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Cour internationale
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LA HAYE

YEAR 2000

Public sitting

held on Tuesday 20 June 2000, at 10 a.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 20 juin 2000, à 10 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
Buergenthal, juges
MM. Torres Bernárdez
Fortier, juges *ad hoc*

M. Couvreur, greffier

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Mr. Sami Abushaikha, Legal Expert,

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Mr. Eric David, Professor of International Law, Université libre de Bruxelles,
Dr. Ali bin Fetais Al-Meri, Director of Legal Department, Diwan Amiri,
Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I (Panthéon-Sorbonne),
Mr. Jean Salmon, Professor emeritus of International Law, Université libre de Bruxelles, Member of the Institut de droit international,
Mr. R. K. P. Shankardass, Senior Advocate, Supreme Court of India, Former President of the International Bar Association,
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Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law, University of London, Member emeritus of the Institut de droit international,
Mr. Rodman R. Bundy, *Avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,
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Mr. Robert Volterra, Freshfields, London, Member of the Bar of Upper Canada,
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H.E. Dr. Mohammed Jaber Al-Ansari, Advisor to His Highness, the Amir of Bahrain,
Mr. Ghazi Al-Gosaibi, Under-Secretary of Foreign Affairs, State of Bahrain,
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Mr. Nabeel Al-Rumaihi, Ministry of State of the State of Bahrain,
Mr. Hafedh Al-Qassab, Ministry of State of the State of Bahrain,
Ms Aneesa Hanna, Embassy of Bahrain in London,
Ms Jeanette Harding, Ministry of State of the State of Bahrain,
Ms Vanessa Harris, Freshfields,
Ms Iva Kratchanova, Ministry of State of the State of Bahrain,
Ms Sonja Knijnsberg, Freshfields,
Mr. Kevin Mottram, Freshfields,
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M. Michael Reisman, professeur de droit international à l'Université de Yale, titulaire de la chaire Myres S. McDougal, membre du barreau du Connecticut, associé de l'Institut de droit international,
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M. Graham Coop, cabinet Freshfields, Paris, avocat et conseil de la *High Court* de Nouvelle-Zélande et conseiller de la Cour suprême d'Angleterre et du Pays de Galles,
M. Andrew Newcombe, cabinet Freshfields, Paris, membre du barreau de la Colombie britannique,
Mme Beth Olsen, conseiller, ministère d'Etat de l'Etat de Bahreïn,
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S. Exc. le cheikh Abdul-Aziz bin Mubarak Al Khalifa, ambassadeur de l'Etat de Bahreïn aux Pays-Bas,
S. Exc. M. Mohammed Jaber Al-Ansari, conseiller de Son Altesse l'émir de Bahreïn,
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Mme Maisoon Al-Arayed, ministère d'Etat de l'Etat de Bahreïn,
M. Nabeel Al-Rumaihi, ministère d'Etat de l'Etat de Bahreïn,
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Mme Aneesa Hanna, ambassade de Bahreïn, Londres,
Mme Jeanette Harding, ministère d'Etat de l'Etat de Bahreïn,
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Mme Iva Kratchanova, ministère d'Etat de l'Etat de Bahreïn,
Mme Sonja Knijnsberg, cabinet Freshfields,
M. Kevin Mottram, cabinet Freshfields,
M. Yasser Shaheen, second secrétaire, ministère des affaires étrangères de l'Etat de Bahreïn,

comme personnel administratif.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous entamons aujourd'hui le deuxième tour de plaidoiries dans l'affaire opposant Bahreïn à Qatar et je donne la parole immédiatement au professeur Jean Salmon qui s'exprimera au nom de l'Etat de Qatar.

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

1. A ce stade des débats, les positions opposées des Parties sont bien profilées. Avant de se prononcer sur une délimitation maritime, la Cour aura à déterminer l'appartenance de territoires terrestres : Zubarah, dont elle aura compris que cet objet a été soulevé pour tenter de contrebalancer ce qui est la plus profonde pomme de discorde entre les deux Parties : Hawar ; Hawar qui soulève chez les deux Parties autant de sentiments profonds que jadis l'Alsace Lorraine.

Concernant Hawar, la Cour sait, maintenant, que Qatar estime qu'il possédait, avant la saisie de l'île principale par Bahreïn en 1937, un titre originaire, reconnu internationalement. Ce titre n'a pas été déplacé par l'occupation illégale dont ce territoire à fait l'objet.

C'est, pour l'essentiel, ce que les exposés des conseils de Qatar montreront une nouvelle fois, en s'attachant à répondre aux arguments de nos adversaires et à mettre en lumière les points essentiels du débat qui divise encore les Parties.

Dans la première partie des exposés qui vont suivre les questions seront abordées dans l'ordre suivant :

Après une introduction générale de ma part, la première partie des exposés sera consacrée aux questions territoriales. M. Shankardass réfutera les soi-disant «effectivités» bahreïnites. M. Bundy traitera ensuite de l'intégrité territoriale de Qatar, de l'étendue territoriale limitée de Bahreïn, de la pertinence des cartes. Il sera suivi à nouveau de M. Shankardass sur l'étendue territoriale de Qatar postérieurement à 1916 et sur l'histoire des concessions pétrolières, puis il sera suivi de sir Ian qui exposera les aspects positifs des moyens invoqués par Qatar concernant Hawar. Après un exposé sur Zubarah par M. le professeur David, sir Ian reprendra la parole sur les décisions de 1936-1939 cette fois.

Dans une seconde partie, beaucoup plus brève, le professeur Quéneudec montrera à la Cour que la frontière maritime unique que Qatar défend représente, dans les circonstances de l'espèce,

une délimitation permettant d'aboutir à une solution équitable. Les exposés de Qatar se termineront par quelques réflexions de l'agent du Qatar.

J'en viens maintenant à quelques questions générales. Et tout d'abord, celle de l'*uti possidetis juris*.

I. *UTI POSSIDETIS JURIS*

2. Dans sa plaidoirie du 13 juin, le Dr. Fathi Kemicha a exprimé sur le principe de l'*uti possidetis* des considérations générales que l'on ne peut partager, ni en fait ni en droit. Toutefois, comme elles sont largement hors sujet nous ne prendrons pas le temps de la Cour à les réfuter. Nous nous bornerons aux aspects essentiels susceptibles de s'appliquer concrètement aux litiges dont la Cour est saisie.

3. Il ne fait guère de doute que la règle de l'*uti possidetis juris* est aujourd'hui une règle de droit international de portée générale, en ce sens qu'elle est liée au phénomène de l'accession à l'indépendance où qu'il se manifeste, et en vertu de laquelle les Etats nés de la décolonisation succèdent aux limites qui étaient les leurs quand ils étaient sous l'administration de l'Etat colonial (que ces limites aient alors été des frontières établies internationalement par des traités ou de simples limites administratives décidées unilatéralement par la métropole).

Comme l'a dit la Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*, arrêt du 22 décembre 1986 :

> «En tant que principe érigeant en frontières internationales d'anciennes délimitations administratives établies pendant l'époque coloniale, l'*uti possidetis* est donc un principe d'ordre général nécessairement lié à la décolonisation où qu'elle se produise.» (P. 566, par. 23.)

4. L'*uti possidetis* — principe de succession d'Etats — implique donc une *accession à l'indépendance*, c'est-à-dire l'émergence d'un nouveau sujet de droit, *à l'issue de la décolonisation*, d'autre part.

Aucune de ces deux conditions n'est présente dans le cas d'espèce, ni en général dans les Emirats du Golfe.

L'*indépendance* des émirs ne fut jamais contestée, seul l'exercice de certaines compétences, essentiellement en matière de relations extérieures, fut conventionnellement transféré par eux au Royaume-Uni, sans que la substance de leurs droits, qu'ils soient territoriaux ou autres, en ait été

affectée. Les traités de 1971 qui mirent fin aux relations spéciales de Bahreïn et de Qatar avec le Royaume-Uni — nous examinerons leur texte dans un instant — n'aboutirent en rien à la création de sujets de droit nouveaux ou de personnalités juridiques nouvelles qui auraient pu être appelées à succéder aux droits établis par une puissance administrante sur une colonie. Les personnes juridiques existantes récupérèrent simplement l'intégralité de leurs compétences.

5. Jamais Bahreïn ni Qatar n'ont été considérés par le Royaume-Uni comme *des «colonies» ou des «protectorats» de type colonial*. C'étaient des «Etats protégés», *"protected states"*, ce qui est tout autre chose. La résolution 66 (I) de 1946 de l'Assemblée générale des Nations Unies intitulée «Transmission des renseignements visés à l'article 73 *e)* de la Charte», qui répertoria les territoires non autonomes, mentionne, si j'ai bien compté, quarante-cinq territoires désignés par le Royaume-Uni, parmi lesquels ne figurent *aucun* Emirat du Golfe. Oman fut ajouté à la liste des territoires non autonomes en 1965 (rés. 2073 (XX)) mais pour des raisons particulières : notamment la présence militaire britannique, mais ce ne fut pas le cas pour les autres Emirats.

La distinction entre «protectorat» et «Etat protégé» en droit constitutionnel britannique est exposée comme suit par A. B. Keith, constitutionnaliste britannique (dossier d'audience, doc. n° 1):

> «La caractéristique essentielle du protectorat est que la Couronne assume et exerce une autorité souveraine complète, sans toutefois annexer le territoire. Dans le cas d'Etats protégés l'autorité souveraine appartient au souverain de l'Etat, et en aucune manière à la Couronne britannique, et le rôle de cette dernière découle d'arrangements conclus par traités avec les Etats [concernés] qui ne confèrent [à la Couronne] aucune souveraineté sur eux, mais lui attribuent des pouvoirs et des obligations en ce qui concerne soit les affaires intérieures et extérieures, soit les secondes presque exclusivement.» (Keith, Arthur, Berriedale, *The Governments of the British Empire*, MacMillan, London, 1935, p. 508.) *[Notre traduction.]*

6. Que les Emirats, y compris Bahreïn et Qatar, n'ont jamais été considérés comme des colonies ou des «protectorats» de type colonial ainsi défini, mais ont toujours conservé leur indépendance résulte aussi bien de diverses positions officielles du Gouvernement britannique.

Ainsi, lord Curzon, Vice-Roi de l'Inde s'exprima comme suit à propos de la côte de la Trêve *(Trucial coast)* (dossier d'audience, doc. n° 20):

> «Chefs, sur la base de relations qui furent ainsi créées et qui par votre propre consentement instituèrent le Gouvernement britannique en garant d'une paix intertribale, se sont développés des liens politiques entre le Gouvernement de l'Inde et vous-même, par lesquels le Gouvernement britannique devint votre suzerain et protecteur et vous n'avez pas de relations avec d'autres puissances...»

> Nous n'avons pas saisi ou pris vos territoires. Nous n'avons pas détruit votre indépendance mais l'avons préservée... La paix de ces eaux doit être maintenue; votre indépendance continuera à être assurée et l'influence du Gouvernement britannique doit rester supérieure...
>
> Le Gouvernement britannique n'a aucun souhait d'intervenir et n'est jamais intervenu dans vos affaires intérieures.» (D. M., vol. 2, p. 203, cité par l'arbitrage relatif à la frontière Doubaï/Charjah, 19 octobre 1981, *ILR*, vol. 91 p. 561.) *[Notre traduction.]*

Le tribunal arbitral dans l'affaire de la *Frontière Doubaï/Charjah*, d'où j'ai tiré cette citation de lord Curzon de 1902, en tirait la conclusion suivante :

> «Bien sûr, le Gouvernement britannique peut avoir eu l'idée, à un moment ou à un autre, de renforcer les liens juridiques entre les émirats et la Grande-Bretagne, mais l'allocution de lord Curzon de 1902 à laquelle référence a été faite au chapitre I de cette sentence démontre que, en s'adressant aux souverains de la région, il s'engagea expressément à continuer à maintenir leur indépendance effective.
>
> Il est dès lors clair qu'aucun traité n'autorisait les autorités britanniques à délimiter unilatéralement les frontières entre les émirats et qu'aucune administration britannique n'a jamais affirmé qu'elle en avait le droit. Le tribunal a, par conséquent, abouti à la conclusion que le consentement des souverains intéressés était nécessaire avant qu'aucune délimitation de la sorte ne puisse être entreprise.» (*Ibid.*, p. 567.)

Même Rendel dans son projet du 5 janvier 1933 — que nos adversaires ont cru bon de citer — parlant en général des principautés de la côte de la Trêve *("principalities of the Trucial coast")* insistait sur le fait que ces territoires ne faisaient pas partie de l'Empire britannique ou de l'Inde et que c'étaient «des Etats indépendants» (réplique de Qatar, annexe II.58, vol. II, p. 342).

La Cour notera la qualification d'*Etats indépendants,* ce qui n'est pas la caractéristique habituelle d'une colonie.

7. L'échange de notes constituant un accord entre le Gouvernement du Royaume-Uni et le Gouvernement de l'Etat de Qatar relatif à l'abrogation du régime spécial de traité entre le Royaume-Uni et le Qatar du 3 septembre 1971 est aussi tout à fait éclairant sur ce point.

> «Altesse,
>
> J'ai l'honneur de me référer aux entretiens que j'ai eus avec vous au sujet de l'abrogation du régime spécial de traité entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et *l'Etat du Qatar* et au désir qu'a manifesté votre Gouvernement de voir *l'Etat du Qatar reprendre les pleines responsabilités internationales en tant qu'Etat souverain et indépendant.* Ces entretiens ont abouti aux conclusions ci-après :
>
> 1. Le régime spécial de traité et tous autres accords, engagements, dispositions et arrangements conclus entre le Royaume-Uni et l'Etat du Qatar dans le cadre du régime spécial de traité entre les deux Etats cesseront d'avoir effet ce jour...

2. Le traité général du 3 novembre 1916 et les traités et engagements que l'Etat du Qatar a acceptés au titre dudit traité général entre le Royaume-Uni et l'Etat du Qatar, qui est incompatible *avec le plein exercice* des responsabilités internationales d'un Etat souverain et indépendant, prendra fin ce jour.» (*RTNU*, 1972, n° 11811, p. 101.)

Le texte en langue anglaise avec Bahreïn daté du 15 août 1971 est identique sous réserve des dates des traités spéciaux, bien entendu, qui étaient différentes. Il y a une différence dans la traduction française. Le membre de phrase *"resume full international responsibility"* est traduit, pour Bahreïn, par «assumer une entière responsabilité sur le plan international" et, dans le texte relatif à Qatar, par les mots «reprendre les pleines responsabilités internationales». Nous pensons que cette seconde traduction est plus fidèle au texte anglais *(resume)*.

Comme on le voit, ces textes ne contestent pas un seul instant que Qatar et Bahreïn étaient, avant la signature de ces accords des Etats *souverains et indépendants*; ils prennent acte simplement que *le plein exercice* de leurs responsabilités d'Etat souverain leur était rendu.

8. Les traités, dont la terminaison était constatée, n'avaient d'ailleurs jamais eu pour effet de mettre fin à l'indépendance des émirats en question. Ainsi, le traité entre le Gouvernement britannique et le cheikh de Qatar, en date du 3 novembre 1916, comportait divers engagement du cheikh notamment de respecter les obligations propres à la côte de la Trêve.

Nulle part il n'était question d'une administration directe ou indirecte du territoire de l'émirat par Sa Majesté, qui n'a envoyé de représentant à Qatar que bien tard aux yeux des Qatariens. Sous réserve de quelques engagements particuliers, l'administration intérieure du territoire était entièrement souveraine, seul l'exercice des relations extérieures se voyait limité par l'intermédiaire obligé du Royaume-Uni (dossier d'audience, doc. n° 3) :

> «Moi, cheikh Abdullah, je m'engage en outre à ne pas avoir de relations et à ne pas correspondre avec une autre puissance, ni à recevoir son agent, sans le consentement du Gouvernement britannique; sans un tel consentement, je ne céderai pas non plus de terres à aucune autre puissance ni à ses sujets, que ce soit en les affirmant, en les vendant, en les transférant, en les donnant ou de toute autre manière.» (Art. IV, mémoire de Qatar, annexe III.63, vol. 6, p. 90.) *[Traduction du Greffe.]*

Il est clair que ce texte ne signifie pas que le Gouvernement britannique devient titulaire des droits en question : ils demeurent ceux de l'émir, mais ce dernier a besoin de l'autorisation du Gouvernement britannique pour les exercer à l'extérieur.

En contrepartie, le Gouvernement britannique s'engageait à protéger le cheikh, ses sujets et son territoire contre toute agression par la mer (art. X) et à prêter ses bons offices en cas d'attaque terrestre du territoire de Qatar (art. XI). J'invite respectueusement les membres de la Cour à relire le texte complet de ce traité. Pour ceux qui ont vécu ce qu'était une administration coloniale, assimiler cet état de fait et de droit à une situation coloniale est un non-sens.

Il en va de même du traité du 22 décembre 1880 signé par le souverain de Bahreïn (mémoire de Qatar, vol. 6, annexe III.35, p. 49 de la traduction du Greffe) et de celui du 13 mars 1892 entre le cheikh de Bahreïn et le Gouvernement britannique (mémoire de Qatar, vol. 6, annexe III.41, p. 55 de la traduction du Greffe)

9. L'histoire des deux émirats montre d'ailleurs que les relations extérieures avec les pays voisins échappaient quant au fond, dans une large mesure, au Gouvernement britannique. Ainsi, dès 1935, l'Arabie saoudite déclarait que lui étaient inopposables les traités qui pourraient avoir pour effet de l'empêcher d'entretenir une correspondance avec le Qatar (Husain Al Baharna, *The Legal Status of the Arabian Gulf States*, *Manchester University Press*, 1968, p. 75). Le Royaume-Uni après avoir participé au début des négociations, ne fut tenu au courant qu'après coup de l'accord de Riyadh entre le Gouvernement de Bahreïn et le Royaume d'Arabie saoudite du 22 février 1958 sur la délimitation maritime. Le Royaume-Uni donna son accord postérieurement le 2 juin 1958 (voir avis de sir Lionel Heald que je cite un peu plus loin). C'est avant les accords d'août-septembre 1971 que furent conclu : par Qatar, sans en référer au Royaume-Uni, son accord avec l'Arabie saoudite sur la délimitation de leur frontière terrestre et dans le Golfe de Salwah du 4 décembre 1965, ou son accord avec Abou Dhabi du 20 mars 1969 (mémoire de Qatar, vol. 12, annexe IV.259) et avec l'Iran du 20 septembre 1969 (mémoire de Qatar, vol. 12, annexe IV.260, *RTNU*, vol. 787, p. 165) et, par Bahreïn de son accord avec l'Iran du 17 juin 1971 (mémoire de Qatar, vol. 12, annexe IV.264). Si c'est cela que nos adversaires appellent un régime colonial, nous n'avons à l'évidence pas la même conception de cette expression juridique.

10. La prétention soudaine de Bahreïn, qu'il était sous un régime colonial ou de protectorat impliquant qu'il n'a accédé à l'indépendance qu'en 1971, est d'autant plus surprenante que ceci ne cadre aucunement avec les analyses qui ont pu être faite de son statut par le Dr. Al-Baharna dans

l'ouvrage que nous avons déjà eu l'occasion de citer et qui fait autorité en la matière *(The Legal Status of the Arabian Gulf State)*. Cet auteur note ce qui suit (dossier d'audience doc. n° 4) :

> «en premier lieu, les traités passés avec les émirats, qui sont rédigés de manière rudimentaire, ne déclarent pas expressément ou formellement l'établissement d'un protectorat britannique sur aucun des émirats... En deuxième lieu, quoique le Royaume-Uni ait qualifié les émirats d'«Etats protégés britanniques», ... le Gouvernement britannique a, dans des déclarations officielles faites de temps à autre, décrit les émirats comme des *«Etats indépendants sous protection britannique»* ou comme des *«Etats indépendants* dans des relations spéciales de traité» avec le gouvernement de Sa Majesté.» (P. 78; les italiques sont de nous.)

Et le Dr. Al-Baharna de conclure :

> «On observera des déclarations qui précèdent que les émirats sont soit qualifiés *d'«Etats indépendants»* sous protection britannique, soit d'«*Etats* dans des relations spéciales de traité avec le gouvernement de Sa Majesté». Et, dans les deux cas, on se réfère spécifiquement à eux comme «*Etats*» ou comme «*Etats indépendants*». *(Ibid.)*

11. La position juridique qui a été développée ici même, que Bahreïn était soumis à un statut colonial, est d'autant plus inattendue que le Gouvernement de Bahreïn lui-même fit remettre au Foreign Office un avis juridique de sir Lionel Heald du 4 juillet 1963 qui comprenait notamment les passages suivants :

> «Lorsque la Perse émit en 1927, des prétentions à la souveraineté sur Bahreïn, le secrétaire britannique aux affaires étrangères écrivit ce qui suit au Gouvernement de Bahreïn : «Les accords (entre La Grande-Bretagne et Bahreïn depuis 1820) ont tous été conclus en considérant que le cheikh de Bahreïn est un *souverain indépendant»*...
>
> Dans ces conditions, le simple fait que le gouvernement de Sa Majesté assure, en vertu de décrets en conseil, la responsabilité des relations extérieures de Bahreïn ne peut pas être invoqué comme justification d'une quelconque privation, par le gouvernement de Sa Majesté, des *droits souverains* du cheikh, y compris ses droits sur le fond marin...
>
> On peut encore trouver d'autres déclarations qui montrent que le Royaume-Uni a toujours traité Bahreïn comme un *Etat souverain indépendant* et a toujours pris soin d'exercer toutes ses activités dans les limites des dispositions des divers traités qui ont été conclus. La détermination des limites de Bahreïn, telle qu'elle a été signifiée, doit dès lors, à notre avis, être justifiable au regard des termes de ces traités. Dans le cas contraire, elle n'a aucun effet juridique sur le souverain de Bahreïn.
>
> Les deux traités visés ci-dessus [ceux de 1880 et 1892] restreignent, en termes négatifs, les relations extérieures de Bahreïn, mais ils ne prétendent pas transférer la *souveraineté de Bahreïn* ni accorder au Royaume-Uni un droit positif quelconque de déterminer de quelque manière que ce soit les frontières de Bahreïn...» (Mémoire de Qatar, annexe IV.248, vol. 11, pages 286-288 de la traduction du Greffe; les italiques sont de nous.)

12. La Cour aura compris que la Partie adverse confond funestement limitation de souveraineté et absence de souveraineté. La phrase suivante de conclusion de M. Kemicha sur le caractère colonial est très claire à ce propos :

> «57. Quel que soit le qualificatif qu'on donne à la nature de ces «*liens spéciaux*», nul ne peut prétendre que Bahreïn et Qatar disposaient alors de la plénitude et de l'exclusivité des compétences internes et externes qui sont les attributs de la souveraineté.
>
> 58. Nier le fait colonial, etc.» (CR 2000/13, p. 58 par. 57 et 58; les italiques sont dans l'original.)

J'ai le regret de faire part aux Allemands, aux Britanniques, aux Espagnols, aux Français, aux Néerlandais, et pourquoi pas aux Belges qui sont dans cette salle, que leurs pays respectifs sont, selon les critères de M. Kemicha, sous protectorat des Communautés européennes et donc dans une situation coloniale.

Trêve de plaisanterie. Au vu de ce qui précède la Cour voudra bien sans doute constater que Bahreïn et Qatar n'ont jamais été des colonies, qu'il s'est toujours agi d'Etats indépendants, aussi bien avant qu'au moment de signer les accords de 1971, qu'il n'y a pas eu de personnalité juridique nouvelle succédant aux droits et obligations d'une puissance administrante quelconque, qu'il n'y eût pas de succession d'Etats et, par conséquent, pas plus de «legs colonial» que de «table rase». J'en viens à la seconde partie de mon exposé relatif aux hésitations entre décision et sentence arbitrale.

II. DE LA DÉCISION À LA SENTENCE ARBITRALE

13. L'appel à la notion de statut colonial et à la règle de l'*uti possidetis* n'est pas innocent. Il s'agit de sauver du naufrage la décision de 1939. D'une part, on nous dit qu'il s'agit d'un modèle de sentence arbitrale et on invoque le principe de la *«res judicata»*. Mais, pour le cas où la Cour ne serait pas bien convaincue, on retombe sur l'idée que ce peut aussi être une décision politique ou administrative (sir Elihu Lauterpacht, CR 2000/11, par. 19, subdivision 14, p. 15 de la traduction française).

Comme le dit encore M. Kemicha : «Que cette décision ait le caractère d'une sentence arbitrale ou d'une décision politique ou même administrative importe peu !» (CR 2000/13, p. 64, par. 106.) Mais oui, comme La Fontaine le faisait dire à la chauve-souris selon les circonstances :

«Je suis oiseau, voyez mes ailes ... je suis souris, vivent les rats !» Si on ne peut sauver la décision comme sentence arbitrale, essayons toujours le legs colonial.

14. A vrai dire, comme on va le voir, c'est exact. Que cette sentence ait le caractère d'une sentence arbitrale ou d'une décision politiquer ou sadministrative, importe peu. Mais pas pour les raisons invoquées par M. Kemicha.

Mon confrère sir Ian Sinclair a déjà exposé à la Cour pourquoi la décision de 1939 ne peut, en aucun cas, être assimilée à une sentence arbitrale. Il donnera demain quelques indications complémentaires sur ce point.

Mais qu'il s'agisse d'une sentence arbitrale ou une d'une décision politique ou administrative, en tout état de cause, le Gouvernement britannique a admis en 1965 que sa décision concernant Hawar ainsi que celle concernant la ligne de 1947 pouvaient être soumises par les deux gouvernements à un tribunal d'arbitrage neutre. Faut-il le souligner, ceci s'est passé alors que les deux Emirats étaient encore sous le régime des traités créant des relations spéciales avec le gouvernement de Sa Majesté ?

Le Gouvernement de Qatar a déjà eu l'occasion d'invoquer cette question devant la Cour dans son mémoire concernant les questions de compétence et de recevabilité (par. 3.02 et 3.03). Mais comme ceci est déjà un peu lointain, il n'est pas inutile de rappeler ici comment le Royaume-Uni en est arrivé à adopter cette position.

15. Dans son mémorandum soumis au Gouvernement britannique en 1961 pour une revision de la ligne de 1947, le Gouvernement de Bahreïn invoqua la possibilité d'un accord entre lui et celui de Qatar concernant la délimitation maritime sous l'égide du gouvernement de Sa Majesté. «Le souverain espère que le gouvernement de Sa Majesté sera ainsi en mesure de l'aider à parvenir à un règlement juste et satisfaisant sans avoir recours à l'arbitrage international.» (Mémoire de Qatar, fond, vol. 12, annexe IV.254, p. 5 de la traduction du Greffe). On se souviendra que ce mémorandum ne fut cependant transmis au Gouvernement de Qatar qu'à la fin août 1964, c'est-à-dire trois ans plus tard.

Entre-temps les hauts fonctionnaires britanniques réfléchissaient à la question. Le 24 janvier 1962, Given, du Foreign Office, écrivit ce qui suit à Man, à la résidence politique dans le golfe Persique :

> «mais je crois personnellement que cela pourrait, en fin de compte, déboucher sur la mise en place d'un organe quelconque d'arbitrage. Quoi qu'il en soit, il pourrait être plus facile pour nous de nous écarter de la ligne de 1947 si les Qataris comme les Bahreïnites nous demandaient de le faire.» (Mémoire de Qatar, fond, vol. 11, annexe IV.236, p. 237 de la traduction du Greffe).

Dans un mémorandum du 2 mars 1962, intitulé «la décision de 1947 : la frontière entre Qatar et Bahreïn sur le fond marin», Walmsley, du Foreign Office, remarquait :

> «Si nous voulons revenir sur la décision de 1947 (que nous avons maintes fois réaffirmée) sans perdre la face, on voit difficilement comment nous pourrions éviter de recourir à un arbitrage ou à un tribunal neutres.» (Mémoire de Qatar, fond, vol. 11, annexe IV.239, p. 249 de la traduction du greffe.)

Il notait cependant :

> «Une autre complication concerne le fait que le souverain de Qatar profiterait de l'occasion pour contester la propriété des îles (Hawwar) et des hauts-fonds en question.» *(Ibid.)*

Francis Vallat, alors *legal adviser* du Foreign Office exprima des doutes sur le droit du gouvernement de Sa Majesté de disposer de droits territoriaux des Emirats sans leur consentement (Ephemeral, 26 avril 1962, mémoire de Qatar, fond, vol. 11, annexe IV. 240, p. 252 de la traduction du greffe) ; (texte anglais : Ephemeral dated 26 April 1962, Memorial of Qatar, Merits, vol. 11, Annex IV.240, p. 381). Ian Sinclair, alors *assistant legal adviser*, exprima les mêmes doutes le 9 mai 1962 (*ibid.*, p. 252-253)) ; (texte anglais : Ephemeral dated 9 May 1962, Memorial of Qatar, Merits, vol. 11, Annex IV.240, p. 384-385).

Des discussions approfondies eurent lieu alors au Foreign Office concernant les avantages et les inconvénients de rouvrir des décisions comme celles de la ligne de 1947 et des îles Hawar (voir mémoire de Qatar, fond, vol. 11, annexes IV.241 à 243, p. 255 à 266) ; (texte anglais : see Memorial of Qatar, Merits, vol. 11, Annex IV.241 to 243, p. 387 to 403). Elles montrent que les autorités britanniques étaient parfaitement conscientes que le règlement arbitral était de nature à remettre en question diverses décisions, auxquelles on donnait parfois le nom ambigu de *"award"* qui peut signifier aussi bien «sentence» que «décision» — et qui avaient été prises concernant les Emirats. D.C.I. Gracie, de l'agence politique Doha, dans une lettre du 2 juillet 1962 à Brown, de la résidence politique dans le golfe Persique, rejetait toute idée de ne soumettre à l'arbitrage que la ligne de 1947 en déclarant :

> «Le souverain et M. Kamel ne consentiront sans doute pas à ce que la question du fond marin soit rouverte si le mandat n'inclut pas Hawar et Dibal, pour lesquels il

semble au non-initié que je suis qu'ils disposent d'arguments solides.» (Mémoire de Qatar, fond, vol. 11, annexe IV.246, p. 278 de la traduction du Greffe.)

16. La prétention de certains fonctionnaires du Foreign Office que le gouvernement de Sa Majesté pouvait décider des frontières des Emirats sur la base de ses pouvoirs relatifs aux relations extérieures fut réduite en pièces par l'avis précité de sir Lionel Heald du 4 juillet 1963 relatif à Bahreïn mais dont le raisonnement s'appliquait à Qatar par identité de motifs (mémoire de Qatar, fond, vol. 11, annexe IV.248, p. 284 de la traduction du Greffe).

Par une lettre du 27 juillet 1964 adressée au Foreign Office, le souverain de Bahreïn relevait :

«nous avons été heureux d'apprendre du comte de Dundee que le gouvernement de Sa Majesté serait disposé à prendre des mesures pour que les questions en litige soient examinées et tranchées par une autorité neutre, sous réserve que le souverain de Qatar et nous-mêmes soyons prêts à nous engager d'avance à accepter toute décision ainsi prise. Pour notre part, nous avons déjà fait savoir que nous accepterions une telle décision, ce que nous confirmons présentement.» (Mémoire de Qatar, fond, vol. 12, annexe IV.252, p. 3 de la traduction du Greffe.)

En tout état de cause, lorsque le mémorandum de 1961 fut enfin transmis à Qatar à la fin août 1964 (mémoire de Qatar, fond, vol. 12, annexe IV.254, p. 5 de la traduction du Greffe), il donna lieu à une réponse de Qatar à l'agent politique du Gouvernement britannique à Doha sous forme de note verbale du 21 avril 1965 à laquelle était joint un mémorandum détaillé qui se terminait par la phrase suivante :

«Le Gouvernement de Qatar se félicite de la possibilité d'obtenir, *par un arbitrage international*, le règlement *des différends* entre les deux Etats et il est prêt, dans un esprit de bon voisinage et conformément à la Charte des Nations Unies, à conclure avec le Gouvernement de Bahreïn un compromis d'arbitrage en vue d'obtenir une décision définitive sur les questions mentionnées dans le présent mémorandum, *y compris en particulier la question de Hawar*.» (Mémoire de Qatar, fond, vol. 12, annexe IV.255, p. 29 de la traduction du Greffe; les italiques sont de nous.)

La réponse de l'agence politique à Doha du 27 octobre est lumineuse (dossier d'audience, doc. n° 6) :

«L'agent politique de Sa Majesté britannique à Doha présente ses compliments au directeur général et conseiller juridique du Gouvernement de Qatar et a l'honneur d'accuser réception de la note verbale et des pièces jointes, en date du 21 avril 1965, qui ont été transmises au résident politique à Bahreïn pour être communiquées au Gouvernement de Bahreïn.

Il est maintenant entendu que le Gouvernement de Bahreïn, comme le Gouvernement de Qatar, souhaitent que la question soit soumise à l'arbitrage, et *que le gouvernement de Sa Majesté a donné son accord à cette procédure d'arbitrage pour*

> *régler le différend.* Le gouvernement de Sa Majesté m'a chargé de vous informer qu'il devra être consulté quant aux personnes choisies comme *arbitres neutres* et qu'il devra être tenu informé du déroulement des négociations.» (Mémoire de Qatar concernant les questions de compétence et de recevabilité, vol. II, annexe I.58, traduction du Greffe, p. 146; les italiques sont de nous.)

Le 8 novembre 1965, le Dr. Hassan Kamel, directeur général et conseiller juridique du Gouvernement de Qatar, informa M. Boyle, agent politique de Sa Majesté à Doha, de la désignation par Qatar du professeur Charles Rousseau «comme son arbitre dans le différend» (mémoire de Qatar concernant les questions de compétence et de recevabilité, vol. II, annexe I.59, p. 369).

La réponse de Boyle, du 12 décembre 1965 (dossier d'audience, doc. n° 6) faisait état que : «Je suis heureux de vous informer que le gouvernement de Sa Majesté a approuvé ce choix.» (Mémoire de Qatar concernant les questions de compétence et de recevabilité, vol. II, annexe I.60, traduction du Greffe, p. 148.)

17. Cet échange de correspondance démontre plusieurs points essentiels :

Primo, que le gouvernement de Sa Majesté britannique ne considérait pas les décisions de 1939 et de 1947 comme des sentences arbitrales. Sinon il n'aurait pas accepté que des sentences arbitrales rendues par lui soient soumises à nouveau à l'arbitrage sans toutefois relever cette circonstance particulière qu'il s'agissait, en quelque sorte d'un «appel». S'il ne s'agit pas de sentences arbitrales, il ne peut donc être question de *res judicata* et les longs développements théoriques que nous avons entendus à ce propos sont absolument sans pertinence.

Deuxio, que le gouvernement de Sa Majesté britannique acceptait que les deux décisions en question, qu'elles soient politiques ou administratives, fassent l'objet d'un arbitrage entre les deux Etats du Qatar et de Bahreïn. C'était donc admettre que les tentatives politiques du gouvernement de Sa Majesté en vue de régler ces deux questions ne s'imposaient pas *en droit* aux deux souverains en présence. La thèse juridique de l'incompétence du Gouvernement britannique à régler les conflits frontaliers de deux Etats souverains dont il assurait seulement les relations internationales a apparemment prévalu au sein du Foreign Office. La situation était donc une matière ouverte, un différend qui avait à être réglé directement entre les deux Etats souverains qui y étaient parties soit par des négociations soit par un arbitrage auquel le Royaume-Uni n'avait pas l'intention de prendre part à aucun titre.

Tertio, que si même, un problème de succession d'Etats devait être considéré comme s'appliquant en l'espèce — et nous pensons avoir montré qu'il n'en est rien — on se trouverait ici devant une succession non à une frontière établie mais à *un différend concernant la frontière*. Les exposés théoriques qui ont été faits sur la notion d'*uti possidetis* sont donc doublement hors sujet.

18. Sans doute, ultérieurement, le Gouvernement de Bahreïn a-t-il essayé de limiter l'objet de l'arbitrage, pour en exclure la question des îles Hawar. Mais, comme chacun le sait, cet élément fut finalement inclus dans l'échange de lettres de décembre 1987 et dans la formule dite bahreïnite qui fit à son tour l'objet de l'accord de Doha du 25 décembre 1990.

La Cour, dans son arrêt du 15 février 1995, déclara :

> «il est clair que des revendications de souveraineté sur les îles Hawar et sur Zubarah peuvent être présentées par l'une ou l'autre des Parties, dès lors que la question des îles Hawar et celle de Zubarah sont soumises à la Cour» (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn, compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 22, par. 48).

S'il y a une *res judicata* dans la présente affaire, c'est bien celle qui résulte de l'arrêt de la Cour du 15 février 1995.

III. LE RAPPORT ENTRE TITRES JURIDIQUES ET EFFECTIVITÉS

19. Nous ne reviendrons que brièvement sur cette question, que nous avons traitée le 29 mai. Les deux Parties s'entendent pour prendre pour point de départ un passage de l'arrêt de la Cour dans l'affaire du *Différend territorial (Burkina Faso/République du Mali)*. La Cour avait envisagé quatre hypothèses. Les Parties se fondent essentiellement sur les deux premières, mais ne s'entendent pas sur les façons de les appliquer à l'espèce.

20. Première hypothèse : «Dans le cas où le fait correspond exactement au droit, où une administration effective s'ajoute à l'*uti possidetis juris*, l'«effectivité» n'intervient en réalité que pour confirmer l'exercice du droit né d'un titre juridique.» (*C.I.J. Recueil 1986*, p. 586 et 587.) Selon la Partie adverse son titre découlerait de l'*uti possidetis* : «Quelle que soit sa nature juridique», nous déclare M. Kemicha, *«la décision de 1939 fait incontestablement partie intégrante du legs colonial»* (CR 2000/13, p. 64, par. 110; les italiques sont dans l'original).

Cette position n'est pas acceptable pour les raisons suivantes. Le seul *fait* dont puisse se targuer Bahreïn est son occupation de l'île à partir de 1937. En effet, comme le démontrera une

nouvelle fois un des exposés qui va suivre, les prétendues effectivités antérieures à cette occupation ne résistent pas à l'examen. *Le droit* invoqué par Bahreïn serait dès lors la décision britannique de 1939, rendue intouchable par le truchement de l'*uti possidetis.*

Or nous avons montré, il y a un instant, qu'il n'est pas question ici d'*uti possidetis*. Au surplus, il s'agit toujours de la même pétition de principe qui consiste à s'appuyer sur la décision de 1939 alors que dès l'origine Qatar en a contesté la validité et que ceci est le cœur même du débat. Mon ami et confrère, sir Elihu Lauterpacht, qui est prompt à voir des raisonnements circulaires dans les raisonnements des autres, tombe, me semble-t-il,

aisément dans le même travers (CR 2000/11, page 22, paragraphe 42 de la traduction).

21. Deuxième hypothèse envisagée dans l'arrêt de 1986 : «Dans le cas où le fait ne correspond pas au droit, où le territoire objet du différend est administré effectivement par un autre Etat que celui qui possède le titre juridique, il y a lieu de préférer le titulaire du titre.» (*C.I.J. Recueil 1986*, p. 587.)

C'est cette hypothèse que Qatar demande respectueusement à la Cour de retenir. Il a montré à la Cour qu'il possédait un titre territorial sur l'ensemble de la péninsule y compris les îles Hawar, en particulier dans les décennies qui ont précédé 1936. Nos adversaires ont été incapables de prouver qu'aux yeux de la communauté internationale de l'époque, Bahreïn se composait d'autre chose que d'un groupe compact d'îles au centre du Golfe. Ce n'est qu'en 1936 que les îles Hawar ont fait l'objet d'une réclamation occulte puis, à partir de 1937, que l'île principale de Hawar a commencé à subir l'occupation de Bahreïn. Selon un principe fondamental du droit international, aucun titre valable ne peut naître d'une occupation illégale du territoire d'autrui. Ceci me conduit à répondre à un dernier point de nos adversaires celui des périodes pertinentes dans la présente affaire.

IV. LES PÉRIODES PERTINENTES

22. C'est essentiellement — encore que non exclusivement — en ce qui concerne Hawar que nous souhaitons répondre à certaines positions de nos adversaires.

La période essentielle aux yeux de Qatar est celle qui s'ouvre avec la réclamation occulte de l'île de Hawar par Bahreïn et son occupation à partir de 1937. C'est à ce moment qu'il convient de

déterminer qui était souverain sur cette île ou plus précisément sur cet archipel. Si la Cour retient le point de vue de Qatar, ce que Bahreïn appelle ses «effectivités», postérieures à cette date, ne peuvent être retenues à l'appui d'un titre quelconque car elles constituent un simple fait accompli résultant d'une occupation illégale.

Comme ces prétendues «effectivités» sont surtout récentes, nous avons assisté à une double manœuvre pour tenter de les légaliser.

23. La première consiste à caractériser les activités de Bahreïn postérieures à 1971 d'«effectivités postcoloniales». Le fait de rebaptiser une occupation illégale en «effectivités postcoloniales» (même exposé de M. Kemicha (CR 2000/13, p. 65, par. 115 et suiv.) n'en fait pas pour autant disparaître le vice originaire : Qatar maintient qu'il n'y a pas eu ici de phénomène colonial, ni d'application de la règle de l'*uti possidetis juris*.

24. La seconde manœuvre consiste à interpréter le principe du *statu quo* dérivant de la médiation saoudienne pour lui retirer toute valeur quelconque. Je connais de longue date les talents de mon confrère et ami sir Elihu Lauterpacht, mais j'ignorais qu'il était aussi maître en prestidigitation.

La Cour se souviendra, en effet, comment, dans son exposé du 8 juin (CR 2000/11, trad. fr, p. 25, par. 51) il a su faire disparaître la juridicité du principe du *statu quo* adopté à partir de 1983 dans le cadre de la médiation confiée à Sa Majesté le roi d'Arabie saoudite. Alléguant que Qatar avait violé ce principe en étendant sa mer territoriale à 12 milles marins, ce à quoi il sera répondu plus tard, il ajoutait cette surprenante déclaration :

> «En tout cas, c'était au médiateur qu'il revenait d'intervenir en cas d'allégation de violation éventuelle du *statu quo*, ce qu'il n'a jamais fait, ni dans ce cas-ci ni dans aucun autre. Bahraïn considère qu'il n'y a pas lieu de s'attarder davantage sur la question du *statu quo* en l'espèce.» *(Ibid.)*

Et hop, le lapin disparaît dans le chapeau. Il convient de rappeler succinctement les textes applicables en la matière.

Le 13 mars 1978, le roi Khaled proposa une série de «Principes pour un cadre de règlement.» Le deuxième principe imposait un *statu quo* :

> «Chaque partie s'engage à partir de ce jour à s'abstenir de toute action qui pourrait renforcer sa position juridique ou affaiblir la position juridique de l'autre partie ou modifier le *statu quo* en ce qui concerne les questions en litige. Toute action

de cette nature sera considérée comme nulle et non avenue et n'aura aucun effet juridique en la matière.» (Mémoire de Qatar sur la compétence et la recevabilité, vol. III, annexe II.1.) [*Notre traduction.*]

"Each Party undertakes from this date to refrain from any action that would better its legal position or weaken the legal position of the other Party, or change the status quo with regard to the disputed matters. Any action of this nature shall be deemed null and void and having no legal effect in this matter". (Memorial of Qatar, Jurisdictional Admissibility, Vol. III, Annex II.1, p. 3).

Ce cadre fut approuvé le 22 mai 1983 par les représentants de l'Arabie saoudite, de Bahreïn et de Qatar.

Le roi Fahd écrivit des lettres identiques aux émirs de Bahreïn et de Qatar le 19 décembre 1987. Elles contenaient les dispositions suivantes relatives aux ruptures du *statu quo*. Vous trouverez ce document dans le dossier d'audience comme document n° 7.

«Jusqu'à ce que les questions en litige soient réglées définitivement..., les deux Etats frères du Qatar et de Bahreïn observeront les principes du cadre de règlement dont ils sont convenus le 10 /8 /1403 de l'hégire — correspondant au 22 mai 1983 — et en particulier ce qui suit :

a) chacune des parties s'engage dès maintenant à s'abstenir de toute action qui renforcerait sa position juridique, affaiblirait celle de la partie adverse, ou modifierait le *statu quo* à l'égard des questions en litige. Toute action en ce sens sera considérée comme nulle et non avenue et n'aura aucun effet juridique en la matière» (requête introductive d'instance de Qatar du 8 juillet 1991, annexe 4, p. 47).

L'accord suivant pour soumettre le différend à la Cour internationale de justice fut atteint et signé le 25 décembre 1990. L'accord (en forme de «minutes» ou «procès-verbal») constatait : Il a donc été convenu ce qui suit : «1) réaffirmer ce dont les deux parties sont convenues précédemment» (requête introductive d'instance de Qatar du 8 juillet 1991, annexe 6, p. 57).

Dans son arrêt (*Délimitation maritime et des questions territoriales entre Qatar et Bahreïn, compétence et recevabilité,* 1er juillet 1994 (*C.I.J. Recueil 1994*, p. 120, par. 22), la Cour a déclaré :

«22. Les Parties sont d'accord pour considérer les échanges de lettres de décembre 1987 comme constituant un accord international ayant force obligatoire dans leurs relations mutuelles.»

Dans le même arrêt, la Cour déclara ensuite :

«25. Le procès-verbal de 1990 comporte donc le rappel d'obligations passées;

Ainsi, ... cet instrument n'est pas un simple compte rendu de réunion, analogue à ceux établis dans le cadre de la commission tripartite. Il ne se borne pas à relater des discussions et à résumer des points d'accord et de désaccord. Il énumère les engagements auxquels les Parties ont consenti. Il crée ainsi pour les Parties des droits

> et des obligations en droit intenational. Il constitue un accord international.» (*Ibid.*, p. 121, par. 25.)

Ceci fut répété par la Cour dans son arrêt du 15 février 1995 (p. 11, par. 24) dans les termes suivants :

> «24. Comme il a été rappelé ci-dessus (paragraphe 9), la Cour, dans son arrêt du 1er juillet 1994, a dit «que les échanges de lettres entre le roi d'Arabie saoudite et l'émir de Qatar, datées des 9 et 21 décembre 1987, et entre le roi d'Arabie saoudite et l'émir de Bahreïn, datées des 19 et 26 décembre 1987, ainsi que le document intitulé «procès-verbal», signé à Doha le 25 décembre 1990 par les ministres des affaires étrangères de Bahrein, de Qatar et de l'Arabie saoudite, constituent des accords internationaux créant des droits et des obligations pour les Parties.» *(C.I.J. Recueil 1995*, p. 14, par. 24.)

Ces accords ne font en rien de l'intervention du médiateur une condition d'application des obligations ainsi souscrites.

Le numéro de prestidigitation de mon confrère et ami sir Eli est donc raté.

25. Monsieur le président, Madame, Messieurs de la Cour,

Arrivé au terme de mon exposé je souhaiterais en résumer les constatations

1) Bahreïn et Qatar ayant toujours subsisté comme personnalités juridiques indépendantes d'Etats souverains protégés, n'ont jamais été des «colonies» ni des «protectorats» et le principe de l'*uti possidetis* ne s'applique pas à leur situation.
2) Les autorités britanniques, en acceptant que la question de Hawar soit soumise à l'arbitrage entre les deux Etats, ont reconnu que la décision de 1939 n'avait ni le caractère de sentence arbitrale, ni de décision administrative ou politique ayant un caractère intangible.
3) La période pertinente essentielle dans la présente affaire concernant Hawar est celle qui s'ouvre avec la réclamation occulte des îles Hawar par Bahreïn et l'occupation par Bahreïn de l'île principale de Hawar à partir de 1937. Aucun effet ne peut être donné aux conséquences d'une occupation illégale et donc aux activités entreprises ultérieurement par Bahreïn pour renforcer ses prétendues «effectivités».
4) Le principe de *statu quo*, s'impose à Bahreïn — il faut ajouter — depuis 1983 tant au nom des conventions souscrites que des décisions de la Cour de 1994 et 1995.

Monsieur le président, Madame, Messieurs de la Cour, ceci étant ma dernière intervention dans la présente affaire, je remercie la Cour d'avoir bien voulu me prêter attention avec patience. Puis-je vous demander, Monsieur le président, de donner la parole à M. Kumar Shankardass.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to Mr. Shankardass.

Mr. SHANKARDASS: Mr. President, distinguished Members of the Court.

REBUTTAL OF BAHRAIN'S *EFFECTIVITÉS* — PRE-1936

1. The Court has now heard repeated submissions and descriptions of Bahrain's alleged *effectivités* or examples of "exercise of authority" from 1800 to 1936 on the Hawar Islands which Bahrain summarized and included in its "bullet points" in the Reply (Chap. 2, Sect 2.3). In my presentation on this subject on 5 June (CR 2000/8, p. 16), I analysed these and submitted that apart from the three *categories* of *effectivités* (and not just three *examples*), namely the alleged grant of permission by the Al-Khalifah in 1800 to the Dowasir to "settle" in Hawar, the exercise of jurisdiction by courts, and the service of process on or arrest of "residents of Hawar", for which there was no credible evidence, the remainder were in any case not *effectivités à titre de souverain*. These included the activities of members of the Dowasir tribe in seasonally visiting the Hawar Islands for hawking or fishing, the existence of their "large huts", their cemeteries, etc. In support, both Professor Salmon and I invoked the *Kasikili/Sedudu Island* decision of this Court.

2. However, my learned friend, Sir Elihu Lauterpacht, sought to distinguish that decision and contended that the position in the present case is different (CR 2000/11, p. 23). Here, he claimed, there was already a *souverain* of the Al-Khalifah rulers that existed prior to the arrival of the Dowasir in Hawar and that it was that *souverain* from whom the Dowasir obtained by grant the right to reside in Hawar. This must surely be wrong; because Bahrain itself asserts in its Memorial (Memorial of Bahrain, paras. 36-37) that its "jurisdiction and control over the Hawar Islands" *commenced* with the grant of the alleged permission in around 1800. Be that as it may, I have already shown that there is no credible evidence even of the grant of such permission, nor of the arrival of the Dowasir in Hawar in 1800, and that a casual reference to these events by a fisherman in Hawar to Prideaux in 1909 (more than 100 years later) does not in any sense amount to such evidence. These allegations are in fact contradicted by Lorimer's positive evidence to the effect that the Dowasir only arrived in Bahrain in 1845 from Najd via Zakhuniyah. Similarly, there is no evidence whatsoever for Bahrain's assertion that the "Hawar Dowasir" were invited by the Ruler of

Bahrain "to settle on the main island of Bahrain, while at the same time continuing their life on the Hawar Islands" (Memorial of Bahrain, para. 417).

3. Furthermore, as my learned colleague Ms Nanette Pilkington has shown (CR 2000/5, p. 48), even in 1823 — when the British assumed that Qatar was Bahrain's dependency — the Bahrain Sheikhs were clearly not exercising any authority at all over the peninsula (Memorial of Qatar, para. 3.20). Bahrain's counsel have simply ignored the fact that the authority of the Bahrain Sheikhs over the peninsula of Qatar at this time amounted to not much more than a paper claim, and that whatever the extent of such authority, it ended in 1868. My learned colleague, Mr. Bundy, will address you further on this issue. I need only refer to Lorimer's observation in the *Gazetteer* that at that time "the political connection, such as it was between Bahrain and Qatar came to an end" — 1868 (Counter-Memorial of Qatar, para. 3.30). Lorimer also went on to describe the boundaries of Qatar on the east, north and west as surrounded by the sea, without excluding the Hawar Islands or any other part of Qatar.

I. THE INDEPENDENT STATUS OF THE DOWASIR

4. Qatar's submission therefore is that after 1868, there never was any Al-Khalifah *souverain* in or over Qatar or over the Hawar Islands. Accordingly, the status of the Dowasir and the nature of their activities on the main Hawar Island necessarily has to be examined, to see whether they amounted to Bahraini *effectivités à titre de souverain.*

5. Qatar has shown that the Dowasir were an independent semi-nomadic tribe and, as recorded by Lorimer (Memorial of Bahrain, Ann. 74, Vol. 3, p. 378) were to be found in numerous locations on the Arabian side of the Gulf including Qatar (but not Hawar) and even in Iran. Furthermore, the principal occupation of the Dowasir living in Budaya and Zellaq was pearling in the summer months and fishing in different locations in the winter months. Some of those living in Zellaq travelled to Hawar during the winter to engage in fishing and hawking.

6. As Khuri, a well-known author on tribes in the area, writes:

> "Al-Dawasir of Budayya and Zallaq . . . were the most powerful, influential, and autonomous of all tribal groups because they were relatively numerous, wealthy, and, above all, able to mobilize a wide variety of tribal alliances on the mainland. Other tribes exercised autonomy as granted them by the Al-Khalifa ruler." (Counter-Memorial of Qatar, Ann. II.74, Vol. 2, p. 408.)

And Lorimer goes on:

> "The Dawasir of Bahrain are a practically independent community; they pay no revenue to the Shaikh of Bahrain on account either of their pearl boats or their date gardens . . ." (Memorial of Bahrain, Ann. 74, Vol. 3, pp. 382-383.)

7. It is entirely unlikely therefore that they would have accepted any regulation or paid any taxes for any fishing or other activity in Hawar. The Ruler of Bahrain did not trust the Dowasir either. As Lorimer reports, when Colonel Ross, the Political Resident, met the Ruler of Bahrain in March 1879, the Ruler "referred to an intention on his own part of chastising the Dawasir of Bahrain, whom he suspected of treason and of collusion with the Bani Hajir" (Counter-Memorial of Qatar, para. 3.116).

8. After the forced retirement of Shaikh Isa as Ruler of Bahrain in 1923, Sheikh Hamad who succeeded him, and who enjoyed British support, sought to introduce reforms in the pearling industry. As a result, the Dowasir simply left Bahrain for Dammam. As the same writer, Khuri, records:

> "Tribal chiefs and pilots considered the reforms an encroachment on their sovereignty and a limitation of their 'freedom in pearl production'. To them the sovereignty of tribal groups was synonymous with that of independent states. They abhorred the idea of being treated like other subjects in the country, as the reforms proposed to treat them *with reference to taxes and courts of justice.*
>
> . . . . . .
>
> Being the strongest tribal group in Bahrain, the Dawasir never recognized Shaikh Hamad as successor, nor did they pay taxes to the Al-Khalifa regime, on the grounds that such payment implied a submissive status in tribal politics." (Counter-Memorial of Qatar, Ann. III.55, Vol. 3, pp. 325-326.)

9. As to the Ruler of Bahrain's own attitude to the Dowasir, the Political Resident informed the Secretary of State for the Colonies on 4 January 1924:

> "Now that the whole Dawasir tribe has left, I may remark that Shaikh is greatly relieved and does not want them back at any price. In this I think he is right and that he is well rid of them." (Counter-Memorial of Qatar, Ann. III.28, Vol. 3, p. 147.)

10. As the record shows, Ibn Saud regarded the Dowasir who left Bahrain as his own subjects (Counter-Memorial of Qatar, Ann. III.34, Vol. 3, p. 179) and on their behalf pressed Sheikh Hamad of Bahrain in 1928 to return their properties in Bahrain. This is hardly consistent with Bahrain's contention that the Dowasir had owed uninterrupted and unswerving allegiance to successive Rulers of Bahrain since about 1800 (Memorial of Bahrain, paras. 36, 38, 346 and 351).

Conditions of Dowasir return to Bahrain

11. Sheikh Hamad of Bahrain felt disgraced before the Arab tribes for having forfeited the properties of the Dowasir, and, in 1927, wished to let them return (Memorial of Qatar, Ann. III.73, Vol. 6, pp. 383, 386). But the British were reluctant to let him do so. In his letter of 27 March 1927, the British Political Resident (Memorial of Qatar, Ann. III.72, Vol. 6, pp. 379, 381) set out the conditions on which the Dowasir would be permitted to return to Bahrain. The letter in which these were set out is at tab 8 in the judges' folders and on the screen. These conditions included:

> "1. They [the Dowasir] must be obedient in every way to the Bahrain Government and must neither claim nor exercise any independent status whatsoever;
>
> 2. they must pay the same taxes as other agriculturists and traders;
>
> 3. they must be submissive to the Courts in Bahrain established by Your Excellency;
>
> 4. they must accept a police post at Badaya;
>
> 5. they must accept any headman appointed by Your Excellency and Your Excellency is to have full liberty to deprive their headman of his post and appoint another if you should so wish."

These conditions for the return of the Dowasir make it clear that, prior to 1927, the Dowasir had not been complying with any of them. They had not been obedient to the Bahrain Government; they had not paid taxes; they had not been submissive to Bahraini courts; they had not accepted a police post even in Badaya — much less on Hawar; and they had appointed their own headman. In short, the Dowasir had acted independently of any Bahraini authority.

The Political Agent concludes his letter by saying:

> "I am sure that Your Excellency . . . is convinced that the return of the Dowasir under any other conditions would be a danger to the safety and good Government of the islands which are much too small to admit of the establishment of any authority whatever, independent of your own."

As counsel for Bahrain also noted (CR 2000/13, p. 21, para. 56), the Dowasir did in fact eventually return to their properties on the main island of Bahrain on these conditions (Memorial of Qatar, Ann. III.73, Vol. 6, pp. 383, 387); and this marked the first occasion on which such of them as did actually return in the five or six years after 1928 could possibly be considered subjects of the Ruler of Bahrain.

12. The Court will see therefore that even assuming Dowasir activities on Hawar prior to 1923-1933 could have any relevance to Bahrain's claim of territorial sovereignty over Hawar, such activities of a semi-nomadic independent tribe could not sustain any rights of the Ruler of Bahrain in Hawar any more so than the activities of the Naim tribe in Zubarah. Furthermore, there is no evidence that the Dowasir resumed any fishing or other activities on Hawar after their return to Budaya or Zellaq in the 1920s or the early 1930s.

13. The Court will not have failed to notice the clear implication of the conditions on which the Dowasir were allowed to return from 1928, that, before that date, they did not even accept the jurisdiction of the courts in Bahrain. This alone must throw serious doubt on the relevance of the two judgments of 1909 and 1910 of a kadi in Bahrain which are offered by Bahrain as evidence of the exercise of Bahraini judicial power over fish traps in Hawar. In any event, Qatar has shown that these "judgments" dealt only with private rights in the exercise of a jurisdiction *in personam*.

14. Taking account of Qatar's submissions on the activities of the Dowasir, counsel for Bahrain also asked: "Does Qatar wish to assert to the Court that there was an independent state of the Dowasir?" (CR 2000/13, p. 22, para. 61) I would submit most respectfully, Mr. President, that this question is unfairly addressed to Qatar. Only Bahrain could have answered it if only it could have had access to the "decision" of the year 1800 which Prideaux reports he heard from a fisherman "awarded" "the ownership" of Hawar Islands to the Dowasir; on the other hand Bahrain contends that it was only "permission" to the Dowasir to "settle" in Hawar. The problem is that no one has ever seen the "decision" or "award" or "permission" or whatever else it was, or even if it ever existed. The fact that there is nothing to show that any Kadi has power to make territorial grants (Reply of Qatar, Ann. III.98, Vol. 3, p. 601) is further ground for totally disbelieving its very existence. Mr. President, would you wish this to be the moment for a break this morning?

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

The Court adjourned from 11.20 a.m to 11.40 a.m.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole à M. Shankadass.

Mr. SHANKARDASS: Merci, M. le président. Mr. President, distinguished Members of the Court.

II. THE PURELY PRIVATE CHARACTER OF DOWASIR ACTIVITIES

15. May I now turn from the status of the Dowasir to the activities of the Dowasir. Even assuming, that they were to be regarded as Bahraini "subjects", it is Qatar's submission that their activities were of a purely private nature and cannot sustain Bahrain's claim to sovereignty over Hawar.

(i) Fishing activities

16. I would like to begin, if I may, with fishing activities but, with the Court's permission, may I first briefly draw the Court's attention to the relevant general setting with regard to fishing in the Gulf area. It is Qatar's submission that fishing was the principal winter activity which tribes, such as the Dowasir, engaged in on the Hawar Islands; and that such an activity was of a purely private nature and did not have any relevance to sovereignty over any territory, regardless of what might have been the nationality or allegiance of those who engaged in it.

17. The Court will have seen in Qatar's Reply (Reply of Qatar, para. 4.181) the reference by a writer on international and legal problems in the Gulf (Amin, S. H., *Treatise on International and Legal Problems of the Gulf*, Reply of Qatar, Ann. III.100, Vol. 3, p. 617) to the effect that "the fishing activities of the Gulf have been traditionally governed by Shariah or Islamic law". He also points out that under the general Shariah rules, individuals may use and exploit the oceans, seas and rivers, in a reasonable manner, as much as required, and that no restriction could be imposed on them with regard to the fishing industry. In this context, the Court will recall the observation of the Tribunal in the *Eritrea/Yemen* arbitration:

> "This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. . . ."

The Tribunal went on to say:

> "The socio-economic and cultural patterns described above were perfectly in harmony with classic Islamic law concepts, which practically ignored the principle of

'territorial sovereignty' as it developed amongst the European powers and became a basic feature of 19th Century western international law." (Paras. 128 and 130.)

18. There is also extensive evidence of complete freedom of fishing in the Gulf area during the nineteenth century and at least up to the middle of the twentieth century. The Court will recall that such rights were expressly protected, not only in the British decision of December 1947 establishing the 1947 line (Reply of Qatar, para. 7.23), but also in the proclamations issued in 1949 by both Bahrain and Qatar on their rights over the seabed *(ibid.)*. Furthermore, Bahrain's own claim to the Bu Saafa banks was rejected in 1951 by Saudi Arabia as the historical freedom and common practice of fishing by anyone in the area was acknowledged (Reply of Qatar, para. 7.24).

19. The Court will have noticed that there is considerable evidence on record of fishing as a principal activity in the Gulf area. Even in the pages of Captain Brucks's Survey produced and relied upon by Bahrain, there are, apart from Hawar, numerous other locations where fishing is specifically mentioned as an occupation in the 1820s (Memorial of Bahrain, Ann. 7, Vol. 2, pp. 92-109).

20. As for the Hawar Islands, the *Persian Gulf Pilot* of 1864 (Memorial of Bahrain, Ann. 11, Vol. 2, p. 40), that is some 35 years later, contains the entry that the largest "island is called Hawar, and is about 10 miles long, and *frequented by fishermen*". They were clearly not exclusively Dowasir fishermen: nor is there any suggestion that they necessarily originated only in Bahrain. The Court will recall Lorimer's similar description of the Hawar main island which Bahrain's counsel also quoted (CR 2000/13, pp. 12-13), and to which quotation I would like to add the next significant sentence. The quote which you saw is now on the screen.

> "[The main Island of Hawar is about] 10 miles long, north and south, and roughly parallel to the Qatar coast. There are no wells, but there is a cistern to hold rain-water built by the Dawasir of Zallaq in Bahrain, who have houses at two places on the island and use them in winter as shooting boxes."

And if I may add the next few words, which are: *"Fishermen also frequent Hawar."* (Memorial of Qatar, para. 5.38.)

21. In none of these descriptions, including in Brucks's Survey is there any indication, as indeed there cannot be, that the fishing around Hawar was restricted in some way only to the Dowasir tribe and that others were forbidden to fish in these waters. This is the very fact which the Ruler of Qatar tried, as it happened unsuccessfully, to get Weightman and the other British officials

involved to recognize after his protest against the Bahraini incursions in Hawar (Reply of Qatar, para. 4.173 *(d)*). As the Court will recall, even Prideaux recorded in his letter of 20 March 1909, that "the Dowasir of Budaiya and Zellaq on the north-west coast of Bahrain are in the habit of every winter partially migrating to Zakhnuniya and Hawar Islands for fishing (sharks as well as edible fish) and hawking". It is only because a Dowasir fisherman told him the story of "a century-old decision of a Kazi of Zubara" whereby "*the ownership* of this island of Hawar" (emphasis added) had been "awarded to the tribe" (Memorial of Qatar, Ann. III.53, Vol. 6, p. 249) that the wholly unjustified inference has been drawn by Bahrain that the Dowasir had the exclusive right to visit and fish in Hawar. In any event there is nothing to suggest that the Dowasir stopped anyone else from fishing in the waters surrounding the island.

22. To summarize therefore, no activities of the Dowasir by way of participating in fishing in Hawar waters could confer any sovereignty on the Ruler of Bahrain or even the Dowasir. Even if the Dowasir were "subjects" of Bahrain, their mere presence in Hawar for fishing purposes could not and did not amount to presence or sovereignty of Bahrain.

23. Apart from the fact, therefore, that there was no need for the Dowasir to obtain any permission from the Ruler in 1800 or at any other time, to undertake any fishing activities in Hawar, I have already shown that in any event there is no credible evidence of any such permission or, as Prideaux puts it, the "award" of ownership of the island upon which Bahrain relies so strongly for its claim of title to Hawar.

24. Although Bahrain claims "The granting and protection of fishing rights off the Hawar Islands' shores by the Ruler of Bahrain" as an *effectivité* (Reply of Bahrain, p. 16), it has produced no evidence in support. The two documents cited as "evidence" are Belgrave's Note of 29 May 1938 furnished in the course of the so-called arbitration and his letter to Packer of PCL of 31 January 1938 (Memorial of Bahrain, Anns. 249 and 250, Vol. 5, p. 1106 and p. 1078].

25. Belgrave's Note, written in the context of Bahrain's claim of title, states that "Fishing rights off the shore of Hawar and the other islands were originally granted to the people of Hawar by the Shaikh of Bahrain." And then he goes on to say "If these documents are available they will be forwarded." (Memorial of Bahrain, Ann. 261, Vol. 5, pp. 1106, 1109). It seems that no such documents were ever discovered or "forwarded". It is also noteworthy that the next sentence

contains Belgrave's statement that the Hawar fish traps are registered in the Land Department of the Bahrain Government — a statement he was later obliged to retract. So there is no evidence whatsoever to support these assertions.

26. Belgrave's letter to Packer cited by Bahrain only complains that PCL staff on their way to Qatar had been stealing fish — fish from the fish traps belonging to "the Arabs living at Hawar". (Memorial of Bahrain, Ann. 250, Vol. 5, p. 1078). It is in no sense evidence of the State's "granting and protection of fishing rights". Furthermore the letter is dated January 1938, i.e., some time after Bahrain's illegal occupation of Hawar.

27. Bahrain now states that after the development of oil in the early 1930s, there was a decline in whatever activity there had been on Hawar (Memorial of Bahrain, para. 38). This must necessarily mean a decline in any seasonal fishing by the Dowasir in winter — further demonstrating that such fishing activities by themselves can have no relevance to sovereignty. If I may refer to an observation of the Tribunal in the *Eritrea/Yemen* case, "it may be expected that population, and economic realities, will change over time. What may be important today in terms of fishing may be unimportant tomorrow, and the reverse is also true." (Para. 313.) As the Court is aware, in that case the Tribunal concluded, as in fact was the position in Hawar, that in the absence of any State control of licensing or enforcement activities, the fishing practices of individuals did not amount to *effectivités* as they were not acts *à titre de souverain* (para. 315).

(ii) The two villages

28. Mr. President, may I also briefly return to Captain Brucks' Survey in the 1820s, upon which Bahrain places so much reliance. Counsel for Bahrain invokes the entry in this Survey which states, with regard to Warden or Hawar Islands: "It has two fishing villages on it, and belongs to Bahrein." (CR 2000/13, p. 12.)

29. First, as to the quality of this information: counsel for Bahrain informed the Court of the meticulous care with which the Survey was prepared and quoted (CR 2000/13, p. 11) Captain Brucks's own description of his methodology in words which are now on the screen:

> "My information has been obtained in the following manner: I have proposed to the chiefs certain questions relative to the tribes, and their localities, of the revenues, trade, &c, which I have noted, with their replies." (Memorial of Bahrain, Ann, 7, Vol. 2, p. 93.)

I would like, Mr. President, if I may, to complete this quotation and reproduce the rest of the paragraph which reads:

> "This I have done to several other persons at different periods, and then taken such of the substance as appeared to agree the best; but it is impossible to trust the native accounts in this part of the world, consequently it can at best be considered but an approximation to the truth." (Memorial of Bahrain, Ann, 7, Vol. 2, p. 93.)

30. Mr. President, as an indication of what the thinking was at the time, Brucks' Survey also states with reference to "Ras Reccan", which is the northernmost point on the Qatar peninsula, that "From the point [Ras Reccan] to Al Bidder southward, and to Warden's Islands [that is Hawar Islands] westward, the authority of the Shaikh of Bahrain is acknowledged" (Memorial of Bahrain, Ann. 7, Vol. 2, p. 99). Mr. President, Members of the Court, you will notice, he was including most of the Qatar peninsula including the Hawar Islands, *together*, under the Ruler of Bahrain's authority, which even by 1830, as we have shown, was extremely tenuous and ended altogether in 1868.

31. Counsel for Bahrain also asserted that this was a case where what was important was human history and not physical geography. But as I have said, Bahrain itself has shown that with the development of oil and the decline of any activity in Hawar, the Dowasir families — many of whose members are undoubtedly distinguished members of Bahrain society — now live in Bahrain (Memorial of Bahrain, para. 38). Mr. Paulsson tells us "Hawar Islanders were there *as children* many years before oil was discovered" (CR 2000/12, p. 43, para. 204). Even the witness statements, for what they are worth, speak of the past, of houses (or huts) in ruins, obviously having been abandoned, so that whatever the nature of their links they were only of a number of generations ago. The Court will no doubt appreciate that cemeteries of those who happened to die in the distant past on the island, adult or children, easily fit into this past history, but without any implication for claims of sovereignty.

32. The Court will recall the images presented by Bahrain in its video and photographs which really show ruins of tiny enclosures hardly fit for long human habitation. These images seem really to fit in only with Lorimer's description of "shooting boxes" which he recorded the Dowasir used in Hawar in winter.

(iii) Quarrying of gypsum

33. Another example claimed by Bahrain as that of exercise of authority is "Quarrying of gypsum on the Hawar Islands during the nineteenth and twentieth centuries". It is Qatar's submission that this is not an example of exercise of authority. The Costa report (Memorial of Bahrain, Ann. 310, Vol. 6, pp. 1348-1350) is relied on for the proposition that "Hawar gypsum was quarried throughout the nineteenth and twentieth centuries and used as building material for construction on both the Hawar Islands themselves and on the main island of Bahrain and Muharraq Island" (Memorial of Bahrain, para. 454). However, the Costa report says nothing of the kind. The section on gypsum begins "As it is known gypsum quarrying is reported on Hawar island by C. Belgrave and other authorities." No indication is given of when quarrying might have taken place. Interestingly, the Report — dated 17 January 1995 — indicates that

> "Since we are still awaiting the results of the chemical analysis of the samples of gypsum and the plaster collected at Hawar and Bahrain, we are not yet to say *[sic]* [presumably in a position to say] whether or not there is a factual relationship between the building material quarried at Hawar and the plaster preserved in the traditional houses of Bahrain."

Bahrain has not produced the results of this analysis, and the inference must be that there is no such "factual relationship". The Court will in any event no doubt be aware that gypsum has also been quarried in the past at Ras Abruq opposite Suwad al Janubiyah; so the origin of whatever gypsum may have been used in the construction of the palace on Hawar is quite uncertain.

34. None of the documents relied on by Bahrain provides any support for gypsum quarrying in the nineteenth century, nor for Bahrain's assertion that "gypsum quarrying in the Hawar Islands increased during the period between 1916 and 1939" (Memorial of Bahrain, para. 455). Belgrave's Note of 29 May 1938 (Memorial of Bahrain, Ann. 261, Vol. 5, p. 1106) which keeps reappearing, simply states, "The island is rich in gypsum" and is "brought by boats to Bahrain". And that famous Weightman's letter of 22 April 1939 (Memorial of Bahrain, Ann. 281, Vol. 5, p. 1169) refers to the gypsum found in Hawar being excavated under licence from Bahrain; and the Bahrain Government Report for 1937-1938 (Memorial of Bahrain, Ann. 253, Vol. 5, p. 1086) states that "small sailing boats which used to carry passengers now bring . . . juss from Hawar", meaning gypsum from Hawar, suggesting that this is a very recent practice. The documents also all post-date Bahrain's illegal occupation of Hawar.

35. Also claimed as *effectivités* are "Licensing of the gypsum industry on the Hawar Islands by the Government of Bahrain at the request of the Hawar Island residents" and regulation of the trade in gypsum during the 1930s.

36. There is nothing to suggest that the "industry" was licensed before 1937. Indeed, a witness statement, (Memorial of Bahrain, Ann. 313 *(a)*, Vol. 6, p. 1368) confirms that the licensing occurred after construction of the fort: "The permits were issued by the Bahrain Chief of Police" who "used to stay on the main Hawar Island in the police fort" (para. 23). But the Bahrain Government Report makes no reference to licensing; and no pre-1936 document or licence to cut gypsum on Hawar has been put in evidence by Bahrain.

37. While Bahrain uses the vague expression "during the 1930s", all the evidence is post-1937, and in any event none of it mentions regulation of the trade in gypsum.

(iv) Annual visits to Hawar;

(v) Rescue of soldiers

38. Bahrain also claims that Rulers of Bahrain used to make annual visits to Hawar from 1869 to 1932. This is only mentioned in Belgrave's Note (undisclosed, as the Court is aware, to the Ruler of Qatar) of 29 May 1938 again, (Memorial of Bahrain, Ann. 261, Vol. 5, p. 1107) where he also refers to the alleged rescue in 1873 by the Ruler of shipwrecked Ottoman soldiers. There is no evidence supplied in support and there is nothing in Belgrave's diaries recording any such visits. It is of interest to note that Prior regarded such visits of no consequence and stated that the Sheikhs used to pay an annual visit to Lingeh and Hasa and went hawking even to Zakhnuniyah (Memorial of Qatar, Ann. III.229, Vol. 8, p. 127). As to the rescue of shipwrecked soldiers, the Tribunal in the *Eritrea/Yemen* arbitration noted that since there is a generalized duty incumbent on any person or vessel in a position to render assistance to vessels in distress, no legal conclusion can be drawn from such events (para. 286).

Other activities

39. As to the claim of "ceremonial display of Bahrain flags on the Hawar Islands" a witness statement is cited to the effect that during the Eid festival, the people would "fly the flag of Bahrain from the dhow and roofs of houses", that is the flag of the place that it came from (CR 2000/13,

p. 26, para. 73). There is no claim that the flag was flown by way of Bahraini authority over Hawar. The fact that Bahraini passports are claimed to have been issued to those who fished in Hawar was clearly because they were residents of Zellaq in Bahrain.

40. It is Qatar's submission that the principle enunciated in the *Eritrea/Yemen* arbitration mentioned above, must also apply to a number of other activities pleaded as "bullet points" by Bahrain as *effectivités*, such as the continued presence of the Dowasir on Hawar, confirmation or recognition in British documents of 1909, 1915 and 1916, that the Hawar Islands were habitually used by the Bahrain Dowasir, and that they had two villages on Hawar. None of these would constitute *effectivités à titre de souverain*. Some of the examples, such as, the registration of pearling boats in Bahrain and payment of registration fees by the Dowasir who lived in Bahrain and undertook pearling activities from there, even if true, can obviously provide no support for any Bahraini sovereignty over Hawar, merely because the individuals concerned went to Hawar for fishing in winter. Bahrain seeks to support many of the examples with witness statements. No doubt the Court will treat these statements as always with the utmost caution.

41. I do not really consider that it would serve any useful purpose for me to continue this analysis in detail of the many other alleged examples of *effectivités* which can be similarly discounted or dealt with under other headings such as the acts relating to oil concession negotiations for Bahrain's unallotted area. Many of course relate to the period after 1936 to which I will refer again.

Counting the *effectivités* and the post-1936 *effectivités*

42. Bahrain's counsel complained (CR 2000/13, pp. 36 and 48) that of the 80 *effectivités* listed by Bahrain in its written pleadings, in my presentation in the first round I dealt with only three examples, which by his reckoning, were really 20 examples. I have to say I am happy to have been corrected to that extent as I really was dealing with three categories and not three items. Of the 80 so-called examples of what Bahrain has called exercise of Bahraini authority listed in Bahrain's Reply (para. 28) and its Supplemental Documents, by my count, at least half should be eliminated because even on their face they are not such examples — such as a mere assertion of Bahrain's claim, residence and allegiance of the Dowasir and some are even duplicates. These can

therefore be deleted from the screen. Of the remaining 40 items, in my respectful submission, at least 19 must be eliminated because, by Bahrain's own admission, or on the basis of the evidence presented, they occurred or may logically be assumed to have occurred, in 1937 or later, i.e., in combination with or subsequent to Bahrain's illegal occupation of Hawar.

43. These are:

— all the public works,

— military, coastguard and police activities,

— oil activities,

— surveys, and

— wild life preservation.

These can therefore also be removed from the list on the screen.

44. Of the remaining 21 or so, Mr. President, I have already been given credit for addressing 20 in the first round, and I believe I have today addressed any that might have been left out earlier. So I believe I really can ask for these also to be deleted.

45. As regards the post-1936 *effectivités* cited by Bahrain, Qatar has already submitted, and Professor Salmon reminded you this morning, that these cannot be taken into account after Bahrain's illegal occupation of Hawar following its wholly unjustified claim to the islands in April 1936. The Court will have noted that in these oral pleadings, Bahrain has admitted for the first time that, in 1937, it began to build up military defences on Hawar, or at least that is how they address them (CR 2000/11, p. 8, para. 8; CR 2000/13, p. 31, para. 20).

46. Having said all this, I must say I am reminded once again of the observation by the Tribunal in the *Eritrea/Yemen* arbitration that the evidence of *effectivités* presented in that case, and seemingly by Bahrain in the present case, "is voluminous in quantity but sparse in useful content" (para. 239).

The conspicuous absences

47. Before I leave this subject, Mr. President and distinguished Members of the Court, may I be permitted to draw the Court's attention to the kind of examples that are conspicuous by their absence from Bahrain's list. These would be: references to any form of State administrative

structure or activities. There is no reference at all to any schools, medical or similar facilities and numerous other activities such as transport provided or carried on in Bahrain and listed in Annual Reports on Bahrain. The absence of any such facilities in the Hawar Islands is clearly because the islands were never part of the Bahraini State.

48. Mr. President, I apologize for this somewhat lengthy analysis of Bahrain's alleged *effectivités* but I felt it may further help the Court in considering Qatar's principal submission that none of them are *effectivités à titre de souverain.*

Weightman's letter of 22 April 1930

49. Professor Reisman submitted in his presentation on 9 June (CR 2000/12, p. 48, para. 14) that the Court should declare the finality of the 1939 "Award" as he called it, which confirmed, "on the basis of the *effectivités* that Bahrain then adduced", that the Hawar Islands are the territory of Bahrain. In an effort to save the unreasoned award by investing it with some kind of legality, he argued that "the Award is comprised of two documents" (CR 2000/12, p. 55) namely, the detailed eight-page review of the evidence by Weightman in his letter of 22 April 1939 (Memorial of Bahrain, Ann. 281, Vol. 5, pp. 1165-1172), which was never communicated to Qatar, and the one-page Award of 11 July 1939, which was.

50. My learned friend, Mr. Paulsson, also referred to Weightman's letter of 22 April 1939 and declared that it was "the single most important document in the case" (CR 2000/12, p. 39, para. 181).

51. On the other hand, for the many reasons I referred to in my presentation to the Court on 31 May (CR 2000/7, p. 44), I submitted to the Court that Weightman's summing up in his letter of 22 April 1939 was in effect a meaningless exercise. I drew the Court's attention to Weightman's letter of 12 February 1939 and Fowle's letter of 14 February 1934 (items 42 and 43 in the judges' folders, in the first round) which made it clear that by then "Britain's hands were tied" to the position that not only would BAPCO have to be permitted to acquire a concession over the unallotted area including Hawar, but that it would be the Ruler of Bahrain who would grant the concession. Furthermore, the process of negotiations during which this position was reached, ran in parallel with the so-called "arbitration" on the ownership of Hawar. During this process, long

before Weightman sat down to write his letter of 22 April 1939, it had become a firm assumption that the so-called "arbitration" would formally deliver Hawar to the Ruler of Bahrain. The strong element of prejudgment on Weightman's part is evidenced by several other documents that I referred to, but one passage in his letter of 12 February 1939 demonstrates clearly that he was hardly going to take an objective view when he said:

> "When once His Majesty's Government award Hawar to Bahrain, the Shaikh of Qatar is no longer concerned. If by any chance he were to contest the award by force, he could presumably be 'dissuaded' without undue difficulty."

This letter was written eight weeks before the letter of 22 April.

52. Sir Ian Sinclair will address you on some of the other aspects of Weightman's letter of 22 April in a later presentation; but I need only to draw the Court's attention to one item of particular relevance in showing how he misconstrued the evidence to support the decision that had already been made. Weightman refers in his letter to Prideaux's letter of 4 April 1909 (which is item 45 in the judges' folders, in the first round). The Court will recall, I analysed this letter in some detail in my presentation on 5 June (CR 2000/8, p. 20) and I drew the Court's attention to the conclusion that Prideaux reached on the basis of what he heard first hand from the fishermen he met on Hawar about the ownership of Hawar having been granted to the Dowasir in a written decision "more than a 100 years ago". Prideaux's conclusion was, that "the island would seem to be a dep[illegible]ency of the mainland State, which the Chief of Bahrain still claims as *morally* and *theoretic*[illegible]his". I was also able to show the Court that he clearly meant Hawar as a dependency of the mainland, and therefore a part of Qatar. On the basis of the same casual conversation mentioned in Prideaux's letter, Weightman however proceeds to reach a completely contrary conclusion without any justification, to attribute Hawar's ownership to Bahrain. He then refers to "the written decision" mentioned by Prideaux's source, and baldly states "which however now seems to have disappeared", but volunteers that he had received corroboration "of this story" from the local Dowasir. Weightman carefully avoids any reference to Prideaux's letter of 20 March 1909 showing that the Dowasir only went every winter to Hawar for fishing and hawking.

53. Furthermore, the Court will recall that Captain Prior (later Sir Geoffrey Prior) who became the Political Resident soon after the decision of 11 July 1939 on the ownership of Hawar, examined, the "reasons" given in Weightman's letter and did not consider them at all valid. With

the Court's permission, I would like to read a few passages from Prior's letter of 26 October 1941, which is in your folder at tab 9. Prior began by saying [screen]:

> "The moment I saw the decision on the Hawar Islands case I told Fowle that I thought it most unfair to Qatar and the explanations he gave me for his recommendations were not ones which would carry any weight with any Arab.
>
> . . . . . .
>
> The Hawar Islands case has been decided according to western ideas, and no allowance has been made for local custom and sentiment. During 3½ years in Bahrain I never heard anything to suggest that these islands belonged to Bahrain, and believed them to belong to Qatar, a view supported by Lorimer."

He then examined some of the specific reasons and expressed his views on a number of them. He clearly felt they were unsustainable. Of particular interest was his view as to the claim of Dowasir as Bahraini subjects; he simply pointed out they only acknowledged their own chiefs — and this was in 1941.

He also went on to say — in a passage which is now on the screen:

> "Had Qatar had a British Adviser this claim could not have been made. As for the Hawaris' indignation that anyone should suggest they were not Bahrain subjects, it will be remembered there is a Bahrain Police post there!
>
> The view of independent Arabs is that Hawar belongs to Qatar and I am convinced the decision is inequitable . . ."

54. Mr. President, distinguished Members of the Court, as I have already shown, Prior concluded it would not be "practical politics" to reverse the decision and risk serious embarrassment. It is in this background that Qatar has submitted that the Court is now in a position to restore to Qatar what was wrongfully taken from it and to restore its territorial integrity.

Mr. President, that brings me to the close of this presentation. May I now respectfully ask that you give the floor to Mr. Rodman Bundy.

The PRESIDENT: Thank you very much Mr. Shankardass. Je donne maintenant la parole à Mr. Rodman Bundy.

Mr. BUNDY: Merci, M. le President.

THE TERRITORIAL INTEGRITY OF QATAR; THE LIMITED EXTENT OF BAHRAIN AND THE MAPS

1. Mr. President, Members of the Court. My remarks this morning will be devoted to the following four issues which continue to divide the Parties at this stage of the proceedings:

— first, the significance of the 1868 Agreements entered into between Great Britain and the Chiefs of Qatar and Bahrain, respectively;

— second, the documentary evidence which attests to the fact that the Al-Thani and Ottoman rule extended over the entire peninsula of Qatar to the exclusion of any Bahraini presence on the peninsula following the 1868 Agreements;

— third, the significance of the 1913 Anglo-Ottoman Convention, the 1914 Anglo-Turkish Convention and the 1916 Treaty between Great Britain and Qatar, all of which — all of which — confirmed the extent and integrity of Qatari rule over the entire peninsula, including necessarily its territorial waters; and

— fourth and finally — and probably tomorrow, Mr. President — the map evidence, which so conclusively disproves Bahrain's contention while unreservedly supporting Qatar's title to the Hawar Islands and Zubarah.

2. For the most part, I will be responding to comments and arguments that were advanced by Mr. Paulsson and Sir Elihu Lauterpacht on behalf of Bahrain, although I will also have a few things to say regarding some of Mr. Volterra's contentions on Bahrain's so-called *effectivités*.

3. So, with that brief introduction, let me turn to the first point, which is the significance of the 1868 Agreements.

1. The legal significance of the 1868 Agreements

4. The point of departure for examining the 1868 Agreements was conveniently provided by Sir Elihu the other day in his introductory presentation, when he asked the following rhetorical question: "How will Qatar discharge the burden of proof that undoubtedly rests upon it . . . of showing how, when and in what degree Bahrain lost its title to the peninsula including, more particularly, Zubarah and the Hawars?" (CR 2000/11, p. 16.)

5. Of course, Qatar does not accept that Qatar alone bears the burden of proof in this case. But the short answer to counsel's question is that it was by virtue of the 1868 Agreements that Bahrain was obligated to stay in its island and to respect the maritime peace, while the Al-Thani ruler of Qatar was, for the first time, recognized as a sovereign in his own right possessing territorial rights in the Qatar peninsula. So, whatever vestige of a Bahraini presence in Qatar had existed prior to 1868 — and Qatar has shown that Bahrain's influence on the peninsula and, indeed, even at home was seriously eroded by that time — whatever vestige still might have remained as of 1868 that presence was terminated by the 1868 Agreements.

6. Bahrain has been unable to produce a single piece of evidence following the 1868 Agreements that it exercised any sovereign functions on the Qatar peninsula. There was no Bahraini counterpart on the peninsula to the Al-Thani Ruler, who was described in the 1868 Agreements as the "Chief of Qatar". There was no equivalent to Shaikh Jassim bin-Thani who, in 1874, was appointed as the *kaimakam* of the Ottoman province of Qatar. There is no Bahraini document comparable to the 1913 or 1914 Conventions or the 1916 Treaty between Qatar and Great Britain, all of which confirmed Al-Thani rule over the entire peninsula. And there are no maps which support the theory that Bahrain retained some kind of territorial presence in Qatar or the Hawars after 1868.

7. These facts, I would suggest, go a long way towards explaining why Bahrain, in its first round, scarcely mentioned the 1868 Agreements. Mr. Paulsson passed over the Agreements in silence as if they never existed: and Sir Elihu did not advance the matter much further. He simply asserted that the Agreement of 1868 between Great Britain and Qatar did little more than to tell the Qatari Ruler to "go home and stay there" (CR 2000/14, p. 9).

8. With great respect, I believe Sir Elihu has things backwards. It was the Ruler of Bahrain who was told to go home and not to breach the maritime peace again. It was the Ruler of Bahrain, not the Ruler of Qatar, who was ordered to pay substantial reparations for breaching his predecessor's undertaking in 1861 to observe the maritime peace. And it was the former Ruler of Bahrain, by virtue of the 1868 Agreements, who was deposed for breaching the maritime peace and for attacking Qatar and for whom the equivalent of an arrest warrant was put out.

9. Quite simply, the 1868 Agreements marked the end of any Bahraini political connection with Qatar and the beginning of British recognition that Qatar was, thereafter, ruled by the Al-Thani régime. And, as I shall presently show, Bahrain's arguments that Al-Thani rule did not come to encompass the entire peninsula, including the Hawar Islands and Zubarah, are conclusively rebutted by a wealth of documentary and cartographic evidence: and that rule of Qatar has never been legally displaced.

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2. The extent of Al-Thani authority over Qatar; the 1878 Ottoman survey map and corresponding Ottoman and British documents

10. This brings me to the Ottoman presence in Qatar and the 1878 map prepared by Captain Izzet of the Ottoman Army — a map on which our opponents bravely continue to rely as evidence of Bahrain's so-called *effectivités* over the Hawar Islands. [Place Bahrain's version of the map on the screen.]

11. Mr. Paulsson criticized me for putting words in Bahrain's mouth. He argued that Bahrain had never referred to the "blue" colouring on this map and the blue colouring of Bahrain and the Hawar Islands to support Bahrain's contention that somehow — somehow — the map confirmed Bahrain's sovereignty over the Hawar Islands.

12. I think the easiest way to respond to this argument is to go back to what Bahrain said about this map in its Memorial. Because it was there that Bahrain introduced the map and advanced the following thesis: [Place text on the screen under the map.]

> "It was in this period (specifically 1878) that a Captain Izzet of the Ottoman Army prepared a primitive but highly instructive map of the region, reproduced after page 6, which on the one hand shows the Hawar Islands as a part of Bahrain and on the other hand clearly locates 'Qatar' as a place in the far south-east corner of the peninsula." (Memorial of Bahrain, para. 21.)

13. Now I think the Court will readily see that Bahrain was relying on Captain Izzet's map for two purposes: first, the map was said to show that "the Hawar Islands are part of Bahrain"; and

second, Qatar, it was argued, was located "as a place in the far south-east corner of the peninsula". So let me take these two propositions in turn.

14. How, Mr. President and Members of the Court, does this map show the Hawar Islands as forming part of Bahrain? The only possible way Bahrain could draw such a conclusion was by virtue of the colouring on the map — the Hawar Islands are in the same blue shading as Bahrain — at least so they appear. Now, if one abandons this line of argument, as Mr. Paulsson did when he said, "If we had claimed that Captain Izzet's map was evidence of a conscious attempt to define political boundaries, we would have been wrong." And he said, "As far as I know, Bahrain never used the word 'blue' for this purpose." (CR 2000/12, p. 11.) Were you to abandon those two lines of reasoning, then there is no possible way that this map can support the argument that the islands form part of Bahrain. Since it is now common cause between the Parties that the blue shading on Captain Izzet's map is totally irrelevant, Bahrain's first theory that the map somehow supports Bahraini sovereignty over the islands is demonstrably wrong: and we can knock one more item off of Mr. Volterra's list of *effectivités*.

15. As for Bahrain's second argument — that Qatar was limited to a place in the south-east corner of the peninsula — this, too, I would suggest, is misconceived.

16. At paragraph 20 of its Memorial, Bahrain argued:

> "Bahrain continued to exercise authority over the Qatar peninsula's tiny population of scattered tribes until 1871, when the Ottoman Empire took control of the area around Doha Town (referred to as the *kaza* or province of 'Qatar')."

And then Bahrain introduced in the next paragraph the Captain Izzet map in an effort to show that the *"kaza"* of Qatar, the province of Qatar, was limited to the *town* of Qatar, or otherwise known as Al-Bida.

17. Now this argument conveniently overlooks the fact that the Ottomans drew a *clear* distinction between the *"kaza"*, or the province of Qatar on the one hand, and the *"kasaba"*, and the town, central town of the *"kaza"* which was also sometimes called Qatar, on the other. This was demonstrated by an Ottoman map that Dr. Fetais Al-Meri showed to the Court in Qatar's first round presentation but which our opponents have chosen to ignore. [Place map 15 from Qatar's Map Atlas on the screen.]

18. On this map, the *"kaza"*, of Qatar, the province, can clearly be seen to extend throughout the entire Qatar peninsula [highlight in yellow the words "*kaza* of Qatar" on the map]. The town, or the *"kasaba"*, of Qatar is subject to a special insert on the map where no less than twice the *"kasaba"* itself is shown to be the *town* of Qatar, as opposed to the entire peninsula. So when Captain Izzet labelled Qatar in the south-east portion of the map, he was referring to the *"kasaba"* or town of Qatar, not the entire administrative district of Qatar.

19. Now, it was not simply Ottoman maps which confirmed the distinction between the *kaza* of Qatar, encompassing the entire peninsula, and the *"kasaba"* or town of Qatar. Indeed, Ottoman reports concerning Qatar repeatedly make the same point. For example, one report in the record by an Ottoman official, Kamil Pasha, on Arabia described Qatar in the following terms [place texts on screen simultaneously]: "The place called Qatar, on the coast at a distance of one hundred miles from the Ojeir land station, is a tongue projecting into the sea between Oman and Bahrain Island." The report then went on to say: "The administrative centre of this *kaza* is the *kasaba* Al-Bida." Once again you see the clear distinction between the two overlooked by our colleagues on the other side. (Reply of Qatar, Ann. II.45, Vol. 2, p. 255.)

20. And in fact Bahrain's own documents disprove its thesis. For example, we find a 1909 Ottoman document attached to Bahrain's Counter-Memorial which candidly recounts the fact that [place text on screen]: "The districts of Zubare and Udeyd are extensions of the Katar subdivision of the province of Nejid and occupy important positions." (Counter-Memorial of Bahrain, Ann. 35 *(b)*, Vol. 2, p. 113.) The subdivision was the province of Nejid, the district was Qatar. Zubare and Udeyd as well as Al-Bida were part or towns or smaller units within the district of Qatar as a whole.

21. So much for Mr. Paulsson's contention that Captain Izzet's map somehow supports Bahrain's case or that the Ottoman administrative district of Qatar was limited to Doha or Al-Bida. The documents really show nothing of the sort. [Place full Izzet map on the screen.] Moreover, we are still left wondering why Bahrain saw fit to produce a manifestly incomplete version of the map in its Memorial if it was not to cover up the fact that the blue shading that appears on the map and used for Bahrain and the Hawar Islands also appears in many other places on the map. My colleague on the other side now says that "Bahrain would have readily provided Qatar with the

northern half of the map if Qatar had only asked for it" (CR 2000/12, pp. 11-12). But surely, Mr. President, Qatar was entitled to believe that Bahrain had complied with the Rules of Court and specifically Article 50, which stipulates that if only parts of a document are relevant, only such extracts as are necessary need be annexed, but a copy of the *whole document* shall be deposited with the Registry. Since Bahrain did not deposit the whole map, Qatar assumed that the map provided by Bahrain in its Memorial was the whole map, and we were subsequently to find out that this was not the case.

22. Mr. Volterra tried to shore up the Captain Izzet map by referring to a 1879 illustration that was attached to Captain Durand's report on Bahrain as somehow being consistent with the Izzet depiction. Here is the Durand map that counsel referred to.

[Place 1879 Durand map — Bahrain Supplemental Documents, Ann. 22 on the screen]

23. While it is true that Bahrain did indeed submit this map with its Supplemental Documents last March, it is curious to say the least, that Bahrain did not see fit to attach the report to which this map was itself attached in accordance with the Rules of Court. Had Bahrain done so, had it actually furnished the report, the Court would have been able to see for itself that the report was no more than an archaeological and anthropological study of Bahrain with no political ramifications whatsoever. Captain Durand never travelled to Qatar and did not purport to express any views as to its political status. Indeed, he acknowledged that the dotted line that appears on the map marked the limits of his ignorance. What Captain Durand *did* say was that Bahrain was surrounded by water on every side — hardly a description which accords with Bahrain having any territorial rights on the Qatar peninsula or the Hawar Islands.

24. The fact remains that Sheikh Jassim Al-Thani ruled the entire province of Qatar, and that he governed the territory both in his own right and as surrogate for the Ottoman Empire. There was no corresponding Bahraini presence on the peninsula, and no Bahraini administrative structure of any kind in Qatar or the Hawar Islands. This state of affairs was repeatedly recognized both in the cartography (official and non-official) of the time as well as in the documentary evidence.

* *

25. If we turn to the early years of the twentieth century, a 1904 Military Report on Arabia prepared by British authorities clearly distinguished Bahrain, on the one hand, which was described as being separated by the sea from the mainland lying to the south and south-east, in other words separated by the sea from the mainland of Qatar and the rest of Arabia, that report distinguished Bahrain on the one hand from Qatar, and Qatar was described in the following terms — this you will find as No. 10 in the your folders (Reply of Qatar, Ann. II.37, Vol. 2, p. 214) [place text on screen]: "The Katar peninsula to the east of the island of Bahrein is ruled by Sheikh Jasimn-ib-Thani, a rich and powerful chief, who has a following of about 2,000 fighting men."

26. What is striking about this Report is that the island of Bahrain was clearly differentiated from Qatar. This, of course, was no more than a confirmation of the political state of affairs that had existed ever since the 1868 Agreements. Moreover, the reference to Shaikh Jassim's rule in Qatar was to the *peninsula* lying to the east of Bahrain, not to some small portion of it. There was no suggestion that Bahrain possessed any territorial pretensions on the peninsula impinging on Al-Thani rule.

27. Shortly afterwards, Lorimer's famous *Gazetteer* of the area which contained a section on Qatar was printed. And the relevant extracts from that document may be found in under tab 11 in the dossier that you have today. One point I would particularly like to stress about this document is that it was not simply prepared by Lorimer himself, as the report says, it was compiled with the assistance of the Political Agent in Bahrain and the Political Assistant in the Gulf. It thus reflected not simply Lorimer's views but the considered views of British officials stationed in the area at the time.

28. Now Lorimer starts by describing Qatar as "a remarkable tongue of land projecting from the Arabian coast of the Persian Gulf". Lest our opponents suggest that Lorimer was only concerned with a geographic description of Qatar, the next section of his entry is very significant. It is headed "Boundaries" and reads as follows [text on screen]: "*Boundaries* — On the east, north and west Qatar is surrounded by the sea. The southern boundary is somewhat indeterminate."

29. Now Lorimer went on to catalogue the various places comprising Qatar in his report, and included as part of the "East side of Qatar" were such well-known localities under Al-Thani rule as

Doha or Wakrah. Included under the heading "West side of Qatar" were the Hawar Islands, Janan and Zubarah amongst many others and these places were treated no differently than Doha.

30. Here we have, I would suggest, Mr. President and Members of the Court, an authoritative account of Qatar, compiled with the assistance of the Political Agent in Bahrain, which unequivocally described the Hawar Islands, Zubarah and Janan as falling within Qatar's boundaries.

31. As Mr. Volterra reminded the Court, Lorimer also referred to the fact that the Dowasir had houses at two places on Hawar which were used in the winter. Lorimer when on to note that fishermen — not necessarily Dowasir — but fishermen frequented Hawar. But the important point is that, despite these references to the Dowasir — in spite of these references — Lorimer still included the Hawar Islands within the territory of Qatar. Clearly, the authors of the Lorimer report did not consider that the presence of the Dowasir in winter months for fishing purposes or, indeed of other itinerant fishermen in the islands, meant that the islands somehow appertained to Bahrain or that their presence was *à titre de souverain*.

32. Moreover, this state of affairs was confirmed by Prideaux in 1909 when he travelled to the Hawar Islands. The Court will recall that it was during the course of this visit that a local Dowasir tribesman informed Prideaux that, while Zakhnuniya was undoubtedly a Bahrain possession, the Dowasir regarded the Hawar Islands as their independent territory. This did not mean that there was an independent State of the Dowasir, as counsel for Bahrain perhaps rhetorically suggested, but rather that the Dowasir did not view their seasonal presence on the Hawar Islands as having anything to do with the exercise by the ruler of Bahrain of any sovereign functions over the islands.

33. One would also have thought from Mr. Paulsson's description that travel within Qatar at this time was exceedingly difficult. However, in the same Lorimer report that you have, he notes that "travel is not more difficult in Qatar than in any other barren but open country which is without inhabitants but not altogether without water" (Memorial of Qatar, Ann. II.4, Vol. 3, p. 140). Moreover, the distance across Qatar is not comparable, as I believe Mr. Paulsson suggested, to the distance between Washington DC and California. The distance is perhaps more akin to the distance between The Hague and Utrecht.

34. It is instructive to compare these accounts of Qatar with how Bahrain was viewed at the time. Lorimer, for example, catalogued the Bahrain Principality in 1908 just as he had done for Qatar. While Lorimer acknowledged that the "term" Bahrain had once been more extensive, he noted that [place text on screen]:

> "The present Shaikhdom of Bahrain [the present Shaikhdom of Bahrain] consists of the archipelago formed by the Bahrain, Muharraq, Umm Na'asan, Sitrah and Nabi Salih islands and by a number of lesser islets and rocks which are enumerated in the articles upon the islands: taken all together these form a compact group almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif . . ." (Memorial of Qatar, Ann. II.3, Vol. 3, p. 88.)

35. Counsel for Bahrain suggested that references such as these were mere geographical descriptions, not political ones (CR 2000/12, pp. 33 and 36). But this is not borne out either by the language which Lorimer used or by a subsequent 1916 Handbook of Arabia prepared for the British Admiralty and War Office. Those you can find at tab 12 of your folders, and both of these documents specifically referred to the "present Shaikhdom of Bahrain", a *political* description not a geographical one. None of these accounts suggested in any way that the Bahrain Shaikhdom extended across the sea to the Hawar Islands or Zubarah. To the contrary, all of the contemporary descriptions of the political extent of Bahrain were entirely consistent with the map that had been prepared by Bent for the Royal Geographical Society in 1890 [place map on the screen] as well as with all the other cartographic evidence which Qatar presented in its pleadings and which I reviewed in the first round.

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3. The 1913 Anglo-Ottoman Convention, the 1914 Anglo-Turkish Convention, and the 1916 Treaty between Great Britain and Qatar

36. This, then, is the historical context within which the 1913 Anglo-Ottoman Convention, the 1914 Anglo-Turkish Convention and the 1916 Treaty between Great Britain and Qatar fall to be examined.

37. The Court will recall that the relevant provisions of the 1913 Anglo-Ottoman Convention are to be found in Article 11. The first part of Article 11 described the course of the line which the parties agreed would separate the *Sanjak* of Nejd "from the peninsula of Al-Qatar". Article 11 then went on to say the following [place text on screen in English and French]:

> "The Ottoman Imperial Government having renounced all its claims to the peninsula of al-Qatar, it is understood by the two Governments that the peninsula will be governed as in the past by the shaykh Jasim-bin-Sani and his successors. The Government of His Britannic Majesty declares that it will not allow the interference of the shaykh of Bahrayn in the internal affairs of al-Qatar, his endangering the autonomy of the area or his annexing it."

38. Here we have, once again, a clear recognition by both the British Government and the Ottomans that the Qatar peninsula would be governed, as in the past, by Shaikh Jassim bin-Thani and his successors.

39. Bahrain is right to be troubled by this important document which is so fundamentally incompatible with its case. Thus Mr. Paulsson raised two arguments in an attempt to do away with the 1913 Convention. First, counsel reminded the Court that the 1913 Convention had never been ratified and he concluded that it was thus irrelevant. Second, Mr. Paulsson argued that the 1914 Convention, which was ratified, did not refer to the "peninsula" of Qatar or to Al-Thani rule over the Qatari peninsula, although it did include a specific reference back to Article 11 of the 1913 Convention (CR 2000/12, pp. 8-9).

40. Each of these arguments can be readily rebutted.

41. With respect to the first point, the non-ratification of the 1913 Treaty, this was largely due to the outbreak of war. But the important point — the important point — is that the 1913 Treaty, while not creating binding rights and obligations on the parties by virtue of its non-ratification, *did* accurately reflect the parties' common view as to the territorial situation at the time and the status of the Al-Thani Rulers as governed in the past, and as still governing, the entire Qatar peninsula. The failure of the Treaty to come into effect in no way diminishes the probative value of that document as contemporary evidence of how the interested parties viewed the territorial situation.

42. In the *Eritrea/Yemen* case, the Arbitral Tribunal was faced with a similar question involving the probative value to be given to two agreements between Great Britain and Italy undertaken, respectively, in 1927 and 1938. Neither of those agreements ever came into force.

43. Nonetheless, as to the 1927 Agreement, the Tribunal acknowledged that it could not be regarded as being a binding treaty between States. Nonetheless, the agreement was [place text on screen]:

> "an accurate account of what both parties had agreed and was signed by them as such. It is simply evidence of the thinking of the time — this time by both parties — in much the same way as the Tribunal has been presented with a myriad of other evidence in non-treaty form . . . It is diplomatic evidence, like any other, but of an undoubted interest because it reflects what was recorded by both parties as that which they had agreed to." (Award in First Phase, para. 172.)

44. As to the 1938 Treaty between Great Britain and Italy, which also never came into force, the Tribunal noted much the same thing. It stated [place text on screen]:

> "There is no evidence, however, that either Italy or the United Kingdom failed to proceed with registration [of the Treaty] for any reason other than the approaching war clouds. The text of the treaty still has significance, which the Tribunal may properly take account of, as to the understanding of the parties in the autumn of 1938 regarding the correct position of the islands and their intention at that moment as to how they should continue to be treated." (Award in First Phase, para. 183.)

45. Mr. President, Members of the Court, the same reasoning, I would respectfully submit, applies *mutatis mutandis*, to the 1913 Anglo-Ottoman Convention. It is relevant as contemporary evidence of the views of Great Britain and the Ottomans as to the status and extent of the authority of Al-Thani rule in Qatar.

46. As for Mr. Paulsson's second argument — that the 1913 Convention says two things, "peninsula" and "southern border", while the 1914 Convention only says that the "southern border" of Qatar will be in accordance with the 1913 text — this argument is of even less help to Bahrain's case than the first argument.

47. Mr. Paulsson criticized Qatar for not including the 1914 Convention in the judges' folders. I am happy to say that we have now complied with counsel's wishes, and the Court will find both the 1913 and 1914 Conventions in tab 13 in its folders. Mr. Paulsson asserted that "There is nothing in the ratified Convention of 1914 that could be said to incorporate a recognition of Al-Thani rule over a unitary Qatari peninsula". He then went on to conclude, somewhat

ominously, that "it seems we must be *very* careful when examining the alleged interrelationship of historical documents" (CR 2000/12, p. 9).

48. Indeed, we do have to be careful, Mr. President. Unfortunately, my distinguished colleague failed to point out that the actual language used in Article III of the 1914 Convention referred to a line which separated the "territory" — the "territory"— of the Ottoman *Sanjak* of Nejd from the "territory" of Qatar. And this reference to "territory" was very significant. For if we are to pay heed to my colleague's concern about the "interrelationship of historical documents", we should not forget that in 1934, when the British were studying Qatar's boundaries, a Foreign Office analysis of the 1913 and 1914 Conventions had the following interesting thing to say [tab 14 in judges' folders, p. 2, para. 3] [place text on screen]:

> "A second point which has emerged is that the 1914 Convention speaks of the blue line as separating the Turkish territory from the 'territory' of Qatar, and not merely, as in the case of the 1913 Convention, from the 'peninsula' of Qatar. We are now of opinion that this further strengthens our case for contending that the negotiators of the Convention intended to regard the territories to the east of the 'blue line' as politically appertaining to the Sheikhdom of Qatar and not merely as geographically attached to the Qatar peninsula." (Counter-Memorial of Qatar, Ann. III.41, Vol. 3, p. 228.)

49. So, if anything, the British view was that the 1914 Convention was even more explicit in confirming the political extent of the territory of Qatar than the 1913 Convention.

50. At this point, Mr. President, I have two further issues with which I would wish to deal with. One would be naturally to talk about the 1916 Treaty between Great Britain and Qatar, which is highly relevant, and the last section of my presentation deals with the map comments made by our colleagues in their first round presentation. Given that it is shortly before 1 o'clock, perhaps it would be better to take up those subjects tomorrow morning.

Le PRESIDENT : Je vous remercie beaucoup, M. Bundy. Ceci met un terme à notre séance de ce matin. La Cour se réunira à nouveau demain à 10 heures pour entendre la suite de la présentation de Qatar. La séance est levée.

L'audience est levée à 13 heures.