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International Court
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Cour internationale
de Justice

LA HAYE

YEAR 2000

Public sitting

held on Thursday 22 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 jeudi 22 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,

as Counsel;

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. Graham Coop, Freshfields, Paris, Barrister and Solicitor of the High Court of New Zealand and Solicitor of the Supreme Court of England and Wales,
Mr. Andrew Newcombe, Freshfields, Paris, Member of the Bar of British Columbia,
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H.E. Sheikh Abdul-Aziz bin Mubarak Al Khalifa, Ambassador of the State of Bahrain to the Netherlands,
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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Ms Alia Al-Khatar, Freshfields,
Mr. Nabeel Al-Rumaihi, Ministry of State of the State of Bahrain,
Mr. Hafedh Al-Qassab, Ministry of State of the State of Bahrain,
Mr. Yousif Busheery, Ministry of Foreign Affairs of the State of Bahrain,
Ms Janet Cooper, Ministry of State of the State of Bahrain,
Ms Eleonore Gleitz, Freshfields,
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,
Ms Sarah Mochen, Freshfields,
Mr. Kevin Mottram, Freshfields,
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M. Prosper Weil, professeur émérite à l'Université de Paris II (Panthéon-Assas), membre de l'Académie des sciences morales et politiques (Institut de France), membre de l'Institut de droit international,

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Le cheikh Khalid bin Ahmed Al-Khalifa, premier secrétaire, ministère des affaires étrangères de l'Etat de Bahreïn,
Le capitaine de frégate Christopher Carleton, M.B.E., directeur de la division du droit maritime du bureau hydrographique du Royaume-Uni,
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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,
M. John Wilkinson, ancien maître de conférence à l'Université d'Oxford, membre émérite du Collège Saint Hugh, Oxford,

comme conseillers;

S. Exc. le cheikh Mohammed bin Mubarak Al Khalifa, ministre des affaires étrangères de Bahreïn,
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,
M. Ghazi Al-Gosaibi, sous-secrétaire d'Etat aux affaires étrangères de l'Etat de Bahreïn,
S. Exc. la cheikha Haya Al Khalifa, ambassadeur de l'Etat de Bahreïn auprès de la République française,
M. Yousef Mahmood, directeur du bureau du ministre des affaires étrangères de Bahreïn,

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M. Jon Addison, ministère d'Etat de l'Etat de Bahreïn,
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Mme Alia Al-Khatar, cabinet Freshfields,
M. Nabeel Al-Rumaihi, ministère d'Etat de l'Etat de Bahreïn,
M. Hafedh Al-Qassab, ministère d'Etat de l'Etat de Bahreïn,
M. Yousif Busheery, ministère des affaires étrangères de l'Etat de Bahreïn,
Mme Janet Cooper, ministère d'Etat de l'Etat de Bahreïn,
Mme Eleonore Gleitz, cabinet Freshfields,
Mme Aneesa Hanna, ambassade de Bahreïn, Londres,
Mme Jeanette Harding, ministère d'Etat de l'Etat de Bahreïn,
Mme Vanessa Harris, cabinet Freshfields,
Mme Iva Kratchanova, ministère d'Etat de l'Etat de Bahreïn,
Mme Sonja Knijnsberg, cabinet Freshfields,
Mme Sarah Mochen, 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 et je donne la parole au professeur Eric David qui s'exprimera au nom de l'Etat de Qatar.

M. DAVID : Merci beaucoup, Monsieur le président. Monsieur le président, Madame et Messieurs de la Cour, lors de l'interruption de mon exposé hier, j'étais occupé à examiner les documents qui, selon la Partie adverse, impliquaient reconnaissance par les Britanniques de la souveraineté de Bahreïn sur Zubarah. Et nous avions examiné deux de ces documents. Il en reste un troisième.

35. Il s'agit d'un document daté du 29 mai 1937, attribué à l'agent politique Hickinbotham, document dans lequel Belgrave propose de céder à Qatar la région adjacente à Zubarah pourvu que Bahreïn puisse conserver Zubarah; les Naïm pourraient alors décider par plébiscite de leur allégeance [6.9], et s'ils se rendaient dans une quelconque portion du territoire de Qatar, ils seraient soumis à l'impôt comme n'importe quel résident de Qatar. M. Paulsson fait grand cas de la formule «toute portion appartenant au cheikh de Qatar» qui, selon M. Paulsson, devrait heurter nos oreilles car ce texte date de 1937, soit soixante-neuf ans après que Qatar aurait prétendument acquis — c'est M. Paulsson qui le dit — a *"coast-to-coast sovereignty"*[1]. Ce texte suggérerait que ce n'est pas le cas.

Ce commentaire appelle deux remarques :

1) Le texte, signé des initiales B. T., est écrit non par l'agent politique Hickinbotham, mais par son assistant, un certain Tomlinson[2];
2) Ce texte n'est rien d'autre que le rapport d'une discussion de cet assistant avec Belgrave qui était venu faire une contre-offre à une proposition antérieure de l'émir de Qatar pour régler le différend[3]; il ne s'agissait donc que de simples contre-propositions — le texte est d'ailleurs rédigé au conditionnel — émanant de Bahreïn [6.10] et sur la formulation desquelles l'assistant de l'agent politique et Belgrave se mettent d'accord; sur cette base, il nous paraît

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[1]CR 2000/12, 9 juin 2000, p. 20-21, par. 91-92.

[2]Mémoire de Qatar, annexe III.131, vol. 7, p. 157.

[3]Texte dans mémoire de Qatar, annexe III.130, vol. 7, p. 153-155.

pour le moins léger de chercher dans la simple relation d'une contre-offre faite par Bahreïn l'expression de la position officielle du Gouvernement britannique sur Zubarah...

2. Les actes de reconnaissance émanant de Bahreïn [7.1]

36. Ici aussi, nos contradicteurs n'ont guère contredit ce que M. Shankardass et moi-même avons présenté comme autant d'actes implicites ou explicites de reconnaissance par Bahreïn de l'appartenance de Zubarah à Qatar[4]. Nous avions sélectionné pour la période qui va de 1868 à 1976 plus d'une dizaine de faits de reconnaissance. Nos adversaires ne les ont même pas discutés, à l'exception de l'accord de 1944 dont ils se bornent à souligner l'ambiguïté et auquel ils n'accordent qu'un effet de *standstill*[5]. Par contre, rien n'est dit sur des faits aussi importants que :

— la conclusion par Bahreïn avec les Britanniques du traité du 6 septembre 1868 sans que Bahreïn n'émette aucune réserve quant à ses droits éventuels sur la péninsule[6] [7.2];

— l'acceptation par Bahreïn de l'occupation permanente de Zubarah par les Turcs en 1878[7] [7.3];

— la demande adressée par Bahreïn à Qatar en 1911 de pouvoir prendre en location Zubarah[8] [7.4];

— l'absence de protestation de Bahreïn en 1923-1924 à l'égard des cartes de l'Eastern and General Syndicate pour les discussions de sa concession pétrolière, cartes qui n'indiquent pas Zubarah parmi les possessions de Bahreïn[9] [7.5];

— l'envoi par Bahreïn aux autorités britanniques en 1938 d'une carte du territoire de Bahreïn pour les zones de concession à partager entre la BAPCO et PCL sans que la région de Zubarah y soit indiquée[10] [7.6];

— l'absence de protestation par Bahreïn à propos du fait que la Grande-Bretagne n'avait tenu aucun compte de Zubarah dans le tracé de la délimitation maritime du 23 décembre 1947[11] [7.7];

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[4]CR 2000/9, 5 juin 2000, p. 10, 14, 16-17, par. 17, 26, 32, 34; M. K. Shankardass, *ibid.*, p. 26-33.

[5]M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 23, par. 102-103.

[6]M. K. Shankardass, CR 2000/9, 5 juin 2000, p. 26, par. 3.

[7]*Ibid.*, p. 10, par. 16.

[8]*Ibid.*, p. 14, par. 26.

[9]M. K. Shankardass, CR 2000/6, 30 mai 2000, p. 21, par. 30; *Bahrain, judge's folder, Vol. 2, No 67-70.*

[10]M. K. Shankardass, CR 2000/9, 5 juin 2000, p. 32, par. 22.

— la demande adressée par l'émir de Bahreïn à Ernest Bevin le 28 juin 1948 de ne se voir reconnaître que certains droits de caractère privé à Zubarah[12] [7.8];

— la confirmation adressée en janvier 1950 à l'émir de Qatar par les Britanniques que l'émir de Bahreïn réclamait non la souveraineté sur Zubarah, mais seulement le droit d'y envoyer ses sujets avec leurs troupeaux[13] [7.9];

— la demande adressée en 1957 par Bahreïn aux Britanniques de se prononcer définitivement sur la question et l'engagement formel de Bahreïn de respecter la décision qui serait prise[14] [7.10];

— l'acceptation par Bahreïn en 1976 de la médiation de l'Arabie saoudite pour résoudre le différend «sur les îles, les frontières maritimes et les eaux territoriales», sans qu'il soit question de Zubarah[15] [7.11].

37. Cette liste est loin d'être exhaustive. On pourrait y ajouter, par exemple, entre autres descriptions de Bahreïn, celle faite par Belgrave en 1928 où il n'est question ni de Zubarah, ni des îles Hawar, et rappelée lors de ce deuxième tour de plaidoiries par sir Ian ou l'admission par l'émir de Bahreïn le 13 juillet 1937 que les Naïm s'étaient désormais soumis à l'émir de Qatar[16]. On doit cependant à la vérité scientifique de dire que Qatar ne pouvait pas être au courant de tous ces actes de reconnaissance, et qu'il serait donc difficile de leur conférer globalement un effet d'*estoppel* à l'égard de Bahreïn. Mais un tel effet doit cependant être reconnu aux faits que Qatar devait nécessairement connaître, à savoir ceux de [7.12] 1868, 1878, 1911, 1944, 1950 et 1976.

Mis à part l'accord de 1944, Bahreïn n'a pas discuté de ces différents arguments et Qatar en prend acte. Bahreïn déclare toutefois avoir protesté à de nombreuses reprises depuis 1937 contre la présence de Qatar à Zubarah[17]. C'est vrai, mais il s'agit de valses-hésitations entre tantôt des protestations, tantôt des acceptations. Il n'en demeure pas moins que certains faits de reconnaissance sont largement antérieurs à 1937, que Qatar est fondé à s'en prévaloir en tant

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[11] *Ibid.*, p. 30, par. 13.

[12] *Ibid.*, p. 30, par. 14.

[13] *Ibid.*, p. 30, par. 15.

[14] *Ibid.*, p. 17, par. 34.

[15] M. K. Shankardass, *ibid.*, p. 31, par. 19.

[16] Mémoire de Qatar, annexe III.138, vol. 7, p. 192.

[17] M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 22, par. 100.

qu'«accords singularisés»[18], et que les protestations ultérieures de Bahreïn sont impuissantes à les remettre en cause.

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38. En conclusion, sur les différents exemples d'actes d'autorité effectués par Qatar à Zubarah entre 1868 et 1937, Bahreïn n'a contesté que deux d'entre eux, et nous avons vu que ces contestations restaient vaines.

Quant aux nombreux faits impliquant la reconnaissance de l'appartenance de Zubarah à Qatar, reconnaissance émanant du Royaume-Uni, d'Etats tiers ou de Bahreïn lui-même, nos adversaires n'y ont opposé que des exceptions très limitées et dont aucune ne résistait à un examen sérieux.

Je peux aborder à présent, et très brièvement, le dernier point de cette plaidoirie.

III. L'ABSENCE DE RÔLE DES LIENS TRIBAUX D'ALLÉGEANCE DES NAÏM ENVERS L'ÉMIR DE BAHREÏN [8.1]

39. Monsieur le président, et vous m'en serez sans doute reconnaissant, la question n'est abordée que pour mémoire : en dehors de ce que nous avons déjà relevé (*supra*, par. 9 et 22), nos contradicteurs n'ont pas vraiment contesté les arguments développés sur ce point il y a deux semaines[19]. Qatar en prend acte, une fois de plus et, pardonnez-moi de me répéter, Qatar n'en dira pas davantage : s'il n'y a pas de réponse, il ne peut y avoir de réplique.

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40. Monsieur le président, Madame et Messieurs de la Cour, Bahreïn n'a rien dit qui soit de nature à remettre en cause les conclusions de Qatar sur Zubarah. Beaucoup d'arguments de Qatar sont restés sans réponse, et ceux auxquels Bahreïn a tenté de répondre n'ont pas été ébranlés.

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[18]Chaumont, Ch., *Cours général de droit international public*, *RCADI*, 1970, vol. 129, p. 430.

[19]M. J. Paulsson, CR 2000/12, 9 juin 2000, p. 14 et 18, par. 61 et 82.

Goethe disait que la clarté «est une juste répartition d'ombres et de lumières»[20]. Pour l'instant, la réclamation de Bahreïn sur Zubarah ne comporte que des ombres et aucun rayon.

Monsieur le président, Madame, Messieurs de la Cour, je vous remercie une fois de plus de votre patience et de l'attention soutenue que vous m'avez accordée hier comme aujourd'hui. Et, je vous demande à présent, Monsieur le président, de bien vouloir appeler sir Ian Sinclair à cette barre. Je vous remercie.

Le PRESIDENT : Je vous remercie Monsieur le professeur. I now give the floor to Sir Ian Sinclair.

Sir Ian SINCLAIR:

RESPONSE TO PROFESSOR REISMAN'S PLEADING OF 9 JUNE 2000 ON THE 1936 AND 1939 BRITISH DECISIONS ON HAWAR

Mr. President, Members of the Court,

1. My task this morning is to respond to the arguments advanced by our opponents, in particular Professor Reisman, on the legal consequences of what Professor Reisman terms the "award" in the "1939 arbitration", that "award" enjoying in his submission the status of *res judicata*.

Weightman's failure to report his conversations with the Ruler of Qatar on Hawar in February 1938

2. Before I begin, however, I must say a few words about the manner in which Mr. Paulsson dealt on 9 June with Weightman's letter to the Political Resident of 15 May 1938, belatedly reporting on his conversation with the Ruler of Qatar in February of that year. Weightman's letter of 15 May 1938 is at Annex III.152 to the Qatar Memorial, and I would invite the Members of the Court to study that letter carefully. I have caused a copy of the letter to be placed in the judges' folders as item 28. Quite how Mr. Paulsson can interpret that letter as establishing the truth of Weightman's astonishing surmise that the Ruler of Qatar was by no means prepared to make a claim to the Hawar group of islands at that time is, if I may put it mildly, puzzling (CR 2000/12,

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[20] *In Maximes et réflexions*, Paris, Gallimard.

p. 38, paras. 174 and 175). Weightman states in the letter that the Ruler of Qatar had admitted that the Bahrainis had occupied Hawar, but had gone on to state that "they had no *de jure* rights there", as you will now see on the screen. A change of conversation thereafter can hardly be interpreted as amounting to a refusal on the part of the Ruler of Qatar to advance a claim to Hawar at that time. After all, if the Bahrainis had no *de jure* rights there, as the Ruler of Qatar was protesting, who had? Surely only the Ruler of Qatar himself. The mildest reproach one can make of Weightman's reporting of the conversation in February 1938, is that it was an exercise in self-deception; he was reporting what he wanted to report, and putting an unsustainable gloss upon a conversation incapable of bearing the interpretation which he was putting on it. In short, in a word which has been used in modern times, he was being economical with the truth. But the Members of the Court must decide for themselves, bearing in mind, of course, that Weightman had to explain away his failure to report this important conversation with the Ruler of Qatar at the time.

The uninformed view of Mr. Darwin

3. I turn now to Professor Reisman's presentation. My learned opponent had some knock-about fun about my citation of the views of certain British "bureaucrats", such as Mr. Long who produced in 1964 what even I would concede was a potted and incomplete account of some of the principal events surrounding the two British decisions of 1936 and 1939 (CR 2000/12, p. 44, para. 3). Indeed, it could well be, and here I would refer to the presentation by Mr. Volterra on 13 June (CR 2000/13, p. 51, para. 145), that, precisely because my former colleague, Mr. Henry Darwin, who was an Assistant Legal Adviser in the Foreign Office in June 1964, did not have access at the time to the very wide range of documentary and cartographic materials which the Parties to the present case have now made available to the Court, that he came down in favour of the Bahrain case as regards sovereignty over the Hawar Islands. Regrettably, Mr. Darwin died very shortly after his retirement from the Foreign and Commonwealth Office just over ten years ago. I would only say that his manuscript minute of 9 June 1964 is based upon certain assumptions, such as the tribal affiliations of the supposed "residents" of the Hawar Islands and the supposed "acts of administration" of the Bahrain Government, the very basis of which Qatar strongly challenges in the present proceedings. Accordingly, I have to say that Mr. Darwin's view on the merits of the

dispute between Qatar and Bahrain over the Hawar Islands is an uninformed view reached on the basis of incomplete information. Those Members of the Court who have previously served in national administrations as legal advisers to Ministries of Foreign Affairs will be only too well aware that, on specific issues, the individual legal adviser often has to give his advice on the basis of the limited materials which may have been put before him.

Professor Reisman's failure to cite the *Dubai/Sharjah Border* case

4. The main thrust of Professor Reisman's argument is of course that the issue of sovereignty over Hawar was, in his words, "resolved 61 years ago, by a valid and binding arbitration, in favour of Bahrain, which is *res judicata*" (CR 2000/12, p. 44, para. 2). One would think that Professor Reisman would seek to follow up this bold assertion by demonstrating conclusively that what the British Government did on 11 July 1939 was to issue an arbitral award determining that the Hawar Islands appertained to Bahrain. But what jurisprudence does Professor Reisman invoke in his argument on whether the Court has jurisdiction to review the award of another tribunal? He invokes the *Socobelge* case before the Permanent Court in 1939, the *Arbitral Award Made by the King of Spain* case, and the Judgment of this Court in the *Arbitral Award of 31 July 1989* relating to the maritime boundary dispute between Senegal and Guinea-Bissau. In none of these cases were the parties in dispute as to whether the very process in which they or others had been previously engaged had been a process of arbitration at all. In other words, none of them are in the slightest degree relevant to the issue which the Court has to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties. Curiously enough, however there is one recent case in which the arbitral tribunal constituted to hear it had to determine questions raised by the arguments of the parties as to whether certain decisions taken by a third party were or were not arbitral awards. This was of course the *Dubai/Sharjah Border* case, where the Court of Arbitration delivered its Award on 19 October 1981.

Salient points in the *Dubai/Sharjah* case

5. The Award in the *Dubai/Sharjah Border* case, which was published in Vol. 91 of the *International Law Reports* (p. 549), contains much that is of direct relevance to the present case.

And yet Professor Reisman made no reference to it whatsoever. Why? Qatar would suggest that it is because the Award in that case runs directly counter to the argument he was seeking to present. Let me briefly recall some of the salient points in the Award in the *Dubai/Sharjah* case:

(1) One of the principal issues in the arbitration was whether decisions made by the Political Agent in the Trucial States, a Mr. Tripp, on the course of the land boundary between Dubai and Sharjah should properly be characterized as arbitral awards. The Award states:

> "In their simplest form, the arguments of the Parties may be summarised as follows. In the view of the Government of Dubai the British authorities did not have the right to delimit the boundary without the consent of the Emirates concerned. The consent given by the Ruler of Dubai was invalidated *ab initio* and therefore the subsequent administrative decisions were devoid of all legal value. In the view of the Government of Sharjah, however, the consent given by the Ruler of Dubai could not in any way be considered as invalidated and the subsequent decisions arrived at by Mr. Tripp must be interpreted as binding arbitral awards." (91 *ILR*, p. 566.)

(2) The Court of Arbitration in that case then considered whether the British Government had the right to decide, unilaterally and on its own initiative, upon the delimitation of a boundary between the two Emirates. This is clearly equivalent to the right to decide, unilaterally and on its own initiative, upon the appurtenance of a disputed parcel of territory as between two sheikhdoms; and the Court of Arbitration decided that:

> "no treaty authorised the British authorities to delimit unilaterally the boundaries between the Emirates and . . . no British administration ever asserted that it had the right to do so" (*loc. cit.*, p. 567).

Parity of reasoning requires that the same conclusion should be applied to the attribution of disputed territory as between two sheikhdoms. So, as the Court of Arbitration found, the consent of the Rulers concerned was necessary before any such delimitation or attribution of territory could be made.

(3) Having determined on the facts that, contrary to the submissions of Dubai, the consent of the Ruler of Dubai to a determination of his boundaries with Sharjah had, in fact, been freely given, the Court of Arbitration turned to the status of the Tripp decisions. The Ruler of Dubai had advanced four objections to Sharjah's submission that the Tripp decisions should be characterized as arbitral awards. The four objections were as follows:

(i) there was no arbitration agreement;

(ii) the arbitrator was not independent;

(iii) the parties had been unable to present their arguments; and

(iv) the decisions had not been reasoned.

Requirement that arbitrator be independent

6. The Court will of course be aware, from the content of Qatar's Memorial, that the Court of Arbitration in *Dubai/Sharjah* upheld the third and fourth objections raised by Dubai to the submission that the Tripp decisions constituted arbitral awards (Memorial of Qatar, paras. 6.113-6.119). In the present case, Qatar relies, not only on the third and fourth objections which were upheld in *Dubai/Sharjah*, but also on the second objection, namely, that the arbitrator was not independent. In this context, Qatar relies on the voluminous evidence which it has presented in its written pleadings that Weightman, the British official appointed to conduct the "enquiry" in 1938 and 1939, was not only prejudiced in favour of Bahrain and against Qatar on this particular issue, but, even more importantly, and in common with some other British officials in the Gulf and in London at the time, had also prejudged the outcome of the "enquiry" before it had even begun. I should perhaps add that, quite apart from these reasons, Qatar also relies on the fact that — and here it is in contrast to the position in the *Dubai/Sharjah Border* case — its Ruler did not consent at the time or subsequently to the appointment of a nominee of the British Government as sole arbitrator in an agreed process of arbitration. There is accordingly no legal basis for concluding that the British decision of 11 July 1939 on the Hawar Islands amounted to an arbitral award having the force of *res judicata*.

7. If it were not enough for Qatar to point out that Professor Reisman, in his oral argument on 9 June, failed to address the *Dubai/Sharjah Border* case, Qatar must add that he also seems to have been unaware that the United Kingdom Government itself waived, in the 1960s, whatever objection they might have been able to raise to the consideration by this Court, or indeed by any process of true international arbitration, of the continuing dispute between Qatar and Bahrain as regards sovereignty over the Hawar Islands.

British Government's acceptance of international arbitration in the 1960s as a means of solving disputes between Bahrain and Qatar on Hawar and the maritime delimitation

8. I do not propose to go into this in any detail, since my learned friend, Professor Salmon, has already drawn to the attention of the Court, in the second round, the circumstances under which the British Government expressed their agreement in October 1965 to a process of international arbitration to settle the continuing dispute between Qatar and Bahrain, that dispute including the differences between the two States as regards their claims to sovereignty over the Hawar Islands (CR 2000/17, pp. 18-20, paras. 16-17). So there is no way in which it can be argued that what is involved in the present case is an attempt to reopen an arbitral award having the force of *res judicata*. Even if what had taken place in 1938 and 1939 had been in fact a process of arbitration, which Qatar strenuously denies, the sole "arbitrator", the British Government, was prepared 35 years ago to see its 1939 and 1947 decisions on Hawar and the maritime delimitation referred to a process of independent arbitration between Qatar and Bahrain. This, Qatar would submit, is wholly inconsistent with any notion that the 1939 British decision on Hawar has or ever had the force of *res judicata*.

Denial of alleged "conspiracy" theories

9. I must add that the extraordinary conspiracy theories attributed to me by Professor Reisman hardly merit a response. Qatar has never alleged a conspiracy on the part of the British Government to deprive Qatar of the Hawar Islands. What it has alleged, and indeed what it has established, is that a very limited number of British officials in the Gulf and in London acted with less than full impartiality and objectivity in setting up and participating in the procedures applied between 1936 and 1939 to determine, as between Qatar and Bahrain, the issue of which of these two sheikhdoms had sovereignty over the Hawar Islands.

The "provisional decision" of 1936

10. What then of Professor Reisman's response as regards the British Government's "provisional decision" of 1936? First of all, he says that there was no arbitration in 1936. I can in fact agree with this, precisely because the "provisional decision" was an *ex parte* decision taken by the British Government without the knowledge or consent of the Ruler of Qatar: and it is pointless for Bahrain to point out that the British Government was unaware at the time that the Ruler of

Qatar might have a valid claim to the Hawar Islands. This is specifically disproved by the content of paragraph 7 of Fowle's letter to the Secretary of State for India of 25 May 1936: and, Members of the Court, I would be grateful if you would note that date —25 May 1936. [Show on screen.] Here, Fowle, in presenting his view that Hawar should be regarded as belonging to Bahrain adds that "the burden of disproving his claim lies on the Shaikh of Qatar". He then goes on to say that: "We have heard nothing on the subject from the Shaikh of Qatar, and it is quite possible that he may not dispute the claim of the Shaikh of Bahrain." (Memorial of Qatar, Ann. III.107, Vol. 7, p. 31.)

11. But this, I would submit, is wholly disingenuous. The reason why the British authorities in the Gulf had heard nothing from the Ruler of Qatar on the 1936 Bahraini claim of sovereignty over the Hawar Islands, is that they were carefully keeping secret from him the existence of the Bahraini claim first put forward in writing in Belgrave's letter to the Political Agent of 28 April 1936.

12. There may well of course have been mutterings in Bahrain in the early months of 1936 that the Ruler of Bahrain maintained a claim to the Hawar Islands, but this claim had never been treated seriously, nor had it ever been subjected to any critical scrutiny. Belgrave himself had never visited the Hawar Islands, which presumably figured as part of the Ruler of Bahrain's "rather nebulous claim to certain areas on the Arab coast" to which reference is made in Laithwaite's letter to Starling of 3 May 1933 (Memorial of Qatar, Ann. III.84, Vol. 6, p. 431). It is obvious that Laithwaite in 1933 did not attach the slightest importance to this "rather nebulous claim" of the Ruler of Bahrain, which, strangely enough, only began to surface in the wake of the Ruler's discovery that the "unallotted area" of Bahrain for which he could offer a new oil concession comprised less than half of the land territory of the main Bahrain Island, Muharraq, Sitrah, Nabi Salih and Umm Naa'san.

13. What Professor Reisman does not discuss in his comments on the relevance of the 1936 "provisional decision", is that that "provisional decision" obviously created an expectation among British officials dealing with this matter that the eventual final decision would be in Bahrain's favour. Now this inevitably gave rise to some of the examples of pre-judgment of the issue of sovereignty over the Islands to which Qatar has inevitably drawn attention.

The 1936 "provisional decision" and the question of consent to arbitration: informed consent

14. I return to the argument advanced by Professor Reisman. He argues first of all that the Ruler of Qatar *did* in fact consent to the supposed arbitration by virtue of his letter of 10 May 1938. But this of course ignores the oral protest against Bahraini building activities on Hawar which the Ruler had made to Weightman in February 1938 and which Weightman had not even reported to his superior. Even more significantly, it ignores the British Government's "provisional decision" of 1936 in favour of the Bahraini claim to the Hawar Islands, a provisional decision, which I would repeat, was reached *ex parte* and without any indication to the Ruler of Qatar that the Ruler of Bahrain had advanced a claim to the Islands, and you will recall, Members of the Court, that many of these islands lay within the 3-mile belt of territorial sea appertaining to the mainland of Qatar. In the light of the facts now known to us, there is no way in which the Ruler of Qatar's letter of 10 May 1938, can be interpreted as a true consent by the Ruler to arbitration by the British Government over the dispute as to title over the Hawar Islands. Nor, indeed, can his later letter of 27 May 1938 be so interpreted. Incidentally, Professor Reisman is mistaken in thinking that prior to 27 May 1938, the Ruler of Qatar had been "informed of the claims and evidence submitted by Bahrain" (CR 2000/12, p. 49, para. 18). He had certainly not received a copy of Belgrave's letter of 28 April 1936 to Loch advancing the Ruler of Bahrain's claim to the Hawar Islands. All he had received was Weightman's letter to him of 20 May 1938, which was far from forthcoming about the "claims and evidence submitted by Bahrain". Indeed, all it says on this aspect is the following, and here I am quoting from Weightman's letter to the Ruler of Qatar of 27 May 1938:

> "I remember that you mentioned the question of Hawar to me when I last met you in Dohah and at that time I said to you that I understood that the Bahrain Government claimed the Islands and were in fact in occupation of them. It is indeed a fact that by their formal occupation of the Islands for some time past the Bahrain Government possess a prima facie claim to them..." (Memorial of Qatar, Ann. III.156, Vol. 7, p. 279.)

15. This can hardly be said to amount to an indication of the evidence being relied upon by Bahrain to support its claim. Indeed, the Court will certainly remember that Weightman did everything in his power to prevent the Ruler of Qatar from even seeing Bahrain's eventual "counter-claim", and was only overruled on the advice of Mr. Beckett, at that time Second Legal Adviser to the Foreign Office. Nor of course had the Ruler of Qatar been informed that the British

Government had already, nearly two years previously (on 9 July 1936), made a "provisional decision" in favour of the Bahraini claim to the Hawar Islands. I suspect that Professor Reisman would in fact agree with me that any consent by a State — any consent by a State — to participate in a process of arbitration which would result in an award having the force of *res judicata* has to be an *informed* consent. There is certainly no way in which it can be maintained that, by his letters of 10 and 27 May 1938, the Ruler of Qatar had, in full knowledge of all the circumstances, accepted that the British Government should act as sole arbitrator in a process which would result in a binding award having the force of *res judicata*. Look at what had been deliberately withheld from him:

— *First*, that more than two years previously (on 28 April 1936), Belgrave had presented to the Political Agent a formal claim of title to the Hawar Islands on behalf of the Ruler of Bahrain, this claim of title being presented and I quote from the letter, "in connection with the present negotiations for an oil concession over the territory of Bahrain which is not included in the 1925 oil concession".

— *Second*, that the British Government had, without informing the Ruler of Qatar even of the existence of this claim of title on behalf of Bahrain, had provisionally decided nearly two years previously (on 9 July 1936) that, on the basis of the evidence at present before them, "it appears to them that Hawar belongs to the Sheikh of Bahrein, and that the burden of disproving his claim would lie on any other potential claimant" (Memorial of Qatar, Ann. III.110, Vol. 7, p. 47).

Would the Ruler of Qatar have consented in May 1938 to the appointment of the British Government as sole arbitrator in an agreed process of arbitration if he had been made fully aware of these two vital facts? Surely, the answer must be "No". Qatar entirely denies the Bahraini assertion that, by virtue of his letters of 10 and 27 May 1938, the Ruler of Qatar indirectly consented to a process of arbitration with the British Government acting as sole arbitrator.

16. And it is pointless for Bahrain to pretend that neither the Ruler of Bahrain nor the British Government was aware at the time that the Ruler of Qatar also claimed the Hawar Islands. Already, as I have already said this morning, in 1936, Fowle had acknowledged in his letter to the Secretary of State for India of 25 May 1936 (Memorial of Qatar, Ann. III.107, Vol. 7, p. 31), that

the Ruler of Qatar was also at least a potential claimant to the Hawar Islands, since he was proposing "that the burden of disproving the [Ruler of Bahrain's] claim should lie on the Ruler of Qatar". There is absolutely nothing in the record corresponding to the assurances given by the Rulers of Sharjah and Dubai in 1955 and 1956 that they would not contest the decisions of the Political Agent in the Trucial States as regards the boundaries between the two Emirates. The Ruler of Dubai's consent is embodied in his assurance of 18 March 1955, recorded in the Award of the Court of Arbitration in *Dubai/Sharjah* in the following terms:

> "I hereby undertake on behalf of myself and all my successors as Rulers of the Emirate of Dubai that we will not dispute or object to any decision that may be decided by the Political Agent regarding the question of the boundaries between our Emirate and the Emirate of Sharjah." (91 *ILR*, p. 577.)

A similar assurance was given by the Ruler of Dubai with respect to the boundary in the interior on 14 June 1956; and these assurances were paralleled by corresponding assurances given by the Ruler of Sharjah. Mr. President, Members of the Court, you will look in vain through all the voluminous documentation presented to the Court in the present proceedings to find similar expressions of consent given by the Ruler of Qatar or the Ruler of Bahrain to the British Government before it embarked on the enquiry by Mr. Weightman in 1938 and 1939. And the Court will certainly recall that, in 1964, Mr. Christopher Long of the Foreign Office, in summarizing the events of 1938/1939, admitted:

> "Neither of the two Rulers was asked beforehand to promise his consent to the award, nor afterwards to give it. HMG simply 'made' the award. Although it followed the form of an arbitration to some extent, it was imposed from above, and no question of its validity or otherwise was raised." (Reply of Bahrain, Ann. 2, Vol. 2, p. 4.)

Qatar must leave it to the Court to determine the accuracy of this summary. Qatar believes that it does fairly represent what happened in the context of the "enquiry" conducted by Weightman.

17. Indeed, it is again the mere existence of the "provisional decision" of 1936 which undermines the argument advanced by Mr. Paulsson and Professor Reisman about the burden of proof. If an "arbitration" is about to get under way, it would surely be rather odd if the supposed "arbitrator" had already, unknown to one of the parties, made a "provisional decision" on the merits of the case in favour of the other party. And yet this is precisely what happened in this case. Professor Reisman may put on an air of injured innocence in seeking to defend the indefensible,

but it will hardly convince those prepared to read the full documentary evidence in the British archives about the 1938/1939 Weightman enquiry or, as our opponents would have it, "arbitration".

Failure to provide reasons

18. It is, however, in relation to Qatar's charge that the 1939 British "decision" was unsupported by reasons that I genuinely, quite genuinely, fail to understand Professor Reisman's response. He says, and here I quote from CR 2000/12 (p. 55, para. 35):

> "This assertion is simply factually incorrect. In retrospect, it is clear that the process of reaching the award is comprised of two documents . . . The first was the eight-page, detailed review of the evidence by Sir Hugh Weightman to the Political Resident, of 22 April 1939 . . . the second is the shorter communication to the respective Rulers from the Political Resident on 11 July 1939, which is plainly based upon and implements Weightman's memorandum of law and fact, in no way departing from it."

I will come back in a moment to the so-called "memorandum of fact and law". First, I want to concentrate on what Professor Reisman leaves unsaid. He fails to mention that Weightman's letter of 22 April 1939 was given the security classification "Confidential" and accordingly did not come into the public domain until 1970, some 30 years later. It was *not*, I repeat, *not* communicated to the Ruler of Qatar as an enclosure to the Political Resident's brief letter to the Ruler of 11 July 1939. Professor Reisman will, I am sure, be familiar with Lord Mansfield's famous dictum: "Justice must not only be done, but must be seen to be done." The justification for the rule that arbitral awards must be reasoned is to ensure that the losing party is made aware of the grounds on which the decision has been taken. This clearly did not happen in July 1939, when the only conclusion notified to the Ruler of Qatar was that the British Government had decided, after "careful consideration" of the evidence submitted by both Rulers, that the Hawar Islands belong to the State of Bahrain and not to the State of Qatar. I have already explained to the Court, during my first-round presentation on the 1936 and 1939 British decisions (CR 2000/7, pp. 45-54 and CR 2000/8, pp. 8-16), the nature of that "careful consideration". In passing, I may note that neither Professor Reisman nor Mr. Paulsson sought to respond to my suggestion that, before recommending to London that the Hawar Islands be allocated to Bahrain provisionally, Loch or Fowle should have investigated at least some of the claims and assertions made in Belgrave's letter to Loch of 28 April 1936; but neither of them were prepared to do so and, unlikely as it may be,

neither of them seems even to have been prepared to pause in order to consult highly relevant past papers on their own files.

Procedural violations in the conduct of the 1939 proceedings

19. Professor Reisman's response to Qatar's allegation that Weightman committed serious procedural violations in the conduct of what Bahrain says was an arbitration and what Qatar says was an "enquiry" is interesting. He answers the most insignificant of these allegations and simply ignores the more serious. I do not of course dispute that a number of international administrative tribunals do not have oral hearings and do not provide an opportunity for the examination or cross-examination of witnesses as to matters of fact; nor do I suggest for a moment that the failure to provide these facilities would provide grounds for seeking to invalidate their awards. But here we are confronted with something very different and something much more disturbing. This was a process embarked upon by the British Government without the consent of either of the two Rulers concerned. The British Government assumed that it was entitled at the time to determine with binding effect a dispute as to sovereignty over the Hawar Islands, title to these islands being contested between the two sheikhdoms of Bahrain and Qatar. No thought seems to have been given to the question whether, in the light of the status of the two sheikhdoms at the time and their relationship with Britain as the Protecting Power, such a determination could properly be made by the British Government without the express consent of both Rulers.

20. Even supposing that the Court were to hold, contrary to Qatar's submission, that the Ruler of Qatar *did* consent to the British Government's acting as sole arbitrator in a process of arbitration, there are other serious procedural violations in the conduct of the Weightman enquiry in 1939 which preclude, in Qatar's view, the British Government's decision of 11 July 1939, from being treated as an arbitral award having the force of *res judicata*. Our opponents invited us to look carefully at what Professor Reisman terms Weightman's "memorandum of fact and law" (Memorial of Qatar, Ann. III.195, Vol. 7, p. 497), and that is what I now propose to do. If Professor Reisman is satisfied that this constituted in his words "a very careful examination of the evidence and of reasons and amply fulfilled the requirement for a reasoned decision in arbitrations of the time" (CR 2000/12, pp. 55-56, para. 36), then he and I must inevitably continue to disagree.

Let us look — and I take this simply by way of example — at the fundamental question: what documentary and other evidence should an arbitrator take into account?

21. In paragraph 2 of his letter to Fowle of 22 April 1939 (the so-called "memorandum of law and fact"), Weightman seeks to list what he characterizes as "the documents in this case" (Memorial of Qatar, Ann. III.195, Vol. 7, p. 497). He lists five such documents and Qatar would simply point out that one out of the five documents in this list, the so-called "preliminary statement" by Bahrain, had been deliberately withheld from the Ruler of Qatar. So also had the initial Belgrave letter to the Political Agent of 28 April 1936, which had formulated the Bahrain claim to the Hawar Islands. The denial of these two documents to the Ruler of Qatar was a fundamental breach of the principle of equality of arms, since the Ruler of Qatar had in the course of the "enquiry", on several occasions pleaded with Weightman to be informed of the grounds which the Ruler of Bahrain had invoked to sustain his claim of title to the Hawar Islands.

22. The fact that these important documents which contain evidence advanced on behalf of the Ruler of Bahrain were withheld from the other claimant — the Ruler of Qatar — is sufficient in itself to render invalid any subsequent decision on the matter of the Hawar Islands in favour of Bahrain.

23. There is also the consideration that Weightman, in his letter of 22 April 1939, took into account as evidence materials which had not even been put to the Ruler of Qatar, and to which the Ruler of Qatar otherwise had no access, namely, statements in Lorimer's *Gazetteer of the Persian Gulf, Oman and Arabia*, at that time, in 1939, a confidential document; and, also, he took into account as evidence Agency archives dating from 1909 — again, archives to which the Ruler of Qatar had no access; and he took into account his own "knowledge" derived from two brief visits to Hawar in 1938 and 1939 after the Bahraini "occupation" of the islands in 1937 (Memorial of Qatar, para. 6.93).

24. Weightman was not of course a lawyer, and the overriding importance of maintaining a stance of complete impartiality and objectivity during the course of his "enquiry" may not have been sufficiently explained to him. Even so, his conduct of the "enquiry" in 1938 and 1939 was, as is only too apparent, considerably less than satisfactory.

The link between the 1936 "provisional decision" and the final decision of 11 July 1939

25. Mr. President, Members of the Court, the Court may well conclude that the procedures followed by the British Government between 1936 and 1939 to determine the disputed question of title to the Hawar Islands were flawed from the outset. The problem — the real problem — was the coincidence in time of the pursuit of the oil concession negotiations from 1936 onwards with the beginnings of the "enquiry" into the appurtenance of Hawar. There was no way in which Weightman could act in a quasi-judicial manner in the "enquiry" while it was being assumed, indeed taken for granted, in the parallel oil concession negotiations that the Ruler of Bahrain was the person entitled to grant an oil concession covering *inter alia* the Hawar Islands. The only result was the extraordinary situation in which, in May and June 1938, Weightman and Fowle can be seen *combining* their roles as advisers to the Secretary of State for India in London as to the division by the Ruler of Bahrain of his unallotted area, including the Hawar Islands, with inviting the Ruler of Qatar to state his case on the ownership of Hawar (see Reply of Qatar, paras. 4.219-4.249, especially the correspondence referred to in paras. 4.227 and 4.233).

26. The only satisfactory solution, Mr. President, Members of the Court, would have been to reverse the priorities — that is to say, initially to determine the question of title to the Hawar Islands as between Bahrain and Qatar before embarking on any oil concession negotiations over the "unallotted area". This is what the British authorities should have given priority to *already* in 1936. The authorities in the Gulf and in London certainly knew in 1936, even before a claim to the Hawar Islands was advanced on behalf of the Ruler of Bahrain, that the Ruler of Qatar believed that the Islands belonged to him: otherwise, why would Fowle, when recommending that the British Government make a "provisional decision" in favour of Bahrain, put the "burden of disproving" the Ruler of Bahrain's claim on the Ruler of Qatar?

27. Alternatively, the British authorities could have permitted the negotiations for an oil concession over the "unallotted area" to proceed in 1936, but excluding the Hawar Islands from that "unallotted area" at least until the dispute over title to the islands had been resolved. This would certainly have meant a delay in the exploitation of any potential sources of oil on the Hawar Islands, but it would have given legal security to whichever Ruler it was determined had title to the islands.

28. Fowle, as Political Resident, eventually recognized this, but too late. The action which he recommended in 1938 as part of his initial proposals to solve the Hawar dispute — that he should write a second letter to the Ruler of Bahrain asking him to postpone negotiations with the oil companies until the ownership of Hawar and Fasht Dibal had been decided — might have worked had he recommended it in 1936. Such a recommendation could have avoided the issuance of a "provisional decision" on Hawar in favour of Bahrain and a continuation of the oil concession negotiations on the assumption that the Ruler of Bahrain was entitled to grant a concession covering the Hawar Islands as part of Bahrain's "unallotted area". And the oil companies could have been told simply that the issue of which of the two sheikhdoms — Bahrain or Qatar — had title to the disputed islands must first be settled. But of course, by 1938, the oil companies concerned were determined to have a quick solution. As the Court will recall, Longrigg of PCL was wholly opposed to any postponement of the oil concession negotiations in 1938, and Fowle rapidly withdrew this element of his proposals.

The relevance and effect of the 1939 British decision in the current proceedings

29. But, Mr. President, Members of the Court, enough of what might have been. The question is: what legal effect should be attributed in the year 2000 to a decision by the British Government in the year 1939 on the question of title to the Hawar Islands? In the submission of Qatar, the Ruler of Qatar had not given his consent to any process of arbitration involving the British Government as sole arbitrator, the requirement of consent being that of *informed* consent. In the alternative, Qatar submits that, even if the Court were to find that informed consent had been given, the 1939 decision would still not be binding on Qatar by reason of the procedural violations in the conduct of the enquiry which Qatar has invoked. In either case, the result would be that the 1939 decision was not opposable to Qatar as a binding arbitral award or administrative decision. At the very most, the 1939 decision is no more than a fact in the present case. It is part of the record, but not binding as an arbitral award or as an administrative decision. In particular, it is not *res judicata*.

30. Mr. President, Members of the Court, that concludes my presentation this morning. As this is the last occasion on which I will be appearing before you, at least in the present proceedings,

I would like to express my sincere thanks to you, Mr. President, and to all the other Members of the Court, for the unfailing patience and courtesy with which you have always been prepared to hear me. May I suggest, Mr. President, that you now call on Professor Quéneudec who will be addressing you on the maritime delimitation, but you may think that, as the time is now just after 11 o'clock, it might be preferable to take an early pause for coffee and then resume thereafter. It is entirely up to you, Mr. President.

Le PRESIDENT : Je vous remercie, sir Ian. La Cour va suspendre maintenant pour un quart d'heure. Et nous attendons de passer de la terre vers la mer.

L'audience est suspendue de 11 h 10 à 11 h 25.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole au professeur Jean-Pierre Quéneudec.

M. QUENEUDEC :

LA DÉLIMITATION MARITIME

Monsieur le président, Madame et Messieurs les juges,

1. Il me revient de faire le point en matière de délimitation maritime. Faire le point : si c'est là un impératif essentiel dans toute navigation, il s'impose ici d'autant plus que, pendant le premier tour des plaidoiries, la Partie adverse a cherché, semble-t-il, à accréditer l'idée que nous avions perdu le nord, que notre compas gyroscopique nous faisait mettre le cap sur des mirages, en somme que notre boussole juridique était totalement déréglée.

2. Je voudrais tout de suite rassurer les conseils de Bahreïn qui se sont exprimés à ce sujet. Qatar ne cherche nullement à provoquer un grand schisme dans le droit des délimitations maritimes. Qatar n'a jamais prétendu qu'il convenait de renverser les principes établis du droit de la mer et qu'il fallait trancher la présente affaire comme si la mer dominait la terre. Qatar ne considère pas en particulier que l'application en l'espèce du principe de non-empiètement conduirait inévitablement à ce qui a été appelé de l'autre côté de la barre «un révisionnisme de vaste envergure» (CR 2000/15, p. 36, par. 44). Qatar n'estime pas davantage que la mise en œuvre

de la méthode consistant à tracer une frontière maritime entre côtes principales se traduirait par «un révisionnisme territorial à grande échelle d'un bout de la planète à l'autre» (*ibid.*, p. 49, par. 67). Ce sont là certainement des formules où l'exagération occupe une grande place. Et, comme disait Talleyrand, «tout ce qui est exagéré est insignifiant».

3. Au risque de décevoir nos éminents contradicteurs, il me faut ajouter que nous sommes entièrement d'accord avec eux sur une chose : le problème de la délimitation maritime est un *problème second* dans la présente instance. Un problème second, mais non pas un problème secondaire. Il est second en ce sens qu'il ne pourra être résolu par la Cour qu'après qu'elle aura tranché les questions territoriales. Comme l'a déclaré le professeur Reisman, *"the Court's disposition of the territorial issues — the Hawars and Zubarah — will significantly affect the maritime boundary"* (CR 2000/14, p. 34, par. 2 *d)*). Nous partageons ce point de vue.

4. Cela est évident en ce qui concerne le secteur sud de la zone de délimitation. Puisque dans ce secteur, en effet, le tracé de la frontière maritime dépendra de la réponse qui sera donnée à la question de la souveraineté sur les îles Hawar et sur ce que Bahreïn a appelé «la région ou la zone de Zubarah».

5. Dans le secteur nord, le tracé de la ligne de délimitation pourra également être affecté, de manière indirecte, par la solution apportée à ces questions territoriales. Il pourra en être ainsi dans la mesure où la Cour, conformément à une jurisprudence bien établie, aura à cœur de dégager une solution qui soit globalement équitable pour les deux Parties. La Cour sait mieux que personne que, dans l'ordre international, le règlement judiciaire n'est qu'un succédané au règlement diplomatique par voie de négociations.

6. S'il y a bien accord entre les deux Etats pour reconnaître le caractère second ou dérivé de la délimitation maritime en l'espèce, le premier tour des plaidoiries a toutefois confirmé l'opposition radicale de Qatar et de Bahreïn sur tous les autres aspects du problème de délimitation de leurs espaces maritimes respectifs. Cette opposition se manifeste principalement de deux façons. Elle apparaît, d'une part, dans la vision qu'ont les deux Etats de la situation de fait qui caractérise la présente délimitation. Elle se traduit, d'autre part, dans l'application qu'ils font des règles du droit de la mer en l'espèce.

7. Je me propose donc d'envisager successivement les éléments de fait et les considérations de droit qui paraissent les plus remarquables, en me limitant à ce qui semble le plus important. Autant dire qu'il ne saurait être question de reprendre dans le détail tous les points qui nous séparent des positions défendues par les conseils de Bahreïn. Et ce d'autant plus que nous y avons déjà en grande partie répondu, soit dans nos pièces écrites, soit dans les plaidoiries du premier tour. Il ne saurait non plus être question de théoriser *ad nauseam* sur les perspectives du droit de la délimitation maritime; car les circonstances propres à la présente affaire tendent à démontrer, une fois de plus, que chaque affaire de délimitation maritime est bien un *unicum*.

8. Les quelques observations qui vont suivre n'ont, en conséquence, pas d'autre ambition que de faire une mise au point. Voyons d'abord la situation de fait.

I. LA SITUATION DE FAIT

9. Il n'est pas besoin de s'appesantir longuement sur ce qui a été dit de l'autre côté de la barre. Ce qui n'a pas été dit est beaucoup plus éloquent et est tout à fait révélateur de la vision bahreïnite des faits et circonstances de l'affaire.

10. Aux yeux de Bahreïn, la situation pourrait se résumer ainsi : étant un Etat intrinsèquement archipélagique, la destinée de Bahreïn est d'incorporer à son territoire tout élément naturel qui apparaît à la surface des flots, ainsi que la majeure partie de l'espace marin compris dans la zone de délimitation. Ce serait là le fait géographique prépondérant, qui effacerait tous les autres. *"Its archipelagic status is a geographical fact"*, nous a-t-on dit (CR 2000/14, p. 37, par. 7).

11. Pris au piège de ce refrain qu'ils ont entonné et qui ressemble fort au chant des sirènes, les conseils de Bahreïn n'ont pas hésité à affirmer que Qatar avait implicitement reconnu la souveraineté de Bahreïn sur toutes les formations insulaires et autres de la zone de délimitation, puisque, ont-ils dit, Qatar refusait de prendre en compte ces formations pour le tracé de la ligne de délimitation (CR 2000/15, p. 27, par. 26; p. 40, par. 50). Il va sans dire qu'il s'agit là d'une présentation inexacte de la position de l'Etat de Qatar.

12. Il est inutile d'épiloguer davantage sur la manière dont Bahreïn a présenté la situation en déclarant qu'il s'agissait d'une délimitation entre un Etat continental d'une part, et un Etat multi-insulaire ou archipélagique d'autre part (CR 2000/16, p. 40, par. 1).

13. De même, il n'est pas nécessaire d'insister sur le fait que la situation géographique de Bahreïn n'a ici rien de comparable avec celle de la Norvège dans l'affaire des *Pêcheries* en 1951, ni avec celle de la Guinée-Bissau dans l'arbitrage relatif à la frontière maritime entre la Guinée et la Guinée-Bissau en 1985.

14. De façon assez étonnante, Bahreïn semble oublier que la présente affaire de délimitation concerne deux Etats riverains du golfe Arabo-Persique.

[Illustration 1 : *General setting of the Arabian Gulf*]

Plus précisément, la délimitation doit intervenir dans la partie la plus resserrée du Golfe. Il s'agit, de surcroît, de la partie du Golfe où les eaux sont les moins profondes. Cela est particulièrement vrai dans le secteur sud, où l'on a peu de chances de rencontrer un porte-avions ou un super-pétrolier. Dans ce secteur, la délimitation est effectivement une «délimitation de proximité» ou une «délimitation à brève distance», pour utiliser les expressions qu'a employées le professeur Weil (CR 2000/15, p. 18, par. 4; p. 20, par. 6). On ne peut cependant pas prétendre, comme l'a fait le conseil de Bahreïn, que «la délimitation à effectuer est essentiellement une délimitation de mer territoriale» (*ibid.*, p. 17, par. 3); car la Cour est invitée à tracer une ligne unique de délimitation maritime. Cet aspect est important. Nous l'avons souligné au premier tour (CR 2000/10, p. 50-51, par. 35-38). Et il convient d'envisager cet aspect dans le cadre de la situation géographique d'ensemble. En d'autres termes, on ne saurait perdre de vue que la ligne unique de délimitation doit être tracée dans un espace maritime très particulier. Nous ne sommes pas ici confrontés à une question de délimitation entre un archipel océanique *(mid-ocean archipelago)* et un Etat côtier riverain de l'océan Atlantique.

15. D'autre part, on ne doit pas non plus oublier que l'opération de délimitation est à effectuer à partir des côtes, en tenant compte de leurs caractéristiques respectives. Or, partir des côtes, c'est prendre en considération la façade côtière, c'est-à-dire la ligne de côte représentée sur les cartes par le trait de côte. Nous l'avons déjà dit (CR 2000/9, p. 40, par. 17-18). Partir des côtes, ce n'est pas commencer par faire intervenir une sorte de «côte génétiquement modifiée», comme il existe des organismes génétiquement modifiés dont on parle beaucoup aujourd'hui.

16. C'est pourtant ce que Bahreïn n'a cessé de faire, suivant un processus tout à fait artificiel. Qu'avons-nous entendu, en effet ? On nous a dit qu'il fallait prendre en compte «la côte

juridique», que «la côte juridique» d'un Etat multi-insulaire était constituée par une série de lignes reliant entre elles les îles et autres formations les plus éloignées, et que les points de base pertinents pour le tracé de la ligne de délimitation dérivaient de «la côte juridique» ainsi définie. Et le professeur Reisman en a déduit que *"the critical question in determining Bahrain's coast with respect to Qatar is what are its basepoints"* (CR 2000/14, p. 37, par. 9). Mon ami Michael Reisman me permettra de lui faire remarquer que c'est peut-être mettre la charrue avant les bœufs.

17. Quelle est, en effet, l'implication de cette façon d'identifier les côtes pertinentes ?

[Illustration 2 : *Base points used by Bahrain (Bahrain's judges' folders Nos. 110 and 111) alleged as representing the coasts*]

Les côtes se trouvent réduites à une série de points. Sans doute, est-ce ce à quoi on doit parvenir pour procéder techniquement au tracé d'une ligne de délimitation. Mais toute la question est de savoir si ce procédé technique est à mettre en œuvre comme point de départ de l'opération de délimitation. En joignant entre eux ces différents points, on voit que la prétendue «ligne côtière» de Bahreïn est tout à fait irréelle et n'a aucun rapport avec la véritable façade côtière de Bahreïn. Peut-on, dès l'abord, réduire ainsi les côtes ? Partir de là, n'est-ce pas commencer par fausser complètement la situation géographique ? La représentation des côtes des deux Etats par ces différents points donne-t-elle une vue de la réalité côtière, telle qu'elle apparaît en particulier sur les cartes marines ?

18. Soulever ces différentes questions, c'est du même coup montrer le caractère totalement artificiel de la perception qu'ont nos adversaires de la situation concrète. De surcroît, cette façon d'aborder le problème de délimitation est non seulement inacceptable, mais elle est aussi viciée par le fait que Bahreïn part d'un postulat — indémontrable et indémontré — que tout ce qui se trouve entre les côtes des deux Etats est nécessairement placé sous sa souveraineté. Ce faisant, Bahreïn feint d'oublier que Qatar peut tout autant prétendre à un titre sur plusieurs hauts-fonds découvrants existant dans la zone de délimitation.

19. Mais cette façon de faire présente incontestablement pour Bahreïn un avantage. Elle lui évite de procéder à une étude comparative des côtes pertinentes des deux Etats. Elle lui permet, au contraire, de nier l'existence d'une quelconque disproportion entre les longueurs côtières. Il est

assez significatif de relever que Bahreïn ne s'est guère préoccupé d'évoquer la notion de proportionnalité, soit à titre de facteur, soit en tant que test du résultat équitable. Plus exactement, Bahreïn n'a mentionné la proportionnalité qu'en une seule occasion, en prétendant qu'il y avait une stricte proportionnalité entre les lignes de côtes de Qatar et de Bahreïn.

[Illustration 3 : *Map 113 of Bahrain's judges' folders showing proportionality of Bahrain's and Qatar's coastlines*]

20. Comme on le voit sur la carte 113 du dossier d'audience présenté par Bahreïn au premier tour, deux lignes rouges, de longueur rigoureusement égale, ont été tracées. L'une, à droite, représente plus ou moins fidèlement ce que nous avons nous-mêmes considéré comme étant la côte pertinente de Qatar. L'autre, à gauche, est censée représenter la côte de Bahreïn. Mais c'est tout de même une ligne assez curieuse, et ceci à un triple point de vue. D'une part, hormis les îles de Janan et Hawar, elle prend appui uniquement sur deux hauts-fonds découvrants, Qit'at ash Shajarah et Fasht ad Dibal. D'autre part, elle est tracée en prenant appui sur des formations naturelles dont Qatar a démontré par ailleurs qu'elles lui appartenaient. Enfin et surtout, cette prétendue «ligne de côte» court principalement sur des étendues d'eau. Qu'importe ! Cela permet à Bahreïn de dire qu'il n'y a aucune différence entre les deux côtes. Mais qui ne voit qu'il s'agit, une fois de plus, d'un tour de passe-passe ?

21. L'attirance que Bahreïn ressent manifestement pour la prestidigitation ne se limite cependant pas à la manipulation des éléments de fait. Elle se retrouve également dans la manière de jongler avec plusieurs considérations d'ordre juridique.

II. L'APPLICATION EN L'ESPÈCE DES RÈGLES DU DROIT DE LA MER

22. Une grande partie des exposés présentés au nom de Bahreïn sur les questions proprement juridiques que l'on rencontre dans cet aspect de l'affaire a porté sur les notions d'île et de haut-fond découvrant. A travers l'examen de la définition de ces notions, le débat a aussi porté sur la fonction assignée aux expressions «laisse de pleine mer» et «laisse de basse mer». Il ressort, à l'évidence, que nos adversaires ont, à cette occasion, tenté de semer le trouble dans les esprits.

23. Et, à propos de trouble, il en est un sur lequel je souhaiterais attirer l'attention de la Cour. Le 13 juin, au cours de l'audience de l'après-midi, l'un des conseils de Bahreïn a expressément

déclaré : *"The international legal conception of an island did not crystallize until 1982"*. J'avoue avoir éprouvé un certain étonnement devant une telle affirmation.

Le professeur Reisman voudra bien m'excuser de lui faire remarquer que la cristallisation de la notion juridique d'île n'est nullement le résultat de la Troisième Conférence des Nations Unies sur le droit de la mer. Les auteurs de la convention de 1982 ont simplement repris dans l'article 121, paragraphe 1, la définition de l'île que donnait déjà l'article 10 de la convention de Genève de 1958 sur la mer territoriale. On pourrait même, à la limite, faire remonter la cristallisation de cette notion à la conférence de codification réunie à La Haye en 1930 sous les auspices de la Société des Nations.

Dès lors, tenter d'expliquer les incertitudes portant sur le statut juridique de certaines *"maritime features"* par la consécration tardive ou récente de la notion juridique d'île relève, j'ai le regret de le dire, de la pure fantaisie.

24. Qui plus est, partant de l'idée juste selon laquelle la laisse de pleine mer est pertinente pour déterminer si une particularité maritime est une île, le professeur Reisman nous a dit que, si tel était le cas, la laisse de pleine mer était alors aussitôt remplacée par la laisse de basse mer pour identifier la ligne de côte sur cette île ou pour déterminer l'existence d'un haut-fond découvrant que le droit international autorise à prendre comme point de base pour la détermination de la côte (CR 2000/14, p. 39, par. 14). C'est, semble-t-il, vouloir aller un peu vite en besogne. Il aurait peut-être été bon de s'interroger un peu plus sur la fonction exercée par la laisse de haute mer dans le droit de la mer contemporain, avant de la faire disparaître rapidement, comme par enchantement.

25. La même remarque peut être faite, jusqu'à un certain point, à propos de la question, posée par le professeur Weil, de savoir ce qu'il faut entendre par «terre» et par «territoire». Il a rappelé que Qatar déniait cette qualité de terre aux hauts-fonds découvrants. Ce qui est exact. Cependant, emporté par son élan, il a affirmé : «pour Qatar les hauts-fonds découvrants ne sont pas de la terre; ils sont de la mer, ils sont de l'eau» (CR 2000/15, p. 26, par. 22). Pour être relativement aimable et plaisante, la formule n'en est pas moins inexacte. Il suffit d'avoir quelques notions de navigation maritime pour savoir qu'un découvrant ou une roche affleurante ne sont certainement pas de l'eau et qu'il vaut mieux les éviter.

26. Ce que les conseils de Bahreïn ont omis de préciser, c'est que le droit de la mer assigne à la laisse de pleine mer une fonction spécifique. Elle permet, en effet, et elle seule permet de déterminer si l'on est en présence d'une terre, d'une *terra firma*, c'est-à-dire d'une terre émergée. Le recours à la notion de laisse de pleine mer sert, autrement dit, à déterminer ce qui constitue le territoire terrestre d'un Etat côtier, au sens où l'entend en particulier l'article 121, paragraphe 2, de la convention des Nations Unies sur le droit de la mer. Il suffit, pour s'en convaincre, de se référer au *Dictionnaire hydrographique* de l'Organisation hydrographique internationale. Sous la rubrique «territoire terrestre», on peut y lire : «en droit de la mer, territoire insulaire ou continental émergé à marée haute» (OHI, *Dictionnaire hydrographique*, première partie, vol. 2, publication spéciale n° 32, 5e éd., 1998). La version anglaise de ce même dictionnaire, publiée quatre ans auparavant, indique, sous l'expression *"land territory"*, *"Continental or insular land masses that are above water at high tide"* (IHO, *Hydrographic Dictionary*, 5th ed., 1994).

27. Les hauts-fonds découvrants ne sont certainement pas de l'eau. Mais ils ne sont pas non plus regardés comme appartenant au territoire terrestre d'un Etat. Ce n'est pas parce que, dans certaines situations et sous certaines conditions, un Etat côtier peut utiliser la laisse de basse mer sur un haut-fond découvrant afin de fixer la limite extérieure de sa mer territoriale ce n'est pas pour cela que ce haut-fond découvrant doit être considéré comme faisant partie du territoire terrestre de l'Etat côtier. Cela ne suffit pas à en faire un élément représentatif de la côte d'un Etat aux fins d'une délimitation maritime avec un Etat voisin.

28. Mais il en découle une autre conséquence, sur laquelle Qatar a déjà attiré l'attention de la Cour et qu'il suffira donc de rappeler d'un mot. Ne faisant pas partie du territoire terrestre d'un Etat, un haut-fond découvrant est insusceptible d'appropriation. La position juridique traditionnelle, que Qatar s'est borné à appliquer ici, repose d'ailleurs sur la simple raison de bon sens qu'aucune activité souveraine ne peut vraiment s'exercer les pieds dans l'eau. Par conséquent, toutes les prétendues effectivités alléguées par Bahreïn pour affirmer sa souveraineté, notamment sur Fasht Dibal, ne peuvent pas, en tout état de cause, être prises en considération. D'autant plus qu'elles sont de surcroît hautement discutables. Ni l'érection de piliers ou de marques, ni la conduite de patrouilles maritimes, ni les activités de pêche ne sont juridiquement créatrices

d'effectivités, ainsi que Qatar l'a précédemment démontré (CR 2000/5, p. 40, par. 22; CR 2000/17, p. 30-33, par. 16 et suiv.).

29. Maintenant, en ce qui concerne plus particulièrement deux de ces hauts-fonds qui sont revendiqués par la Partie adverse et que Bahreïn souhaite voir jouer un rôle dans la présente délimitation, je voudrais apporter quelques précisions supplémentaires.

30. S'agissant en premier lieu de Qit'at Jaradah, tout ou presque a déjà été dit. Je ferai simplement observer que, dans sa plaidoirie du 13 juin, le professeur Reisman a reconnu que les cartes de l'amirauté britannique ne caractérisaient pas Jaradah comme une île. De façon bizarre, il a pourtant tenté d'expliquer que cela était dû au fait que : *"There were inconsistent reports about the status of Qit'at Jaradah, due . . . to inclarity in the legal conception of an island . . ."* Et il a ajouté qu'à l'avenir les cartes nautiques — sans toutefois préciser lesquelles — indiqueraient que c'est bien une île (CR 2000/14, p. 46, par. 29). La Cour appréciera si l'on peut se fonder sur des cartes qui n'ont pas encore vu le jour.

31. Ainsi que nous avons eu l'occasion de le souligner au premier tour, la situation physique et, partant, l'éventuel statut juridique, de Qit'at Jaradah n'ont cessé d'être soumis à de perpétuelles variations. Il n'en demeure pas moins que, sur les cartes nautiques, Jaradah a constamment été décrit comme un haut-fond découvrant.

32. Quant à Fasht al Azm, on peut se limiter à trois brèves remarques.

33. Le professeur Reisman a critiqué le rapport établi par le professeur Rabenhorst, en arguant notamment du fait que celui-ci s'était fondé sur des cartes terrestres publiées en 1977 et non sur des cartes marines. Sans entrer dans une discussion au sujet de l'existence ou de l'absence de levés hydrographiques qui auraient permis de donner une représentation de cette étroite zone comprise entre l'île de Sitrah et Fasht al Azm, je me bornerai à signaler le fait que les cartes terrestres utilisées par le professeur Rabenhorst coïncident de façon quasi parfaite avec les cartes marines de la région concernée.

34. La deuxième remarque que l'on peut faire, s'agissant toujours de Fasht al Azm, a trait au contenu d'une étude technique rédigée en mars 1982 par une ressortissante de l'Etat de Bahreïn. Il s'agit d'une étude intitulée «Activités de dragage et d'assèchement le long des côtes de Bahreïn», qui a été reproduite en annexe au contre-mémoire de Qatar et que Bahreïn paraît avoir négligée

(contre-mémoire de Qatar, annexe IV.24, vol. 4, trad. fr. p. 79, p. 167 de l'original anglais). On peut y lire, à propos de la zone asséchée du site des usines pétrochimiques, qu'elle «est reliée à Sitra par une chaussée en remblai d'accès de 1250 mètres de long». Puis, l'étude poursuit :

> «Deux chenaux seront dragués. Un des chenaux sera utilisé pour l'eau de refroidissement... L'autre chenal est un passage alternatif au *chenal existant pour les pêcheurs, qui est comblé à certains endroits par le remblai d'assèchement.*» (*Ibid.*, trad. fr. p. 100, p. 187 de l'original anglais ; les italiques sont de nous.)

Le texte de cette étude fait expressément renvoi à la figure 9 qui y est incorporée. Et la figure 9 en question est un croquis descriptif établi le 7 mai 1981. Ce croquis montre en traits tiretés ce qui est appelé le «chenal pour les pêcheurs actuellement fermé» et, un peu plus loin sur le croquis, le «chenal alternatif pour les pêcheurs». Je prie respectueusement la Cour de jeter un coup d'œil à ce croquis (contre-mémoire de Qatar, vol. 4, trad. fr. p. 101, p. 188 de l'original anglais). Quoi qu'il en soit, l'existence d'une séparation naturelle entre Sitra et Fasht al Azm se trouve semble-t-il ainsi confirmée.

35. A titre de dernière remarque au sujet de Fasht al Azm, il convient de rappeler, une fois encore, que Bahreïn tend à en donner une image trompeuse.

[Illustration 4 : *British Admiralty Chart 3790*]

Sur les cartes présentées par la Partie adverse, Qit'at at Shajarah est attaché à Fasht al Azm. Ce qui n'est nullement le cas, comme le prouve la carte marine anglaise la plus récente, à savoir la carte n° 3790 de 1993 corrigée au début de cette année. Sur cette carte, on voit nettement qu'il s'agit de deux hauts-fonds distincts, l'espace les séparant étant parsemé de têtes de corail.

36. J'en viens à présent, Monsieur le président, aux critiques qui nous ont été adressées en ce qui concerne la méthode de délimitation préconisée par Qatar. On nous a reproché, en particulier, d'avoir recours à l'idée du tracé d'une ligne provisoire d'équidistance établie en prenant uniquement en considération les côtes principales des deux Etats, c'est-à-dire d'avoir eu recours à la méthode qu'on a appelée *"mainland-to-mainland"*. Cette méthode, nous a-t-on dit, ne serait pas seulement ambiguë — on ne voit pas en quoi d'ailleurs; elle serait également inacceptable juridiquement et politiquement (CR 2000/15, p. 40, 41 et 48). Mais la critique qu'en a faite de façon éloquente mon ami le professeur Weil ne tient pas. Cette critique repose, en effet, tout entière toujours sur le même postulat, qui peut s'énoncer ainsi : tous les éléments naturels situés

entre la côte occidentale de Qatar et la côte orientale de Bahreïn sont sous souveraineté bahreïnite et doivent servir de points de base pour la fixation de la frontière maritime. Partant de ce postulat, on prétend ensuite que Qatar nie cette souveraineté bahreïnite parce qu'une limite maritime tracée en tenant compte de ces formations intermédiaires serait trop proche de sa côte. Et le tour est joué. On peut alors conclure, je cite ce qu'a déclaré le professeur Weil : «Qatar part ainsi de la souveraineté de Bahreïn sur les formations intermédiaires pour nier cette souveraineté au nom de ses conséquences maritimes» (CR 2000/15, p. 41, par. 52).

37. Or, répétons-le une fois de plus, si les droits de Bahreïn sur certains îlots et hauts-fonds découvrants ne sont pas contestés, ils ne portent cependant pas sur toutes ces particularités maritimes. Et surtout, ces différentes particularités ne sont pas des éléments essentiels lorsqu'on les replace dans le contexte géographique général. N'y a-t-il pas d'ailleurs de nombreux cas dans lesquels une frontière maritime entre Etats a été établie sans tenir compte de petites îles ou d'îlots ?

38. Quant à l'ajustement de la ligne d'équidistance que nous avons eu l'audace de suggérer en tenant compte des circonstances géographiques et autres, il ne trouve pas davantage grâce aux yeux de nos adversaires. Non seulement ils nient toute disparité des longueurs côtières, mais encore ils estiment qu'en invoquant la fameuse ligne de 1947 nous agitons un «fantôme» (CR 2000/14, p. 34, par. 2) et que la référence que nous faisons à la ligne Boggs-Kennedy n'est rien d'autre qu'un appui sur «une planche ... pourrie» (CR 2000/16, p. 10, par. 93).

39. Constatant que le rapport Boggs-Kennedy ne faisait aucune mention de la ligne tracée par les Britanniques en 1947, le professeur Weil en a déduit que cette ligne n'avait aucune importance puisqu'elle avait échappé dit-il «à deux experts aussi avertis des choses du Golfe» (CR 2000/16, p. 10, par. 92).

40. Rappelons que Boggs et Kennedy avaient suggéré une ligne de délimitation en se fondant exclusivement sur des considérations géographiques et techniques, mais en indiquant clairement que leur but était de proposer une solution équitable. Ils ne s'étaient certes pas fondés sur des considérations juridiques, n'étant pas eux-mêmes des juristes. Mais faut-il croire que seuls des juristes sont à même de proposer une solution équitable ?

41. De plus, le conseil de Bahreïn s'est bien gardé de signaler qu'en 1959, soit douze ans après la ligne britannique de 1947, le même Kennedy faisait expressément référence à cette ligne

de 1947 dans la lettre qu'il adressait au Foreign Office. Cette lettre, d'abord publiée en annexe au mémoire de Qatar (mémoire de Qatar, annexe IV.223, vol. 11, p. 180, trad. fr. ; p. 301 de l'original anglais), a pourtant été également insérée dans le dossier d'audience préparé par Bahreïn (*Bahrain judges' folders, Vol. 2, No. 91*).

42. Au total, il ne nous a pas semblé que le premier tour des plaidoiries orales de Bahreïn devait nous amener à modifier en quoi que ce soit la demande présentée par Qatar en matière de délimitation maritime.

[Illustration 5 : *The single maritime boundary claimed by Qatar*]

43. Bahreïn ne nous a pas convaincus du bien-fondé de sa position. Il nous reste à souhaiter que Bahreïn n'a pas davantage convaincu la Cour. Son insistance sur sa qualité d'Etat multi-insulaire ou archipélagique nous a paru hors de propos. Sa vision de la géographie côtière nous a semblé donner une représentation déformée de la situation concrète. Son interprétation des règles du droit de la mer applicables à la délimitation nous a paru elle-même sujette à caution.

Monsieur le président, ayant délibérément réduit ce dernier propos à quelques remarques inspirées par les plaidoiries de la Partie adverse, j'ai parfaitement conscience du caractère incomplet de ma présentation. Puissent néanmoins ces quelques remarques être utiles à la Cour lorsqu'elle entamera son délibéré.

Monsieur le président, Madame et Messieurs les juges. Je vous remercie de votre bienveillante attention. Je vous demanderai, pour terminer, Monsieur le président, de bien vouloir appeler à la barre l'agent de l'Etat de Qatar, le Dr. Abdullah Al-Muslemani.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. And I now give the floor to His Excellency, Dr. Abdullah bin Abdulatif Al-Muslemani.

Dr. AL-MUSLEMANI:

1. Mr. President, distinguished Members of the Court, it falls to me to make a few remarks to close the presentation of Qatar's case.

2. At the outset, I feel obliged to comment upon the statements made by the distinguished Agent of Bahrain, with regard to Qatar's so-called "expansionism". Mr. President, Members of the Court, in no way can Qatar be called expansionist. In fact, it is Bahrain who might be called

expansionist, for claiming the Hawar Islands, which lie so close to Qatar's shores, or Zubarah, which is an integral part of the mainland, not to mention its grossly exaggerated maritime claim.

3. The Agent of Bahrain also said that it would be "intolerable" if the Hawar Islands were taken from Bahrain. But this ignores the fact that these islands are Qatar's territory, which was taken away from Qatar illegally, over 60 years ago. For Bahrain to say that it would be intolerable for Qatar to recover territory that is its own is certainly an abuse of language.

4. Turning now to Qatar's case, the Court will have seen, from Qatar's first and second round presentations, that Qatar's basic case has remained fundamentally unchanged during the course of these proceedings.

5. As regards the territorial issues in the case, I can first be very brief on the subject of Zubarah. In my opening statement I mentioned Qatar's long-held conviction that Bahrain was using Zubarah purely as a litigation tactic and not as a serious claim[1]. This has now been borne out by Bahrain's own oral pleadings, which have devoted very little attention to Zubarah. In fact I am sure that Bahrain would hardly have argued so strongly for application of the principle of *uti possidetis* if it had really been serious in its claim to Zubarah. As has now become perfectly clear, the only real territorial issue in this case is the question of sovereignty over the Hawar Islands.

6. As regards the Hawar Islands, Qatar is confident that your judgment will restore the territorial integrity of Qatar by returning those islands to its sovereignty.

7. I would like to remind the Court that when the Ruler of Qatar protested to the British against the 1939 decision on the Hawar Islands, he pointed out that he could have physically prevented the unlawful occupation of the islands by Bahrain. He added, however, that he had deliberately refrained from resorting to force at that time[2].

8. Qatar has never consented to, or acquiesced in, Bahrain's illegal occupation of the Hawar Islands or the 1939 British decision. It has continued to protest, and has been seeking a peaceful solution to the dispute for many years. During all this time, Qatar has always refrained from any use of force in an attempt to recover the Hawar Islands.

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[1]CR 2000/5, pp. 20-22, paras. 51-59.

[2]See CR 2000/8, p. 46, para. 23.

9. Against this background, the Court will understand why I found it quite disturbing to have to listen to the Agent of Bahrain when, in his opening presentation, he speculated that Qatar would "undoubtedly have invaded" the Hawar Islands if Bahrain had not erected defensive fortifications there[3]. A similar statement was later made by Mr. Paulsson[4]. I found these statements particularly shocking, in the light of the extraordinary efforts that Qatar has exerted over several decades in an attempt to achieve a peaceful settlement of this dispute.

10. Qatar agrees with Bahrain that "Might is not right"[5]. A clear consequence of this precept is that Qatar should not now be penalized for having instead always followed a peaceful policy. And yet it is the perpetuation of an illegal occupation that Bahrain is now seeking, by urging the Court to apply the maxim of *quieta non movere*, or the doctrine of *uti possidetis*. As Professor Salmon has shown, there is no legal basis for the application of such doctrines in this case.

11. It must be emphasized that Qatar has continued to follow its peaceful policy in the face of Bahrain's persistent and blatant violations of the status quo on Hawar. I had occasion to mention these violations in my opening speech[6]. I now regrettably have to return to the subject, following the statements that were made by Sir Elihu Lauterpacht during Bahrain's first round.

12. According to Sir Elihu, "Bahrain considers that the question of the status quo requires no further discussion in this case". This statement was based on Qatar's alleged breach of the status quo in extending its territorial sea, and also on the fact that the King of Saudi Arabia, in his capacity as Mediator, did not intervene in relation to Bahrain's breaches of the status quo[7]. In other words, it appears to be Bahrain's view that if there is no intervention by the King of Saudi Arabia, there can be no breach of the status quo.

13. Mr. President, Bahrain cannot loftily dismiss its numerous violations of the status quo in this fashion. First of all, in the face of Qatar's numerous protests against Bahrain's breaches of the status quo, Bahrain has never responded that it is entitled to commit such breaches because of Qatar's own alleged breach in extending its territorial sea.

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[3]CR 2000/11, pp. 8-9, paras. 8-9.

[4]CR 2000/12, p. 37, para. 172.

[5]CR 2000/11, p. 9, para. 10.

[6]CR 2000/5, pp. 22-24, paras. 60-83.

[7]CR 2000/11, p. 29, para. 51.

14. Second, none of the Parties' status quo undertakings, either in the Second Principle of the Framework, drafted in 1978 and signed in 1983, or in the 1987 and 1990 Agreements, placed any kind of requirement on the Mediator in relation to violations of the status quo. The requirement was on the Parties themselves, to refrain from any action that would change the status quo.

15. Third, as Professor Salmon demonstrated on Tuesday, the Parties subsequently enshrined their status quo undertakings in the 1987 Agreement and, by reference, in the 1990 Agreement. Bahrain cannot just brush aside these solemn and binding undertakings as if they were of no substance.

16. Finally, while other counsel have shown why none of Bahrain's so-called *effectivités* should be given any weight, I would like to address here the specific legal implications of the violations by Bahrain of its status quo undertakings, with regard to activities undertaken by Bahrain on Hawar since 1983. Both the Second Framework Principle and the 1987 Agreement expressly state that any action that changes the status quo with regard to the disputed matters is to be regarded as null and void and as having no legal effect in this respect. This means that the Court is required, *by agreement of the Parties*, to disregard all the activities that Bahrain has undertaken on the Hawar Islands since 22 May 1983, the date of signature of the Principles of the Framework for reaching a Settlement. As counsel for Qatar have shown, a significant number of the so-called *effectivités* that are relied upon by Bahrain fall into this category.

17. It will be recalled that Bahrain suddenly engaged upon activities on Hawar in the period following the so-called "provisional" decision of 1936, in an artificial attempt to strengthen its claim before an official decision was given. However, after Bahrain's failure to find oil in Hawar, the islands were completely neglected by Bahrain except as a military base from which to threaten Qatar's shores, as may be seen from the mosaics provided with Qatar's Memorial[8]. It was only after the filing of Qatar's Application in this case in 1991 that Bahrain suddenly embarked upon numerous new activities on the main Hawar Island[9].

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[8]Memorial of Qatar, App. 7, Vol. 16.

[9]See Reply of Qatar, App. 4, Vol. 6.

18. Moreover, even as I speak, it seems that Bahrain is undertaking round-the-clock work on dredging, reclamation and other activities on the Hawar Islands. Qatar protested these citations last week, and has communicated a copy of its protest to the Court.

19. But even today, it seems that Bahrain has not succeeded in creating a genuine civilian population on Hawar. In its Supplemental Documents, Bahrain provided dozens of photographs of Hawar; but not one, *not one*, showed a school, a hospital, a post office, or any other facility that one would expect to find in a stable civilian community. It is true that in its errata sheet furnished to the Court under cover of its letter dated 12 April 2000, Bahrain stated that the photographs at page 104 had been wrongly captioned, and that they showed not the "Bahrain Defence Force Camp" but "a residential section of the North Village". Strangely, the notice that is pictured at the entrance to this so-called "residential section" is headed "G.H.Q. [or General Headquarters] — Bahrain Defence Force", and continues with the words: "*WARNING*. NO ENTRY. SOLDIERS AND MILITARY VEHICLES IN THIS AREA". I leave it to the Court to decide whether this is really a "residential section of the North Village" or whether it is not, as originally acknowledged by Bahrain, a military camp. The Court will also notice the extraordinary resemblance between the houses pictured on this page and those on the preceding page, which are captioned "Houses, North Village".

20. In any event, by virtue of the agreements between the Parties, all Bahrain's actions on Hawar since 22 May 1983 must of course be regarded as having no legal effect. There is therefore no need for the Court even to examine the questions of whether they are proven or whether they really constitute *effectivités*.

21. Once again, I stress that Bahrain should not be allowed to benefit from its own breaches of its solemn undertakings, and from Qatar's belief in the legal process, rather than the use of force, to resolve this dispute. Bahrain's breaches should not result in the setting of a new precedent in this regard.

22. In this connection, I should briefly refer to Bahrain's argument concerning the alleged *res judicata* character of the 1939 decision. Professor Reisman suggested that the Court should confine itself to declaring the finality of that decision, without concerning itself with the respective

merits of each Party's case on the Hawar Islands[10]. He stated that there is no consent to the reopening of this so-called "arbitral award" in the 1990 Agreement which forms the basis of the Court's jurisdiction in this case[11]. His Excellency the Agent of Bahrain even suggested that Qatar's claim is an "abuse of the legal process"[12], and he asked "How can the finality of the 1939 decision . . . now be overruled?"[13].

23. Mr. President, Members of the Court, Bahrain cannot now say to the Court that it would be unacceptable to reopen the dispute on the merits. Not only had the British Government agreed, in the 1960s, that its decision could be reopened in an arbitral proceeding, but Bahrain's statements also fly in the face of the Court's own previous Judgments in this case.

24. In its Memorial, Qatar requested the Court to adjudge and declare that the State of Qatar has sovereignty over the Hawar Islands. In its Judgment of 1 July 1994, the Court held that by the terms of the 1987 and 1990 Agreements the Parties had undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the "Bahraini formula"[14]. It will be recalled that under the "Bahraini formula" the Court was requested to "decide any matter of territorial right or other title or interest which may be a matter of differences between them"[15]. It will further be recalled that in its Judgment of 15 February 1995, the Court concluded that it was now seised of the whole of the dispute, and that the Application of Qatar was admissible[16].

25. In the light of these Judgments, it is Qatar's submission that what is now "unacceptable" is Bahrain's own insistence that the Court cannot hear on its merits the claim of Qatar to sovereignty over the Hawar Islands.

26. I would like now to turn briefly to a few further legal considerations, in the context of the situation as it existed on the ground in the nineteenth and early twentieth centuries. Bahrain has shown us pictures of the west coast of Qatar. Still today, large areas of Qatar, including parts of the

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[10]CR 2000/12, p. 48, para. 14.

[11]*Ibid.*

[12]CR 2000/11, p. 9, para. 11.

[13]CR 2000/11, p. 9, para. 14.

[14]*I.C.J. Reports 1994*, para. 41(2).

[15]*I.C.J. Reports 1994*, para. 18.

[16]*I.C.J. Reports 1995*, para. 48.

west coast, are barren and uninhabited. The same is true of a large portion of the main Bahrain island, including its south-eastern coast that is closest to the Hawar Islands. The same would also be true of the main Hawar Island if Bahrain had not made its artificial attempts to transform the situation in breach of its status quo undertakings. And the same remains true today of all the other Hawar Islands.

27. Until oil came along, the only interest in the Hawar Islands lay in their use for seasonal fishing. These islands, like the other islands of the Gulf, were traditionally open to all the Arab tribes.

28. To the extent that there was no hostile purpose, and given that the population in these areas, if any, was small and fluctuating, there was no need for any formal acts of authority in such places. This did not mean that the territory concerned was *terra nullius*, or could be lawfully acquired by anybody who came along and performed private activities, or even acts of authority, in the territory.

29. In the present case, as Qatar has shown, by the time Bahrain first raised a claim to the Hawar Islands in 1936, Qatar had been long-established and recognized as a separate political entity, whose territory extended throughout the peninsula. Given that Qatar had a title to the peninsula that was generally recognized, it was not required to perform acts of authority throughout the peninsula in order to obtain or conserve that title — as was recognized in the *Island of Palmas* case.

30. There is nothing to suggest that, after the emergence of Qatar as a separate entity, the Hawar Islands, Janan or Zubarah were considered as not forming an integral part of that entity. If the opposite had been the case, this would surely have been spelt out in the various treaties that were entered into by the British with regard to Qatar, or would have been reflected in the contemporary maps. But it was not. In these circumstances, and in the absence of any consent or acquiescence by Qatar, any attempt by Bahrain to claim title by asserting *effectivités* — especially such unfounded *effectivités* as those invoked by Bahrain — would be unable to overcome Qatar's original title.

31. In addition, all Bahrain's efforts to introduce a human factor into the debate are unfounded. Any links that might have existed between the Hawar Islands and certain tribesmen

from the main island of Bahrain were fluctuating and intermittent at best, and no convincing evidence has been provided that they have continued until the present day or even until recent years. In any event, such alleged links are in themselves of no legal relevance.

32. As a consequence of all these considerations, Bahrain's claims to sovereignty over the Hawar Islands, Janan and Zubarah must fail.

33. With regard to the maritime delimitation, Qatar is confident that the Court will reject Bahrain's highly exaggerated claim, and that it will draw a line that achieves an equitable result, in accordance with international law. In Qatar's submission, the line that is claimed by Qatar does achieve such a result.

34. Finally, I would like to inform the Court that Qatar will respond in writing, by the end of these oral proceedings, to the questions put forward by Judge Vereshchetin at the end of the session of 15 June. This written response will be communicated by Qatar to the Registry.

35. Mr. President, Members of the Court, this concludes my closing remarks. Although these oral proceedings may have seemed long, this is a complex case with many issues of fact and law. Moreover, Qatar has not attempted to rebut all the arguments put forward by Bahrain in its first round of oral pleadings. I am certain in this context that the Court will have given the greatest attention to the written pleadings of the Parties in this case.

36. I thank you, Mr. President and Members of the Court, on behalf of the State of Qatar and its counsel, for your unfailing patience and attention over the past weeks. I must also express our gratitude to the staff of the Registry and the interpreters, who have been so helpful in ensuring the smooth running of these oral proceedings.

37. I will now present Qatar's submissions.

SUBMISSIONS

The State of Qatar respectfully requests the Court, rejecting all contrary claims and submissions:

I. To adjudge and declare in accordance with international law:

A. (1) that the State of Qatar has sovereignty over the Hawar Islands;

(2) that Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty;

B. (1) that the State of Bahrain has no sovereignty over the island of Janan;

(2) that the State of Bahrain has no sovereignty over Zubarah;

(3) that any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case;

II. To draw a single maritime boundary between the maritime areas of seabed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain on the basis that Zubarah, the Hawar Islands and the island of Janan appertain to the State of Qatar and not to the State of Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51° 05' 54" E and 27° 02' 47" N), thence proceeding in a southerly direction up to BLV (50° 57' 30" E and 26° 33' 35" N), then following the line of the British decision of 23 December 1947 up to NSLB (50° 49' 48" E and 26° 21' 24" N) and up to point L (50° 43' 00" E and 25° 47' 27" N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50° 31' 45" E and 25° 35' 38" N).

Mr. President, Members of the Court, thank you very much indeed.

Le PRESIDENT : Je vous remercie, Docteur Abdullah Al-Muslemani. Ceci marque le terme du deuxième tour de plaidoiries de l'Etat de Qatar. La Cour prend acte des conclusions finales dont il a été donné lecture par M. l'agent de Qatar au nom de Qatar. Comme suite à l'une de ses dernières observations, je puis en outre l'assurer que, comme d'ordinaire, la Cour apportera la plus grande attention non seulement aux plaidoiries des Parties mais encore à leurs mémoires écrits. Je remercie l'agent et les conseils de Qatar pour la présentation qu'ils nous ont donnée de leur position.

La prochaine séance de la Cour aura lieu le lundi 26 juin à 16 heures dans l'affaire des mesures conservatoires opposant la République démocratique du Congo à la République de l'Ouganda.

Pour ce qui est de la présente affaire, la prochaine séance aura lieu le mardi 27 juin à 10 heures pour commencer le deuxième tour de plaidoiries au nom de l'Etat de Bahreïn. La séance est levée. Je vous remercie.

L'audience est levée à 12 h 35.