avoir une énergie formidable, tant il semble être partout pour faire avancer les intérêts de sa société. Aussitôt qu'il a obtenu la concession du côté du Qatar — disons du côté des Al-Thani — il se porte candidat pour la "*unallotted area*" de Bahreïn, donc y compris les îles Hawar.

61. Dans ce contexte, la plus grande prudence s'impose à Bahreïn. Car tout en postulant pour la "*unallotted area*" de Bahreïn, M. Skliros, si je puis dire, ne perd pas le nord; sans être historien, sans avoir une «connaissance intime» de la région, sans avoir lu les rapports du capitaine Brucks (de 1829) et du *Political Resident* Prideaux (de 1909) à la suite de leurs visites sur les îles Hawar, sans la moindre indication qu'il y est allé lui-même, M. Skliros, dans cette lettre que nous avons vue vendredi dernier (mémoire de Qatar, annexe III.104, vol. 7, p. 21), déclare que lui et sa société sont d'avis que les îles Hawar appartenaient au cheikh de Qatar. Ceci aurait mis PCL immédiatement dans la position d'avoir tous les droits sur Hawar, donc sans avoir à se préoccuper de la concurrence de la BAPCO — contrairement à la situation dans les zones appartenant à Bahreïn.

62. Le *Political Agent* local ainsi que le *Political Resident*, c'est-à-dire le plus haut fonctionnaire britannique dans le Golfe, se penchent sur la question. Ils concluent que les souverains successifs de Bahreïn "*exercised active jurisdiction*" aux îles Hawar «jusqu'à aujourd'hui» (contre-mémoire de Bahreïn, par. 236). Le Gouvernement britannique accepte l'analyse de ses représentants, et informe M. Skliros, qui avait posé la question, que c'est Bahreïn qui détient la souveraineté sur les îles Hawar (contre-mémoire de Bahreïn, par. 253). En même temps, la Grande-Bretagne prend la précaution de préciser que sa décision n'avait qu'une portée limitée, en ce sens qu'elle pourrait être modifiée si un prétendant pouvait prouver ses droits sur les îles (lettre de l'India Office à PCL, 14 septembre 1936, contre-mémoire de Bahreïn, annexe 79).

C'est une manière de dire à M. Skliros que ce n'est pas à lui de se porter volontaire pour revendiquer des droits au nom d'un cheikh qui ne s'est pas encore manifesté.

63. Au cours des trois années qui suivent, PCL se voit ainsi contrainte de traiter avec Bahreïn, et en concurrence avec la BAPCO. Tout le long de ces négociations, les îles Hawar ainsi que les autres îles, récifs et eaux du Golfe de Bahreïn sont considérés par tous — par Bahreïn, par la Grande-Bretagne, et par les deux groupes pétroliers — comme faisant partie de Bahreïn. Trois illustrations seulement :

- En 1937 et 1938, l'idée est lancée que l'on pourrait partager la "*unallotted area*" entre la BAPCO et PCL. Pour sa part, la BAPCO se verrait attribuer les zones, décrites au numéro 73 du dossier d'audience, sur et autour de la grande île de Bahreïn. Elles sont mises en relief sur cette carte de la BAPCO, préparée en 1938, qui figure également au numéro 74 du dossier d'audience. Quant à PCL, ses droits comprennent les zones décrites au numéro 75 du dossier d'audience, lesquelles — vous le voyez à l'écran — s'étendent à partir de Janan, la plus méridionale des îles Hawar, pour couvrir Fasht al Dibal et l'ensemble des îles, récifs et eaux à l'intérieur du périmètre constitué par le tracé des points *a*) jusqu'à *i*).
- En second lieu, avec son projet de licence (*draft lease*) proposé à l'émir de Bahreïn (lettre de l'India Office au *Political Agent*, 28 avril 1938, à laquelle se trouvent joints le projet de licence de PCL ainsi que deux cartes; mémoire de Bahreïn, annexe 337), PCL soumet les deux cartes que vous trouverez au numéro 76 du dossier d'audience ainsi que sur l'écran derrière moi. PCL propose maintenant en effet deux zones, la première au nord de la grande île de Bahreïn, la seconde dans le Golfe de Bahreïn. Cette seconde zone couvre les îles Hawar, y compris Janan, Fasht al Dibal, et évidemment Qit'at Jaradah, à l'ouest de Dibal.
- Troisièmement, encore une autre proposition de PCL, celle-ci intitulée "*1939 : The Leased Area: Hawar Island*". Vous trouverez une copie de la carte jointe à cette proposition au numéro 77 du dossier d'audience. L'article 1 du projet de concession définit la zone que Bahreïn donnerait en concession comme incluant les îles Hawar, y compris Janan. Vous voyez sur la carte que Janan figure, sans discussion possible, dans la zone qui serait concédée (contre-mémoire de Bahreïn, annexe 104).

64. Les négociations portant sur la *unallotted area*, y compris les Hawar, entre Bahreïn et les deux concurrentes, la BAPCO et PCL, se poursuivent en parallèle avec l'instruction, par les autorités britanniques, du contentieux introduit par le cheikh Abdullah de Qatar en mai 1938.

65. En février 1939, Bahreïn décide que la proposition de la BAPCO pour l'intégralité de la *unallotted area* est la plus avantageuse (contre-mémoire de Bahreïn, par. 279).

66. Prenant note de cette décision, le Gouvernement britannique déclare précautionneusement à tous les intéressés que la question de savoir si les îles Hawar font partie de la concession de Bahreïn dépend de l'issue de la procédure engagée au sujet de la souveraineté sur ces îles (contre-mémoire de Bahreïn, par. 281-287). Rappelons que si le Gouvernement britannique avait eu l'intention cynique de déterminer la souveraineté des îles Hawar en fonction de ses intérêts propres, il les aurait logiquement accordées au cheikh Abdullah de Qatar, qui avait déjà octroyé à une société britannique une concession exclusive portant sur l'intégralité de son territoire.

67. La décision britannique reconnaissant la souveraineté de Bahreïn sur les îles Hawar intervient au mois de juillet 1939. Onze mois plus tard, en juin 1940, les discussions entre la BAPCO et Bahreïn aboutissent et la concession de la BAPCO est modifiée de sorte que la société américaine détiendra désormais un droit sur l'ensemble des territoires de Bahreïn, y compris évidemment les îles Hawar.

*

* *

68. Quelques mots pour finir au sujet de l'activité pétrolière sur place dans les îles Hawar.

69. L'exploration menée par la BAPCO au cours des années quarante et jusqu'en 1949, y compris des forages, n'a révélé aucune structure géologique intéressante.

70. Cette déception a mis un frein aux activités exploratoires jusqu'en 1961, date à laquelle les forages sont entrepris à nouveau. Un *Geological Programme* détaillé est arrêté. Le site des forages est établi sur Sawad Shamaliyah.

71. Les sociétés Conoco et Superior Oil sont invitées à participer; elles non plus ne trouvent aucun signe encourageant. Les recherches continuent jusqu'à aujourd'hui, dans l'espoir que les

techniques nouvelles de la géophysique vont modifier les données, mais pour l'instant il n'y a aucune indication qu'une reprise de forages coûteux serait justifiée.

72. Si les îles Hawar figurent explicitement dans les zones couvertes par les concessions octroyées par Bahreïn, il paraît tout aussi significatif que ces îles, y compris Janan, sont tout aussi explicitement *exclues* des concessions de Qatar signées depuis la sentence britannique de 1939.

73. Ainsi, la concession donnée à la South East Asia Oil and Gas Company en 1970, je dis bien 1970 (Qatar Supplemental Document 30) exclut la "*Hawar Area*". Un gros plan de la zone concédée autour des îles Hawar figure au numéro 78 du dossier d'audience. L'annexe B (*Exhibit B*) de la concession précise que les limites de la *Hawar Area* sont approximatives, "*Pending Final Agreement with Bahrain Government*". Vous avez cet extrait au numéro 79 du dossier d'audience.

74. Exactement le même procédé fut employé par Qatar dans une autre concession, celle-ci de 1973. Encore une fois, la *Hawar Area* est exclue "*Pending Final Agreement with Bahrain Government*" (*Memorial of Qatar, Vol. 5, Annex II.66*). Ce gros plan figure au numéro 80 du dossier d'audience. L'annexe B (*Exhibit B*) répète la formule que nous venons de voir; vous avez cet extrait au numéro 81 du dossier d'audience.

CARTES PÉTROLIÈRES — CONCLUSIONS

Monsieur le président, Madame et Messieurs les Membres de la Cour.

- Depuis les années vingt, les îles Hawar ont été considérées comme partie intégrante de Bahreïn tant au cours des négociations avec les sociétés pétrolières que dans les accords de concession signés.
- Janan a toujours été considérée comme partie intégrante des îles Hawar.
- Au moins à partir des années trente, les îles et récifs du golfe de Bahreïn, y compris Fasht al Dibal et Qit'at Jaradah, ont été considérés comme partie intégrante de Bahreïn.

75. Ceci nous amène, Monsieur le président, à la fin de nos explications sur les parties terrestres de ce différend.

76. Il se trouve que la question des cartes pétrolières que je viens d'examiner est une bonne transition, car les activités pétrolières se déroulent bien sûr, également dans les zones maritimes.

Elles ont également des implications pour Fasht al Dibal et Qit'at Jaradah. Je vous remercie de l'attention que vous avez bien voulu prêter à mes propos, et vous demande, à votre convenance, peut-être après la pause, de donner la parole au professeur Michael Reisman.

Le PRESIDENT : Je vous remercie Maître Paulsson. La séance est suspendue pour un quart d'heure.

L'audience est suspendue de 16 h 20 à 16 h 45.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole au professeur Reisman.

Mr. REISMAN:

MARITIME 1

1. Thank you, Mr. President, Members of the Court. Bahrain now comes to its presentation of the maritime sections of its case. I have been assigned the task of reviewing the physical and political geography of Bahrain, its characterization in international maritime boundary law and questions of sovereignty. Thereafter, my colleague, Professor Weil, will elaborate the general law that governs this part of the dispute and its specific application to the unusual features of this case, along with our more detailed critique of Qatar's case. When Professor Weil has concluded his presentation, I will, with the indulgence of the Court, briefly set out the maritime boundary submissions of Bahrain.

Special features of this case

2. This case is unusual for a number of reasons:

- (a) The Court must delimit a boundary between a continental State and a multiple island State or, as it is now called, an archipelagic State, when the States are coastally opposite and adjacent. Although the Parties disagree on whether certain maritime features are islands or parts of islands and, as a result, constitute parts of Bahrain, there can hardly be controversy over the fact that Bahrain is factually an archipelago and Qatar a continental State.

- (b) The distances between the two States in the southern or lower half of the delimitation area concern territorial waters and they are, moreover, very small. Therefore, in contrast to most past cases, there is very little room for adjustment left to the Court here. A slight adjustment from the true median line to the east moves further into Qatar's claimed territorial waters; a slight adjustment to the west moves further into Bahrain's claimed territorial waters or even into Bahraini insular territory.
- (c) The third unusual feature is that the 1947 letters flit through the case like a phantom. Though they were not an arbitral award and neither Party ever asked for or accepted them, Qatar relies on them from time to time in different ways; and they appear to have been assigned special importance in Professor Salmon's presentation.
- (d) Fourth, the Court's disposition of the territorial issues — the Hawars and Zubarah — will significantly affect the maritime boundary, as the cardinal legal principle here is that the land dominates the sea. Until the Court determines to whom the land belongs, our submissions must be made in the alternative, each premised on a different possible territorial decision by the Court. If the Court restores Zubarah to Bahrain, Bahrain's aggregate coast with respect to Qatar would dictate a particular maritime delimitation in the southern sector. But if the Court were to decide not to return Zubarah, Bahrain, deprived of its continental possessions, could, if it wished, be an archipelago within the meaning of Part IV of the 1982 Law of the Sea Convention or alternatively, if Bahrain did not elect to take Part IV status under the Convention, simply a *de facto* archipelagic State with normal baselines. Each of these options requires consideration of different legal questions, which, we understand, can be complex. We will try to make it as clear as possible and we apologize in advance for the travail caused.

Determining the coasts

3. A fundamental issue here is the coasts, or, as Professor Quéneudec said, "the identification of the pertinent coasts" [*«l'identification des côtes pertinentes»*]¹. How this issue and the question of the pearling banks is decided will largely determine the location of the median line. The governing legal principles here are not those proposed by Qatar.

¹CR 2000/9 at p. 39.

4. Qatar, as I said, is a continental State. Given its geography, the determination of the datum necessary for delimitation of maritime areas off its western coast is quite simple. Under Article 5 of the 1982 Convention and its predecessors in the 1958 Convention, it is the low-water line along the coast. But in its maritime presentation, Qatar has shifted to the line of highest astronomical tide to describe its own coasts. As the Court knows, this has not been done before for this kind of delimitation purpose and has no basis in Article 5 of the 1982 Convention.

5. Now international law allows a State, in determining its own coastline, to waive the low-water line and, if it wishes, to set its coastline at the high-water mark. Bahrain has no objection, in principle, with the unusual system Qatar has elected to describe its *own* coast. But Bahrain must observe to the Court that the theory of law which Qatar insists *requires* the use of the highest astronomical tide is without foundation in international law and is explicitly against the holdings of this Court. Professor Quéneudec states, without any citation of authority, that «là où n'existe pas de laisse de pleine mer, il ne saurait être question de parler de ligne de côte»²: no high water, no coastline. In the *Anglo-Norwegian Fisheries* case, the Court said "What matters, what really constitutes the Norwegian coast line, is the *outer line* of the 'skjaergaard'."³ If Professor Quéneudec were correct, there could be no such outer line. Qatar's tactical objective here is obvious: to drive the coast of Bahrain as far west as possible. There is no legal basis to its theory. It is Article 5 that governs. The low-water line is dispositive.

6. Bahrain, as I said, is a multiple island State or, as it is now called, an archipelagic State: a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which have historically been regarded as such. As the Court well knows, international law's definition of a multiple island State or an archipelago and of the new legal status of the "archipelagic State" has evolved since the 1920s, in work by the Institut de Droit International, the International Law Association, the American Law Institute, the

²*Ibid.*, at para. 18.

³*Anglo-Norwegian Fisheries* 18 *ILR* 86, 90.

Hague Codification Conference of 1930 and the International Law Commission⁴. The concept was reworked by the Arbitral Tribunal in *Island of Palmas* and by the International Court of Justice in *Anglo-Norwegian Fisheries*, and it ultimately was embedded in a special optional régime in the 1982 Law of the Sea Convention. By the time of the Third Law of the Sea Convention, the basic concept of the archipelagic State had been accepted:

*"a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such"*⁵.

7. The innovation of the 1982 Convention was not the recognition of the essential reality and unique legal requirements of multiple island States, which had already been accomplished, but rather the provision for the large or spatially extensive multiple island State that, henceforth, would enclose large areas of theretofore high seas by means of what were to be called "archipelagic" baselines that it could claim. Bear in mind: waters lying landward of straight baselines or normal baselines are internal waters, effectively assimilated to the sovereignty of the State and subject to no international user rights whatsoever. So the extensive multiple island State, by internalizing vast maritime areas that were until then high seas or maritime zones still subject to major international user rights, could pose a threat to other, equally important transit policies of the law of the sea. The optional régime of Part IV is a compromise: a State that is geographically archipelagic may declare itself such, whereupon it may draw straight baselines of 100 nautical miles in length, 3 per cent of which may extend to 125 nautical miles, and it may enclose large ocean spaces up to an extremely generous 9:1 ratio of ocean space to land, *but* — and this is an extremely important "but" — the waters so enclosed are not internal, subject to the full sovereignty of the coastal State. The enclosed waters remain subject to a right of innocent passage and archipelagic sea lanes passage for international users, and sovereignty over the waters is subordinated to the terms of the 1982 Convention. So some multiple island States that could become "archipelagic States" within the meaning of the 1982 Convention may find that they have

⁴See *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos* (A/CONF. 13/18 (1957) UNCLoS I, I OFF. Rec 289); see also *Archipelagic States: Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (1990).

⁵Art. 46, United Nations Law of the Sea Convention 1982.

more control over the waters in their State merely by virtue of their geographical configuration without resorting to the option offered by Part IV; indeed, exercising that option would actually give them less control and impose considerably more international responsibilities on them. A multiple-island State that could but does not declare itself archipelagic under Part IV does not cease to be archipelagic for that reason. Its archipelagic status is a geographical fact, with which it and the rest of the world must contend. But when it comes to delimiting its maritime zones, it may not use archipelagic baselines; it must use what the 1982 Convention calls, in Article 5, "normal baselines".

8. The legal coast of a multiple-island State is comprised of the lines connecting its outermost islands and other natural features. This external perimeter is its legal coast. The lines that produce the external perimeter provide the baselines for its territorial sea. Relevant territorial sea basepoints are also derived from the legal coast for purposes of calculating the median line with an opposite or adjacent State. I emphasize that these are "normal baselines" within the meaning of Article 5 and not the permissive baselines of 100 to 125 nautical miles, which would be available only to a multiple-island State that declared itself archipelagic under Part IV. So these normal baselines are available to a multiple-island State or what Qatar has called a *de facto* archipelago, which has not elected to declare itself "archipelagic" under Part IV. These normal, Article 5, baselines have to be used in order to determine the legal coast of a multiple-island or *de facto* archipelagic State.

Qatar's objections to Bahrain's archipelagic status and features

9. So, Mr. President, Members of the Court, the critical question in determining Bahrain's coast with respect to Qatar is what are its basepoints. But before we consider the elements of Bahrain that comprise its *de facto* archipelago — again to use Qatar's expression — and serve as its basepoints, let me correct a misstatement by Qatar about Bahrain's multiple-island or *de facto* archipelagic status. While Qatar acknowledged in its Counter-Memorial that Bahrain is a *de facto* archipelago, it insisted that the Hawar Islands are not part of that archipelago. The demographic and socio-political integration of the Hawar Islands into the State of Bahrain is a matter of fact and law. Bahrain bases its title to the Hawars on the 1939 Award, its exclusive long-term manifestation

of sovereignty that preceded and accounted for that decision and has continued until the present day and the principle of finality of inherited colonial boundaries *uti possidetis juris*. Qatar's contention that "from a *geographical* point of view... it is not possible to include the Hawar Islands in the 'Bahrain archipelago'"⁶ is incorrect but, even more to the point, it is legally irrelevant. Whether the Hawar Islands are part of the Bahraini archipelago or a separate archipelago in no way reduces the archipelagic character of the State of Bahrain. A multiple-island State may be comprised of several archipelagos as Article 46 (a) explicitly says. So the State of Bahrain includes the Hawar Islands, whether they are part of the Bahraini archipelago or a separate archipelago that pertains to Bahrain by virtue of long-term manifestation of sovereignty, the *res judicata* consequence of an arbitral award or the principle of finality of prior decisions about territory.

10. Mr. President, distinguished Judges, the fundamental legal postulate is that the land dominates the sea, as my friend Professor Weil will develop tomorrow. Hence the juridical progression must be to determine the components of the Bahrain archipelago before we proceed to the delimitation as between a multiple-island or *de facto* archipelagic State and a mainland State. So let me review the insular components of the State of Bahrain that together comprise it without considering for the moment the impact of its mainland component, Zubarah.

Bahrain's relevant islands and low-tide elevations

11. The Court will observe the largest island of Bahrain, which is sometimes referred to as Al Awal and sometimes as Bahrain, and the immediately adjacent islands of Sitrah and Al Muharraq. In addition, there are other islands, including the Hawars and over 22 significant low-tide elevations. I should now like to draw the Court's attention to some of the specific islands and other maritime features which are important for the determination of the normal baselines of a multiple-island State.

⁶Counter-Memorial of Qatar, para. 6.61 (emphasis added).

A. Fasht al Azm

12. First, Fasht al Azm, which must be characterized either as a part of Sitrah Island or as a low-tide elevation for purposes of determining Bahrain's baseline. In 1982, Bahrain dredged a navigable waterway through Fasht al Azm. Both Parties, I take it, agree that this action has no effect whatsoever on the legal status of the Fasht, any more than the Kiel Canal makes the seaward segments that result from that engineering feat henceforth a separate island or other maritime feature. Both Parties also agree, I take it, that the specific question, whose answer will resolve the legal status of Fasht al Azm, is whether, in an area that was landfilled also in 1982 and which lies to the west of the new artificial channel, there had been a natural permanent waterway between Sitrah and Fasht al Azm that did not dry at low tide. The photograph, vintage 1958, which you can see, clearly shows that there was no continuous waterway as at that time. The second photograph, vintage 1983 clearly shows the dredged channel.

13. If, prior to 1982, there was *no* natural permanent waterway, then Fasht al Azm was and is, as a legal matter, part of Sitrah Island. Conversely, if there *was* a natural permanent waterway that did not dry at low tide between Sitrah and Fasht al Azm, then, even though it was landfilled in 1982, Sitrah Island legally terminates at approximately 50° 38' longitude rather than at 50° 55' longitude and, in so far as Fasht al Azm plays a role in maritime boundary delimitation, it would be as a low-tide elevation rather than as part of Sitrah Island.

14. We believe that it is very important to be clear as to the factual and legal issues here: the question is not whether Fasht al Azm is an island in its own right, part of which is above water at high tide. High-water mark is relevant for determining whether a maritime feature is an island; if it is, the high-water mark has performed its function and is replaced by the low-water mark, which is now used to determine the coastline of that island or the existence of a Low Tide Elevation, which international law may allow as a basepoint for determination of the coast. Bahrain claims, not that Fasht al Azm is itself an island, but that it is part of Sitrah Island. The operational question is whether Fasht al Azm is divided from Sitrah by a natural channel at low tide, not whether there is or are natural channels on the Fasht that are, theoretically, passable for small shallow-draft boats at various other levels of the tide, even though the channels dry at low tide. If Fasht al Azm is not part of Sitrah, it is a low-tide elevation, which, by definition, is covered by water at high tide. Of

course there may be channels on Fasht al Azm at different levels of tide as there are likely to be on many low tide elevations, but these small "channels" dry at low tide and cease to be channels; Fasht al Azm is not a smooth feature. Unintentionally, I am sure, counsel for Qatar have confused this issue by voluntarily adopting the high-tide line for the determination of Qatar's own coastline. Qatar as I have said, may do this for itself, but it may not change international law for Bahrain. It is the low-tide datum that is critical here. The question then is whether, prior to 1982, there was a permanent continuous channel *at low tide* — a channel that did not dry anywhere along its length at low tide — dividing Sitrah Island and Fasht al Azm.

15. Now, this is a factual question that must be resolved by geographical and historical evidence, predating the artificial canal's construction and the landfill of the alleged natural canal. Old charts and, where possible, surviving witness testimony must be relied upon. Mariners' charts are particularly important, for they provide guidance for the men who go down to the sea in ships, and whose lives depend on accurate charts. Hence the commission to Commander Carleton, the Head of the Law of the Sea Division of the United Kingdom Hydrographic Office's Admiralty Consultancy Services, to provide a scientific report on this matter. By means of a number of sources, most importantly older charts and Marine Pilots, the United Kingdom Hydrographic Office Study concluded that Fasht al Azm is historically part of Sitrah Island and that prior to the excavation of 1982, there was no permanent channel at low tide between Sitrah Island and Fasht al Azm. In short, Fasht al Azm is part of Sitrah Island. This evidence is in the record and the Court will already have studied it, only extracts are in your folders. And by this evidence, Bahrain submits that it has shifted the burden of proof to Qatar.

16. The United Kingdom Hydrographic Office Study's findings have been questioned by Professor Thomas Rabenhorst, whose report was submitted by Qatar. Professor Quéneudec provided a lively and entertaining summary of Professor Rabenhorst's study, but since we are dealing with scientific matters, I propose to turn directly to the Rabenhorst study rather than Professor Quéneudec's comments about it. My friend, Professor Quéneudec, will know that no disrespect is intended.

17. Professor Rabenhorst bases much of his evidence on a series of maps, published in 1977. This is a land-map series and not a hydrographic chart series. Forgive me if I state the obvious:

maps are graphic presentations of information that is useful, if not vital to their users. Land-maps and hydrographic charts have entirely different functions and, as a consequence, focus on the collection, verification and presentation of different types of information for their very different audiences and users. Land-maps are for land use and concentrate on what is important to their users. Such maps commonly put in what their designers call an "approximate" low-water line for completeness, but this is not — and does not have to be — presented as an accurate indication of the low-water line, as it would be, for example, in maritime charts, whose value depends critically on the most precise bathymetric readings. As I will explain in a moment, other readily available data show that the approximate low-water line on the land-maps that have been adduced is, to put it quite generously, very much an approximation. So Professor Rabenhorst's argument, based on these maps, as opposed to hydrographic charts, is, to say the least, curious, for it is like looking in a Chinese-Chinese dictionary to check the spelling of an English word or looking in the Bible for a Confucian concept and concluding, if one does not find it in the Bible, that it does not exist in Confucianism.

18. Using the land maps of 1977, Professor Rabenhorst finds a "channel". But, as I said, Fasht al Azm is not a smooth feature. It is, as it were, "corrugated," with parts drying at Lowest Astronomical Tide. As is the situation in many tidal areas with which Members of the Court will be familiar, a channel that was passable for small boats at high tide, and marked as such does not indicate a permanently navigable channel, that is to say, one that does not dry at low tide. The fact is that no mention is made of the possibility of passage through a permanent channel in *any* of the Admiralty charts or Pilots from the date of the first publication in 1862 to 1982 — not a single mention in one of the charts or in one of the Admiralty Pilots — even though the drafters of the charts were plainly and understandably on the look-out for channels and, as a result, marked the channel between Sitrah and Al-Awal.

19. But there is a far more serious, I believe fatal, flaw in Professor Rabenhorst's data. The Court will recall that the critical datum in determining whether, prior to 1982, a channel that did not dry at low-water channel divided Sitrah Island from Fasht al Azm is the low-water line, it is international law's decisive criterion for determining the coastal perimeter of an island. The fact that a channel may be intermittently created at higher water — and even be navigable at higher

water — is not relevant to the disposition of this question. Now Professor Rabenhorst states that the Landsat image he selected for analysis was taken on 9 February 1979 at 6.29 GMT⁷. He continues: "Tidal charts for the area show that on this date, at this time of day, the tide was only a matter of a few centimetres, at most, above low tide."⁸ But if one runs Tidecalc, a program developed by the United Kingdom Hydrographic Office and widely used by hydrographers and other mariners to determine tidal level in specific areas and at precise times⁹, one discovers that the Tidecalc height for Sitrah Island at 6:29 GMT on the relevant day is 0.81 m, not a few centimetres but 0.81 m or 2 ft, 8 in above Lowest Astronomical Tide (LAT). This, Mr. President, Members of the Court, is considerably more than the "few centimeters" that Professor Rabenhorst mentions. In other words, Professor Rabenhorst's data — even assuming that he selected the right data — are not low tide, but mid-tide. But even with this discrepancy, was Professor Rabenhorst using the right data? He fails to mention that he used neap tide and not spring tide, the level one would ordinarily look to satellite images to pick the true low-water line. So, Mr. President, Members of the Court, is it any wonder that, with such data, Professor Rabenhorst was able to find "channels" no one else had been able to find in the Admiralty Pilots and Admiralty charts in the area since 1862? Is it any wonder that he can say, on the basis of *his* evidence, that "there are clearly significant expanses of open water between Sitrah Island and Fasht al A'zm"¹⁰.

⁷Rabenhorst Report at p. 3.

⁸*Ibid.*

⁹ "TIDECALC is a version of the tidal prediction program used by The United Kingdom Hydrographic Office for computing the daily tidal predictions published in Admiralty Tide Tables. It has been adapted for use on an IBM PC and has a worldwide application.

The software consists of one program disc (NP158) and a choice of 13 area discs (NP158A1 to 13). Discs A1 to A12 each hold the harmonic constants for about 350 to 400 ports whereas disc A13 holds the harmonic constants for 161 offshore locations on the UK Continental Shelf. The program is available on 1.4 Mb 3.5-inch floppy disc and is compatible with MS-DOS version 4.0 or later. The program runs on IBM 286 compatible computers or greater. A minimum memory of 640K is required.

.....

TIDECALC has a number of useful facilities to complement the traditional presentation of times and heights of high and low water. These include a choice of units for height (metres or feet); allowance for daylight saving time e.g. BST; an indication of periods of daylight and twilight; the option to input ship's draught; and the capability of displaying heights at specified times and time intervals.

Predictions are also displayed graphically as a continuous plot of height against time." [The United Kingdom Hydrographic Office, Admiralty Charts and Publications, Taunton, Somerset, TA1 2DN, United Kingdom, Tidecalc, A PC based Tidal Prediction System, H367A (Revised 11/98).]

¹⁰Rabenhorst Report at 6 (Qatar Supplemental Documents).

20. Professor Rabenhorst also finds some white markers on the 1977 map. Professor Quéneudec rather boldly suggests that the markers are "leading lines" for a channel. Bahrain has been unable to find out why these marker posts were erected nor who carried out the work, but we believe that they were probably marking a high-tide channel to enable small barges access to the petrochemical reclamation works. What we submit *is* significant is that the "channel" found by Professor Rabenhorst could not have been intended for permanent navigation, even by small boats, because it was never marked on Bahraini or Admiralty charts.

21. The United Kingdom Hydrographic Study used Admiralty charts in determining that there was no permanent channel dividing Sitrah Island from Fasht al Azm, at the relevant time, thus making Fasht al Azm part of Sitrah Island. Professor Rabenhorst introduces no other charts, but, after reviewing the Admiralty charts, he states that the Admiralty charts provide "no substantive proof". Yet consider, I beg you, the tenor of his criticism:

— "the charts clearly *leave open the possibility* that a passage may have existed"¹¹.

— "where soundings are not present, dotted lines would most certainly represent a *"best guess" without confirmation*"¹².

— "at that distance a natural channel passage *may easily have been overlooked*"¹³.

— "there is *nothing in these maps that can definitely rule out* the existence of a natural fishermen's channel . . ." ¹⁴.

— "there is no reason to doubt that *a natural channel could have existed* prior to the reclamation project"¹⁵.

22. Is this sequence of "could be" and "might be" and "might have been overlooked" and other conditional observations of this rather tendentious tenor a refutation of Bahraini and Admiralty charts? Neither Professor Rabenhorst nor Qatar adduces other contemporaneous maps to refute the clear implications that the Bahraini and Admiralty charts make for Bahrain's case. Instead Professor Rabenhorst tries to undermine them by raising questions, as does

¹¹*Ibid.* at 3.

¹²Rabenhorst Report (Qatar Supplemental Documents) at 3.

¹³*Ibid.* at 4.

¹⁴*Ibid.* at 4-5.

¹⁵*Ibid.* at 6.

Professor Quéneudec. But all that Professor Rabenhorst can say is that multiple contemporaneous observations that actively looked for a channel, which would have been most economic and useful, that were reported and disseminated widely, that were based on live observation, consistent with each other, and relied upon by generations of mariners, *could* have been wrong. Mr. President, Members of the Court, this is simply not plausible. The hydrographic surveys on which these charts were based would have been conducted by means of small survey boats to carry out the surveys close to the reef. How else would the small drying channel to the west of Sitrah Island, which is mentioned in the Pilots and marked on the charts, have been identified? Why is there no channel mentioned in the east? It is most unlikely that a permanent channel used by local vessels — if it existed — would not have been reported by those who prepared the Admiralty charts.

23. Mr. President, Members of the Court: Bahrain has established that no natural channel existed in the past by the best and only evidence that exists: official charts, the charts that Article 5 of the 1982 Law of the Sea Convention calls for. And lest anyone suspect, even for a moment, that these charts were not based on careful and accurate observation, I would note that their findings are confirmed by the British Admiralty charts. The charts that the United Kingdom Hydrographic Office Study relied on had been prepared by British naval hydrographers over a period of decades. They represented the state of the art. None of the hydrographers had an interest in favouring one position over another. Over decades, the charts were relied upon by mariners and seafarers, who would have recorded if there had been discrepancies between the published charts and their own observations, for their lives and the lives of their fellow mariners depended upon accurate charts. We have no evidence of such corrections. None has been adduced by Qatar. Surely Bahrain, by assembling the best evidence available, has now established that no natural channel existed separating Sitrah from Fasht al Azm and that legally Fasht al Azm is and always was part of Sitrah. All Qatar can say is that the different naval hydrographers, who acted independently during that earlier period and concurred in their results, *may* have been wrong, that they *could* have been wrong.

24. Professor Quéneudec speculates that Fasht al Azm may, in fact, be many different low-tide elevations. But he submits no evidence for this speculation. Fasht al Azm has, as I said, a

corrugated rather than a smooth surface; a low-tide elevation has one or the other. But for centuries Bahrainis have referred to it as a single entity and so it appears on the independently compiled Admiralty charts.

25. Mr. President, Members of the Court, Bahrain respectfully submits that it has adduced ample evidence to show that Fasht al Azm is part of Sitrah Island.

B. Qit'at Jaradah

26. The law governing this matter is clear. Article 121, paragraph 1, of the 1982 Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"¹⁶. As many of the judges who participated in the Third Law of the Sea Conference know, this was a fundamental and carefully drafted policy decision, which, I might add, unlike some other parts of Article 121, is identical in purport in the English and French texts. Professor Quéneudec, in his treatment of Qit'at Jaradah, entertainingly implied adjectives and qualifiers to Article 121, paragraph 1, but there are none in the provision and that was quite intentional. The special provision for "rocks", which do have a habitability and economic life test, shows by their introduction that no such qualifications were intended for Article 121, paragraph 1. It does not matter if it is a small area that is above high tide. The question is whether an area of land surrounded by water is above water at high tide.

27. The question then, quite simply, is factual: whether Qit'at Jaradah is above water at high tide. To find the scientific answer to this question, Bahrain arranged for Dr. Lewis Alexander, the former Geographer of the Department of State of the United States, to observe and verify a survey conducted of Qit'at Jaradah. Dr. Alexander's methodology is set out in his report and the Court will already have studied it — extracts are in the judges' folders. Over a period of six visits, dispersed so as to encompass different periods of the year, Dr. Alexander confirmed evidence of dry sand atop Jaradah during the successive times of high-water springs, that is, the appropriate criterion for this determination. Dr. Alexander concluded:

"Article 121 (1) of the 1982 [Law of the Sea] Convention stipulates three criteria for a feature to qualify as an island. The first is that it must be a naturally formed area of land. Jaradah fits this description; it is a cay, i.e. a sandbank atop a

¹⁶Article 121 (1), United Nations Law of the Sea Convention 1982.

coral reef. The second criteria is that it is surrounded by water. My observations confirm that Jaradah fits this description also. The third and final criteria is that the feature is above water at high tide. My observations confirm that the highest areas of Qit'at Jaradah are above water at monthly high water springs. Jaradah thus fits the description of an island in Article 121 (1)."¹⁷

So reports Dr. Lewis Alexander.

28. As against this evidence, in its submission of 1 March 2000, Qatar has submitted a 27-page report prepared for it by Brian Murphy and Victor Prescott. Once again, as we are dealing with a scientific question, I propose to go directly to Qatar's expert submission and only address new evidence or allegations that Professor Quéneudec may have introduced in his presentation.

29. The Court will have noted that 75 per cent of the Murphy-Prescott Report is irrelevant: a long excursus on techniques for establishing spring high-water tides and an even longer disquisition on sand cays. Murphy and Prescott adduce no evidence of their own, but confine themselves to commenting on the Alexander report and raise a number of objections about its methodology. Let me address these points directly.

- First, Murphy and Prescott point out that British Admiralty charts do not characterize Qit'at Jaradah as an island. That is correct. There were inconsistent reports about the status of Qit'at Jaradah, due, we surmise, to in clarity in the legal conception of an island and, of course, the decapitation of the island in 1986. This is why Bahrain commissioned a study. There is now scientific evidence. Charts will henceforth indicate that Qit'at Jaradah is an island.
- Second, Murphy and Prescott question whether Dr. Alexander was entitled to rely on official Tide Charts, because they are measured at Mina Salman and the time and amplitude of the highest tides may, they speculate, vary in Qit'at Jaradah. With respect, that speculation is, on its own terms, unpersuasive. The two sites are 15.4 nautical miles apart. This distance is most unlikely to lead to any significant difference in time, or any difference whatever in amplitude. As regards any minor time difference, Dr. Alexander, as any careful scientist engaged in this type of activity, took care to arrive at Qit'at Jaradah approximately an hour before the time designated by the Tide Charts and remained for some time afterwards. As regards any differences in amplitude, not only is this most unlikely to have occurred, but if it did occur, it would have been irrelevant to the point at issue, which is whether Qit'at Jaradah is above water

¹⁷Reply of Bahrain, Ann. 13, p. 77 at pp. 82-83.

at all states of the tide *as experienced at Qit'at Jaradah*. Whether this is higher, lower or the same as the high tide at Mina Salman is beside the point.

- Third, Murphy and Prescott question the October 1998 survey of Qit'at Jaradah, because Mr. G. C. Lindsay, the Survey Operations Manager, referred to high tide as "Apparent High Water Mark", without, say Murphy and Prescott, explaining how that datum is derived. The answer to this question is quite simple: Mr. Lindsay *did* explain, in the text accompanying the survey, that "the maximum height observed at Jaradah during the survey . . . is 0.4 meters above the Highest Astronomical Tide calculated from tidal observations for the area". Because the datum that was used in October was *even higher* than the official chart, Mr. Lindsay, with appropriate scientific precision, referred to it as the "Apparent High Water Mark". If Qatar wishes to rely on the Official Chart, Qit'at Jaradah was *even more exposed* at high tide than Mr. Lindsay and Dr. Alexander reported.
- Fourth, Murphy and Prescott observe that the photographs produced by an official Bahraini photographer are not time- and date-stamped. That is correct. A camera with that capacity was not available when the observations were made. Nonetheless, Dr. Alexander has careful notes of the date and exact time when each of the photos was taken and is willing to produce them or be deposed if there is any question on this matter. The State of Bahrain need hardly certify the honesty and good faith of Dr. Alexander, a world-renowned figure, the co-author of the authoritative "*International Maritime Boundaries*", and a scientist of unquestioned reputation. It is the testimony in the report of Dr. Alexander that is submitted and it stands, with or without the photographs.
- Murphy and Prescott finally question whether there will be sufficient sand sediment to maintain Qit'at Jaradah as an island. The issue is Qit'at Jaradah at this moment and not in 20 or 30 years hence, when *many* factors may precipitate *many* unpredictable effects on many islands and many coastal areas. Well no one can predict the future, one presumption seems relatively safe: there will be no shortage of sand in the region. Messrs. Murphy and Prescott may rest easy on that concern.

30. Thus, Mr. President, Members of the Court, the problems that Murphy and Prescott purported to find in the Alexander report prove, on careful examination, to be forced and artificial.

The methodology was that of the standard of the profession and the results of the Alexander observations stand. As for the speculations by Murphy and Prescott to the effect that there may be other geological or geomorphological explanations for the island character of Qit'at Jaradah, those ruminations may be of academic interest, but they are irrelevant for this enquiry. The question quite simply is whether Qit'at Jaradah qualifies as an island under international law, and the answer depends on a scientific enquiry: is the island above water at high tide? It is, as the Alexander report establishes, and Qatar is not able to refute. None of the documents that Qatar has invoked was based on a systematic survey at monthly intervals at high-water springs, as was the study by Dr. Alexander. And, incidentally, all Qatar would need to produce to sustain its position, is a single photograph of Qit'at Jaradah, taken at any time whatever, showing it covered by the tide. It has submitted no evidence whatsoever.

31. Bahrain submits, Mr. President, Members of the Court, that the scientific evidence conclusively rebuts the selected observations that Qatar has made to the effect that Qit'at Jaradah is not above water at high tide. It is an island in international law.

32. Given that Qit'at Jaradah is an island, the question becomes who has sovereignty over it. The written submissions of Bahrain recount the numerous acts of sovereignty that Bahrain historically has exercised over Qit'at Jaradah. The Court was spared recitations of *effectivités* by Qatar, because it had none to submit. Bahrain, in contrast, has innumerable *effectivités* and I fear that the Court is approaching a saturation point on them. So let me only categorize the most relevant *effectivités*, which are set out in detail in the written submissions. The acts of sovereignty include:

- Conducting surveys and granting oil concessions over Qit'at Jaradah¹⁸;
- Erecting a beacon on Qit'at Jaradah in 1939¹⁹;
- Ordering the drilling of an artesian well on Qit'at Jaradah in 1940²⁰;
- Conducting coastguard patrols around the area of Qit'at Jaradah²¹;

¹⁸Memorial of Bahrain, para. 576.

¹⁹Memorial of Bahrain, para. 586.

²⁰Memorial of Bahrain, paras. 584 and 586.

²¹Memorial of Bahrain, paras. 598-599. Bahrain Coastguard Report, Ann. 24, Vol. 2, pp. 148-151.

- Fishing the areas around Qit'at Jaradah by Bahraini fishermen²²;
- Using Qit'at Jaradah for recreational purposes²³. (And incidentally, I will not comment on the innuendo that the Government of Bahrain arranged for a fleet of pleasure boats to assemble at Qit'at Jaradah for a photograph that would give the impression that this was a recreational area. Whether Qatar likes it or not, this actually happens most weekends, with boats gathering about Qit'at Jaradah.)

33. The Court will observe Fasht ad Dibal at approximately 50° 55' latitude and 26° 45' longitude. Fasht ad Dibal is a low-tide elevation, which is approximately 2.08 nautical miles from the island of Qit'at Jaradah. This is a geographical fact that will have important implications for the determination of basepoints, in accord with Article 13 of the 1982 Convention, a matter to which we will return. In addition to its status and boundary-delimitative potentiality as a low-tide elevation, Fasht ad Dibal has historically been viewed by States engaged politically in the area, including the Ruler of Qatar, as susceptible to acquisition as sovereign territory. On 14 August 1937 Belgrave wrote to the Political Agent, indicating that Fasht ad Dibal, among other low-tide elevations was part of Bahrain. As this important document is in your folders, I will not review it here.

34. A list prepared by the Land Department down to 1939 shows that pillars were erected by the Government of Bahrain, *inter alia*, on Al Mu'tarid, Mashtan, Noon, Tighaylib, Al Hul, Qit'at Jaradah, Fasht ad Dibal, and Fasht al'Azm²⁴. On 18 June 1946 Belgrave wrote again to the Political Agent:

"In the year 1936 the Bahrain Government built beacons on the Fasht-Al-Debal. One of the beacons was built on the rock at the north end of the Fasht which is above water. His late Highness Shaikh Hamad and the present Ruler have always regarded this Fasht as being owned by Bahrain. The anchorage there is used exclusively by Bahrain boatmen and fishermen and the Fasht is one of those which are considered to belong to Bahrain."²⁵

²²Memorial of Bahrain, para. 597.

²³Reply of Bahrain, para. 336.

²⁴List prepared by Land Department, Govt. of Bahrain, of pillars erected 1938-1939, Memorial of Bahrain, Ann. 336, Vol. 6, p. 1457.

²⁵Letter from Charles Belgrave, Adviser to the Govt. of Bahrain, to British Political Agent, 18 June 1946, Memorial of Bahrain, Ann. 340, Vol. 6, p. 1470.

35. In July 1946, the Political Agent wrote to the respective Rulers of Bahrain and Qatar to ask whether each Ruler considered Fasht ad Dibal and Qit'at Jaradah to constitute part of his respective territory. In the event of an affirmative answer, the Rulers were asked to state the grounds on which sovereignty was claimed²⁶. The Ruler of Bahrain based his claim both on Bahrain's historical enjoyment of sovereignty over the entire Qatar peninsula and the islands and other maritime features lying between the peninsular and Bahrain, as well as on acts of sovereignty by Bahrain in relation to the maritime features. Bahrain's claim to sovereignty referred specifically to the construction of artesian wells on Fasht ad Dibal and Qit'at Jaradah and annexed a list of cairns which had been erected by Bahrain during the 1930s²⁷.

36. The claim asserted by the Ruler of Qatar to Fasht ad Dibal and Qit'at Jaradah accepted without question that both formations could be subject to national sovereignty, he accepted that they could be subjected to national sovereignty. But he based his claim on the fact that it was closer to him and he should get it as a consolation prize, because he had not been awarded the Hawars²⁸!

"Bahrain . . . has no dependencies contrary to Qatar which is a large territory and has dependencies, coasts, and islands. If we look into the question from the point view of equality, Qatar is to be entrusted with Deebil and Jaradah Fashts which are situated between Qatar and Bahrain, and they are nearer to Qatar. You see that Qatar has been treated unjustly in her clear right in the question of Hawar islands which I am still tenacious to claim their ownership, then how about the others!"²⁹

Mr. President, this has been a very long day, and counsel for Bahrain are particularly grateful to the Court for its sustained attention. But I wonder if this might not be an appropriate moment for us to pause and to resume this presentation tomorrow morning.

²⁶See, for example, letter from British Political Agent to Ruler of Qatar, 9 July 1946, Ann. 341, Vol. 6, p. 1471.

²⁷Letter from Charles Belgrave, Adviser to Govt. of Bahrain, to Political Agent, 10 July 1946, Memorial of Bahrain, Ann. 342, Vol. 6, pp. 1473 and 1474.

²⁸Letter from the Ruler of Qatar to the British Political Agent 18 July 1946, Memorial of Bahrain, Ann. 343, Vol. 6, p. 1476.

²⁹Letter from Ruler of Qatar to British Political Agent, 18 July 1946, Memorial of Bahrain, Ann. 343, Vol. 6, p. 1476.

Le PRESIDENT : C'est comme vous l'entendez. Cela dépend du temps dont vous avez besoin demain matin. Si vous pouvez, demain matin, dire ce que vous avez à dire dans la matinée, il n'y a pas d'objection à ce que nous nous arrêtions maintenant.

Mr. REISMAN: May I consult my colleagues for a moment, Mr. President?

The PRESIDENT: Please.

Mr. REISMAN: Thank you for allowing me to consult my colleagues. No, my colleagues are quite comfortable with a suspension at this time. And we wish the Court a well deserved rest from its labours today. Thank you, Mr. President.

Le PRESIDENT : Merci beaucoup de votre aimable attention. La séance est levée. Nous nous retrouverons demain à 10 heures.

L'audience est levée à 17 h 40.

CR 2000/14Corr.

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2000

Public sitting

held on Tuesday 13 June 2000, at 3 p.m., at the Peace Palace,

President Guillaume presiding

*in the case concerning Maritime Delimitation and Territorial Questions between
Qatar and Bahrain (Qatar v. Bahrain)*

VERBATIM RECORD

ANNEE 2000

Audience publique

tenue le mardi 13 juin 2000, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président

*en l'affaire de la Délimitation maritime et des questions territoriales entre Qatar et Bahreïn
(Qatar c. Bahreïn)*

COMPTE RENDU

[As a result of a technical problem, a paragraph, following on from the sub-heading "B. Qit'at Jaradah", was omitted in error on this page. Accordingly, this and the following pages replace pages 45 to 51 of CR 2000/14 as previously distributed.]

corrugated rather than a smooth surface; a low-tide elevation has one or the other. But for centuries Bahrainis have referred to it as a single entity and so it appears on the independently compiled Admiralty charts.

25. Mr. President, Members of the Court, Bahrain respectfully submits that it has adduced ample evidence to show that Fasht al Azm is part of Sitrah Island.

B. Qit'at Jaradah

26. Below the low-tide elevation of Fasht ad Dibal, at approximately 50° 55' latitude and 26° 10' longitude, the Court will observe the island of Qit'at Jaradah, which has long been recognized as such. Belgrave wrote, on 14 August 1937 to the British Political Agent, referring to Qit'at Jaradah as "an island"¹⁶. Nine other reports and communications from 1940 to 1959 confirm its island status. As these documents are in your folders, I will not review them here. There are, however, a smaller number of documents that are not consistent with the majority of observations. The international legal conception of an island did not crystallize until 1982. Moreover, after 1986, when bulldozers removed the portion of Qit'at Jaradah above water at high tide, the formation certainly ceased to be an island and would have been recorded as a low-tide elevation in the period immediately following 1986.

27. The law governing this matter is clear. Article 121, paragraph 1, of the 1982 Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide"¹⁷. As many of the judges who participated in the Third Law of the Sea Conference know, this was a fundamental and carefully drafted policy decision, which, I might add, unlike some other parts of Article 121, is identical in purport in the English and French texts. Professor Quéneudec, in his treatment of Qit'at Jaradah, entertainingly implied adjectives and qualifiers to Article 121, paragraph 1, but there are none in the provision and that was quite intentional. The special provision for "rocks", which do have a habitability and economic life test,

¹⁶Memorial of Bahrain, para. 581.

¹⁷Article 121 (1), United Nations Law of the Sea Convention 1982.

shows by their introduction that no such qualifications were intended for Article 121, paragraph 1. It does not matter if it is a small area that is above high tide. The question is whether an area of land surrounded by water is above water at high tide.

28. The question then, quite simply, is factual: whether Qit'at Jaradah is above water at high tide. To find the scientific answer to this question, Bahrain arranged for Dr. Lewis Alexander, the former Geographer of the Department of State of the United States, to observe and verify a survey conducted of Qit'at Jaradah. Dr. Alexander's methodology is set out in his report and the Court will already have studied it — extracts are in the judges' folders. Over a period of six visits, dispersed so as to encompass different periods of the year, Dr. Alexander confirmed evidence of dry sand atop Jaradah during the successive times of high-water springs, that is, the appropriate criterion for this determination. Dr. Alexander concluded:

"Article 121 (1) of the 1982 [Law of the Sea] Convention stipulates three criteria for a feature to qualify as an island. The first is that it must be a naturally formed area of land. Jaradah fits this description; it is a cay, i.e. a sandbank atop a coral reef. The second criteria is that it is surrounded by water. My observations confirm that Jaradah fits this description also. The third and final criteria is that the feature is above water at high tide. My observations confirm that the highest areas of Qit'at Jaradah are above water at monthly high water springs. Jaradah thus fits the description of an island in Article 121 (1)."¹⁸

So reports Dr. Lewis Alexander.

29. As against this evidence, in its submission of 1 March 2000, Qatar has submitted a 27-page report prepared for it by Brian Murphy and Victor Prescott. Once again, as we are dealing with a scientific question, I propose to go directly to Qatar's expert submission and only address new evidence or allegations that Professor Quéneudec may have introduced in his presentation.

30. The Court will have noted that 75 per cent of the Murphy-Prescott Report is irrelevant: a long excursus on techniques for establishing spring high-water tides and an even longer disquisition on sand cays. Murphy and Prescott adduce no evidence of their own, but confine themselves to commenting on the Alexander report and raise a number of objections about its methodology. Let me address these points directly.

— First, Murphy and Prescott point out that British Admiralty charts do not characterize Qit'at Jaradah as an island. That is correct. There were inconsistent reports about the status of

¹⁸Reply of Bahrain, Ann. 13, p. 77 at pp. 82-83.

Qit'at Jaradah, due, we surmise, to in clarity in the legal conception of an island and, of course, the decapitation of the island in 1986. This is why Bahrain commissioned a study. There is now scientific evidence. Charts will henceforth indicate that Qit'at Jaradah is an island.

- Second, Murphy and Prescott question whether Dr. Alexander was entitled to rely on official Tide Charts, because they are measured at Mina Salman and the time and amplitude of the highest tides may, they speculate, vary in Qit'at Jaradah. With respect, that speculation is, on its own terms, unpersuasive. The two sites are 15.4 nautical miles apart. This distance is most unlikely to lead to any significant difference in time, or any difference whatever in amplitude. As regards any minor time difference, Dr. Alexander, as any careful scientist engaged in this type of activity, took care to arrive at Qit'at Jaradah approximately an hour before the time designated by the Tide Charts and remained for some time afterwards. As regards any differences in amplitude, not only is this most unlikely to have occurred, but if it did occur, it would have been irrelevant to the point at issue, which is whether Qit'at Jaradah is above water at all states of the tide *as experienced at Qit'at Jaradah*. Whether this is higher, lower or the same as the high tide at Mina Salman is beside the point.
- Third, Murphy and Prescott question the October 1998 survey of Qit'at Jaradah, because Mr. G. C. Lindsay, the Survey Operations Manager, referred to high tide as "Apparent High Water Mark", without, say Murphy and Prescott, explaining how that datum is derived. The answer to this question is quite simple: Mr. Lindsay *did* explain, in the text accompanying the survey, that "the maximum height observed at Jaradah during the survey . . . is 0.4 meters above the Highest Astronomical Tide calculated from tidal observations for the area". Because the datum that was used in October was *even higher* than the official chart, Mr. Lindsay, with appropriate scientific precision, referred to it as the "Apparent High Water Mark". If Qatar wishes to rely on the Official Chart, Qit'at Jaradah was *even more exposed* at high tide than Mr. Lindsay and Dr. Alexander reported.
- Fourth, Murphy and Prescott observe that the photographs produced by an official Bahraini photographer are not time- and date-stamped. That is correct. A camera with that capacity was not available when the observations were made. Nonetheless, Dr. Alexander has careful notes of the date and exact time when each of the photos was taken and is willing to produce them or

be deposited if there is any question on this matter. The State of Bahrain need hardly certify the honesty and good faith of Dr. Alexander, a world-renowned figure, the co-author of the authoritative *"International Maritime Boundaries"*, and a scientist of unquestioned reputation. It is the testimony in the report of Dr. Alexander that is submitted and it stands, with or without the photographs.

— Murphy and Prescott finally question whether there will be sufficient sand sediment to maintain Qit'at Jaradah as an island. The issue is Qit'at Jaradah at this moment and not in 20 or 30 years hence, when *many* factors may precipitate *many* unpredictable effects on many islands and many coastal areas. Well no one can predict the future, one presumption seems relatively safe: there will be no shortage of sand in the region. Messrs. Murphy and Prescott may rest easy on that concern.

31. Thus, Mr. President, Members of the Court, the problems that Murphy and Prescott purported to find in the Alexander report prove, on careful examination, to be forced and artificial. The methodology was that of the standard of the profession and the results of the Alexander observations stand. As for the speculations by Murphy and Prescott to the effect that there may be other geological or geomorphological explanations for the island character of Qit'at Jaradah, those ruminations may be of academic interest, but they are irrelevant for this enquiry. The question quite simply is whether Qit'at Jaradah qualifies as an island under international law, and the answer depends on a scientific enquiry: is the island above water at high tide? It is, as the Alexander report establishes, and Qatar is not able to refute. None of the documents that Qatar has invoked was based on a systematic survey at monthly intervals at high-water springs, as was the study by Dr. Alexander. And, incidentally, all Qatar would need to produce to sustain its position, is a single photograph of Qit'at Jaradah, taken at any time whatever, showing it covered by the tide. It has submitted no evidence whatsoever.

32. Bahrain submits, Mr. President, Members of the Court, that the scientific evidence conclusively rebuts the selected observations that Qatar has made to the effect that Qit'at Jaradah is not above water at high tide. It is an island in international law.

33. Given that Qit'at Jaradah is an island, the question becomes who has sovereignty over it. The written submissions of Bahrain recount the numerous acts of sovereignty that Bahrain

historically has exercised over Qit'at Jaradah. The Court was spared recitations of *effectivités* by Qatar, because it had none to submit. Bahrain, in contrast, has innumerable *effectivités* and I fear that the Court is approaching a saturation point on them. So let me only categorize the most relevant *effectivités*, which are set out in detail in the written submissions. The acts of sovereignty include:

- Conducting surveys and granting oil concessions over Qit'at Jaradah¹⁹;
- Erecting a beacon on Qit'at Jaradah in 1939²⁰;
- Ordering the drilling of an artesian well on Qit'at Jaradah in 1940²¹;
- Conducting coastguard patrols around the area of Qit'at Jaradah²²;
- Fishing the areas around Qit'at Jaradah by Bahraini fishermen²³;
- Using Qit'at Jaradah for recreational purposes²⁴. (And incidentally, I will not comment on the innuendo that the Government of Bahrain arranged for a fleet of pleasure boats to assemble at Qit'at Jaradah for a photograph that would give the impression that this was a recreational area. Whether Qatar likes it or not, this actually happens most weekends, with boats gathering about Qit'at Jaradah.)

34. The Court will observe Fasht ad Dibal at approximately 50° 55' latitude and 26° 45' longitude. Fasht ad Dibal is a low-tide elevation, which is approximately 2.08 nautical miles from the island of Qit'at Jaradah. This is a geographical fact that will have important implications for the determination of basepoints, in accord with Article 13 of the 1982 Convention, a matter to which we will return. In addition to its status and boundary-delimitative potentiality as a low-tide elevation, Fasht ad Dibal has historically been viewed by States engaged politically in the area, including the Ruler of Qatar, as susceptible to acquisition as sovereign territory. On 14 August 1937 Belgrave wrote to the Political Agent, indicating that Fasht ad Dibal, among other

¹⁹Memorial of Bahrain, para. 576.

²⁰Memorial of Bahrain, para. 586.

²¹Memorial of Bahrain, paras. 584 and 586.

²²Memorial of Bahrain, paras. 598-599. Bahrain Coastguard Report, Ann. 24, Vol. 2, pp. 148-151.

²³Memorial of Bahrain, para. 597.

²⁴Reply of Bahrain, para. 336.

low-tide elevations was part of Bahrain. As this important document is in your folders, I will not review it here.

35. A list prepared by the Land Department down to 1939 shows that pillars were erected by the Government of Bahrain, *inter alia*, on Al Mu'tarid, Mashtan, Noon, Tighaylib, Al Hul, Qit'at Jaradah, Fasht ad Dibal, and Fasht al'Azm²⁵. On 18 June 1946 Belgrave wrote again to the Political Agent:

"In the year 1936 the Bahrain Government built beacons on the Fasht-Al-Debal. One of the beacons was built on the rock at the north end of the Fasht which is above water. His late Highness Shaikh Hamad and the present Ruler have always regarded this Fasht as being owned by Bahrain. The anchorage there is used exclusively by Bahrain boatmen and fishermen and the Fasht is one of those which are considered to belong to Bahrain."²⁶

36. In July 1946, the Political Agent wrote to the respective Rulers of Bahrain and Qatar to ask whether each Ruler considered Fasht ad Dibal and Qit'at Jaradah to constitute part of his respective territory. In the event of an affirmative answer, the Rulers were asked to state the grounds on which sovereignty was claimed²⁷. The Ruler of Bahrain based his claim both on Bahrain's historical enjoyment of sovereignty over the entire Qatar peninsula and the islands and other maritime features lying between the peninsular and Bahrain, as well as on acts of sovereignty by Bahrain in relation to the maritime features. Bahrain's claim to sovereignty referred specifically to the construction of artesian wells on Fasht ad Dibal and Qit'at Jaradah and annexed a list of cairns which had been erected by Bahrain during the 1930s²⁸.

37. The claim asserted by the Ruler of Qatar to Fasht ad Dibal and Qit'at Jaradah accepted without question that both formations could be subject to national sovereignty, he accepted that they could be subjected to national sovereignty. But he based his claim on the fact that it was

²⁵List prepared by Land Department, Govt. of Bahrain, of pillars erected 1938-1939, Memorial of Bahrain, Ann. 336, Vol. 6, p. 1457.

²⁶Letter from Charles Belgrave, Adviser to the Govt. of Bahrain, to British Political Agent, 18 June 1946, Memorial of Bahrain, Ann. 340, Vol. 6, p. 1470.

²⁷See, for example, letter from British Political Agent to Ruler of Qatar, 9 July 1946, Ann. 341, Vol. 6, p. 1471.

²⁸Letter from Charles Belgrave, Adviser to Govt. of Bahrain, to Political Agent, 10 July 1946, Memorial of Bahrain, Ann. 342, Vol. 6, pp. 1473 and 1474.

closer to him and he should get it as a consolation prize, because he had not been awarded the Hawars²⁹!

"Bahrain . . . has no dependencies contrary to Qatar which is a large territory and has dependencies, coasts, and islands. If we look into the question from the point view of equality, Qatar is to be entrusted with Deebil and Jaradah Fashts which are situated between Qatar and Bahrain, and they are nearer to Qatar. You see that Qatar has been treated unjustly in her clear right in the question of Hawar islands which I am still tenacious to claim their ownership, then how about the others!"³⁰

Mr. President, this has been a very long day, and counsel for Bahrain are particularly grateful to the Court for its sustained attention. But I wonder if this might not be an appropriate moment for us to pause and to resume this presentation tomorrow morning.

Le PRESIDENT : C'est comme vous l'entendez. Cela dépend du temps dont vous avez besoin demain matin. Si vous pouvez, demain matin, dire ce que vous avez à dire dans la matinée, il n'y a pas d'objection à ce que nous nous arrêtions maintenant.

Mr. REISMAN: May I consult my colleagues for a moment, Mr. President?

The PRESIDENT: Please.

Mr. REISMAN: Thank you for allowing me to consult my colleagues. No, my colleagues are quite comfortable with a suspension at this time. And we wish the Court a well deserved rest from its labours today. Thank you, Mr. President.

Le PRESIDENT : Merci beaucoup de votre aimable attention. La séance est levée. Nous nous retrouverons demain à 10 heures.

L'audience est levée à 17 h 40.

²⁹Letter from the Ruler of Qatar to the British Political Agent 18 July 1946, Memorial of Bahrain, Ann. 343, Vol. 6, p. 1476.

³⁰Letter from Ruler of Qatar to British Political Agent, 18 July 1946, Memorial of Bahrain, Ann. 343, Vol. 6, p. 1476.