CR 94/2

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1994

Public sitting

held on Tuesday 1 March 1994, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain

(Qatar v. Bahrain)

VERBATIM RECORD

ANNEE 1994

Audience publique

tenue le mardi 1er mars 1994, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire de la Délimitation maritime et des questions territoriales entre le Qatar et Bahreïn

(Qatar c. Bahreïn)

COMPTE RENDU

Present:		
	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Ago
	Sir	Robert Jennings
	Judges	Tarassov
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Herczegh
		Jiuyong
		Fleischhauer
		Koroma
	Judges *ad hoc*	Valticos
		Ruda
	Registrar	Valencia-Ospina

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Ago
sir Robert Jennings
MM. Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Herczegh
Jiuyong
Fleischhauer
Koroma, juges

MM. Valticos,
Ruda, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

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as Agent and Counsel;

Mr. Adel Sherbini, Legal Expert,

as Legal Adviser;

Mr. Sami Abushaikha, Legal Expert,

as Legal Adviser;

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I,

Mr. Jean Salmon, Professor at the *Université libre de Bruxelles*,

Mr. R. K. P. Shankardass, Senior Advocate, Supreme Court of India, Former President of the International Bar Association,

Sir Ian Sinclair, K.C.M.G., Q.C., Barrister at Law, Member of the Institute of International Law,

Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law at the University of London,

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Mr. David S. Sellers, Solicitor, Frere Cholmeley, Paris.

The Government of Bahrain is represented by:

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comme conseils.

Mr. PRESIDENT: Please be seated. The sitting is open. I give the floor to Mr. Shankardass. Please continue.

Mr. SHANKARDASS: Thank you. Mr. President, Members of the Court, before the Court rose for the day yesterday I was dealing with the proceedings of the Tripartite Committee formed under the third paragraph of the 1987 Agreement set up to work out the procedure for implementing the Parties' commitment to bring their disputes to this Court.

The Court will recollect I had shown that the First Meeting was addressed on the two different methods of approaching the Court. Because of Bahrain's insistence that a special agreement would be a more appropriate way to approach the Court, the Second, Third and Fourth meetings considered drafts of possible special agreements but no agreement could be reached on a list of disputes that could be included into such a single document. A kind of dead-lock situation had been reached so that no meetings of the Committee were held for several months. One question raised at these meetings which had remained unanswered was whether there was a way in which each party could place its own separate claims before the Court.

Mr. President, I will now continue my submission from the period a few months after the Fourth Meeting.

(vii) The Bahraini formula

Eventually, as a result of a Saudi Arabian initiative (yet again), and after discussions during an exchange of visits of the Heirs Apparent of Bahrain and Qatar to each other's country, the Heir Apparent of

Bahrain transmitted to the Heir Apparent of Qatar a general formula for reference of the disputes to the Court which, the Court will have seen, was in the following terms:

> "The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters." (See, MQ, Ann. II.29.)

(viii) The Fifth Tripartite Committee Meeting

Mr. President, this proposed general formula was discussed at the Fifth Meeting of the Tripartite Committee on 5 November 1988. Qatar welcomed the proposed formula as a good step forward, but its initial reaction was that its scope was too wide. Qatar continued to hold the view that the subjects of the dispute had already been defined in the course of the Saudi Arabian Mediation.

Nevertheless, Qatar decided to seek certain clarifications in regard to the newly proposed general formula (now called the Bahraini formula). It was also felt by the Meeting that it would be desirable to have the Parties' legal advisers consider various questions relating to the formula before the next meeting of the Tripartite Committee.

The Fifth Meeting therefore ended on a somewhat optimistic note. However, as the Court will have seen from the pleadings and documents on record, Prince Saud stated to the Meeting that he had been directed to submit a report on the progress made by the Committee and that King Fahd considered the Committee's mission would terminate by the date of the forthcoming GCC Summit Meeting in December 1988 and he said "whether or

not it succeeded to achieve what was required from it" (see, CMB, para. 3.50 and Minutes of the Fifth Tripartite Committee Meeting, Qatar's T.C.M. Documents, p. 208).

(ix) The Sixth Tripartite Committee Meeting

I now turn to the closing stages of the work of the Tripartite Committee in December 1988. The Sixth and final meeting of this Committee on 6 December 1988 was preceded by a meeting of the legal experts of both sides who discussed the scope of the Bahraini formula. Professor Jean Salmon will address the Court in more detail on the implications of this discussion in his later presentation. For the purpose of my submission it is only necessary for me to point out that Dr. Al-Baharna informed the meeting that the Bahraini formula was meant to be a "compromise formula" to enable each Party to submit whatever claims it wished concerning the disputed matters to the Court. The Chairman of the meeting, Sheikh Abdul Rahman Mansuri of Saudi Arabia, expressed his understanding of Bahrain's proposal, i.e., its formula, in the following words:

> "Bahrain proceeds from the view that there is no agreement to define particular points for presentation to the Court. It, therefore, proposes that a particular formula satisfying both Parties be reached, which will give the Court the jurisdiction to consider any claims by them whether they relate to sovereignty, rights or interests. Thus, the Parties go to the Court not with defined disagreements but by giving the Court jurisdiction and power, and the disagreements will be defined there." (*Ibid.*, p. 238.)

Dr. Al-Bahrana himself offered a most significant clarification when he observed:

> "We are faced with a delicate problem which hindered the two Parties from reaching an accepted formula for the Special Agreement for a whole year. That is Qatar's objection to the

> reference to Zubara, and the attitude of Bahrain regarding Hawar. It is the sensitivity of this matter which has, undoubtedly, made us propose this general formula." (*Ibid.*, p. 242.)

I would submit, Mr. President, that when Dr. Al-Baharna has himself explained that the Bahraini formula was specifically devised to enable Bahrain to raise the subject of Zubarah in any way that it wished, it is impossible to understand how Bahrain can now complain it is unable to do so merely because the formula is not incorporated in a special agreement and because Qatar has approached the Court with *its* own Application under Article 38 of the Rules of Court. Bahrain itself admits in its Counter-Memorial that it is possible even for a special agreement to provide that one party could commence proceedings before the Court and the other would respond (see, CMB, para. 5.22).

It is particularly interesting, Mr. President, to note that in fact in justifying the general formula Dr. Al-Baharna spoke of Article 40 of the Statute and the requirements of Article 38 of the Rules of Court (i.e., for an application) rather than Article 39 which, the Court is aware, concerns notification of a special agreement.

Dr. Al-Baharna explained:

> "I would like to make clear that in consulting the Statute and Rules of the I.C.J. (Article 40, Article 38) I did not find any provision requiring the two parties to a dispute to submit it to the Court according to the general traditional rule referred to by the Qatari note. Moreover, the Statute gives the two parties the full right and freedom in selecting the formula they consent to. All that is required is that the formula should contain two basic foundations: the subject of, and parties to the dispute." (See, Minutes of the Legal Experts Meetings, Sixth Tripartite Committee Meeting, Qatar's T.C.M. Documents, p. 234.)

Dr. Hassan Kamel for Qatar read out and also dealt with the requirements of Article 38 of the Rules of Court, in particular the need "to specify

the precise nature of the claim" in an application, as provided by Article 38, paragraph 2 (*ibid.*, p. 239). It is of interest to note that in this discussion that took place at a Legal Experts Meeting, Article 39 dealing with a special agreement was not referred to. What the parties were now talking about was not a joint submission but simply giving the Court jurisdiction and thereafter enabling each party to specify the precise nature of its claims and present them to the Court in accordance with the requirement of its Rules.

It was in this context that Qatar at that stage expressed some doubts as to whether the Bahraini general formula was specific enough. For this reason, Qatar proposed an amended version of the general formula and also suggested that the formula could have two annexes attached to it; each State could define in its annex the subjects of dispute it wanted to refer to the Court. Dr. Al-Baharna described this as a very "constructive proposal" (*ibid.*, p. 242) but stated he was not authorized to accept it.

When this proposal was placed before the meeting of the Tripartite Committee later on in the day, both Bahrain and Qatar declared that neither would sign the other's annex. This demonstrates that the Parties simply could not reach an agreement on the specific subjects of dispute that the other would wish to refer to the Court. However, at the end of the Meeting, Bahrain sought further time to consider Qatar's amendments.

Bahrain contends in its pleadings (see, CMB, para. 6.29) that the signed Minutes of the Sixth Meeting of the Tripartite Committee recorded the Parties' "agreement" on the subjects of dispute to be referred to the Court. Mr. President, a mere reading of the Minutes shows this claim to be wholly unfounded. These Minutes record the terms of the Bahraini

formula, the amended version suggested by Qatar, Qatar's proposal of attaching two Annexes, and the Bahraini request for time to consider the Qatari amendments. If there was any agreement at all, it was to the effect that even under the Bahraini Formula (either with or without the Qatari amendments), the subjects to be raised before the Court would be "confined" to the list mentioned in the Minutes. Furthermore, while "Zubarah" is included in this list at item (1), which Bahrain claims is an agreed list, item (3) records Qatar's disagreement that:

> "if the content of the dispute regarding Zubarah related to sovereignty over the area, then it would not agree to its inclusion in the subjects to be referred"

and Bahrain's position that it would make "the most unrestricted maximum possible claims" (see, Signed Minutes of the Sixth Tripartite Committee Meeting, Qatar's T.C.M. Documents, pp. 282-283).

In any event, Bahrain's contention is not consistent with the statement in its Counter-Memorial (see, CMB, para. 7.7) that "as late as the Sixth Tripartite meeting on 6 December 1988 the Parties had reached no agreement". As I have just explained, the signed Minutes of 7 December 1988 and the fact that the Tripartite Committee ceased to function from that date is further evidence of the failure of the Parties to reach any agreement even at the Sixth Meeting of the Committee.

As I have said, Bahrain sought time to consider Qatar's amendments to the Bahraini formula and its proposals of two annexes. However, without any explanation or excuse, Bahrain failed to react or respond to these proposals either up to the time of the GCC Summit two weeks later, when the Tripartite Committee ceased to function, or indeed at any time thereafter. Thus, the exercise, initiated at Bahrain's proposal in January 1988, to implement the 1987 Agreement by way of a Special

Agreement, ended in failure; and in view of King Fahd's direction terminating its deliberations, the Tripartite Committee ceased to function - facts which Bahrain simply fails to address. I would emphasize, however, that in spite of these developments, there is no evidence that it was ever in the contemplation of the Parties that the 1987 Agreement to refer the dispute to the Court would be abandoned or rendered invalid merely because no special agreement was signed.

The proceedings of the Tripartite Committee did however have one positive feature.

This was that both Qatar and Bahrain had accepted the fact that whatever method was eventually chosen for "communicating with" the Court would, instead of a joint submission, have to enable each of the Parties to put forward its own claims to the Court which (in the words of Dr. Al-Baharna) "would be left to the Court to decide upon" (*ibid.*, pp. 235-6). In view of Dr. Al-Baharna's explanations of the scope of the Bahraini formula that I have just referred to, I respectfully submit, Mr. President and Members of the Court, it had become immaterial whether the reference to the Court was by notification of a special agreement or by application. The Parties were simply not going to be able to agree on a list of specific subjects of dispute to be incorporated in a single document making a joint submission. It was this situation that the Doha Agreement eventually dealt with.

(x) 1988-1990: Further Saudi efforts to settle the dispute

After the conclusion of the Sixth Tripartite Committee Meeting and the GCC Summit, it will be seen from the pleadings of the Parties that the matter was discussed again at the GCC Summit Meeting in Bahrain in December 1988, which followed that meeting. A meeting which was not only

final but a most undecisive meeting. At this GCC Meeting, it was agreed that Saudi Arabia be given a further period of six months to see if it could secure an agreement on the substance of the disputes through its mediation. No agreement was achieved during the whole of 1989 and the unresolved situation was discussed again at the GCC Summit in Muscat in December 1989. Once again, it was agreed to try to achieve a resolution on the substance of the disputes through the Saudi mediation. These efforts continued until the next Summit Meeting in Doha in December 1990. There were, of course, during these two years, no meetings of the Tripartite Committee as it had ceased to function at the GCC Summit in December 1988.

4. THE DOHA AGREEMENT

(i) The 1990 Summit Meeting

Mr. President and Members of the Court, by the time of the next GCC Summit Meeting in Doha in December 1990, Qatar had been seeking resolution of its disputes with Bahrain for over 40 years. This issue had been raised at every GCC Summit since 1987, but without any effective resolution. The Tripartite Committee constituted under the third paragraph of the 1987 Agreement had ceased to function two years earlier. The Doha Summit was held in the midst of the crisis following upon the invasion and occupation of Kuwait by Iraq - a situation which led everyone present to be conscious of the urgent need to peacefully resolve all boundary disputes between the member States.

Qatar had been deeply disappointed that its disputes with Bahrain had not been resolved during the preceding two years of Saudi mediation and articulated its frustration at the opening session of the Summit

Meeting in strong terms. In the course of the discussions that followed, Bahrain sought a further extension of Saudi mediation without a time-limit, to which Qatar was strongly opposed. During the discussions several suggestions were made and, eventually, an understanding emerged that the decision to refer the disputes to the Court should now be implemented. To facilitate such submission, Qatar announced it would accept the Bahraini formula as a definition of the subject and scope of the disputes to be adjudicated by the Court. Qatar thus decided it would deal with any claims Bahrain might make under the Bahraini formula. Bahrain wrongly states in its Counter-Memorial (see, CMB, para. 1.9) that Qatar began by insisting that the Saudi efforts to achieve a solution should terminate in May 1991 after which the Parties should be free to take the matter to the Court. In fact, Bahrain's Foreign Minister confirms in his Statement filed with the Counter-Memorial, that it was His Majesty Sultan Qaboos of Oman who made this suggestion, i.e., that before the submission was made to the Court, a further period up to the end of Shawwal (mid-May 1991) should be granted to Saudi Arabia to see if a solution on the merits could be achieved; if no such solution was reached during this period, the distinguished Foreign Minister states "the matter might proceed to the I.C.J." (see, CMB, Vol. II, p. 160). This suggestion was accepted by the Parties and it was also agreed that the Saudi mediation would continue even after the submission to the Court and that the case be withdrawn from the Court if a mutually-agreed solution was achieved. It was this understanding which emerged at the Summit meeting that led to the agreement between Qatar and Bahrain which was recorded in the Doha Agreement of 25 December 1990. The accuracy of

Qatar's report of the observations of King Fahd of Saudi Arabia and the Sultan of Oman to this effect, contained in Qatar's Memorial, has not been challenged by Bahrain.

As also explained in Qatar's Memorial, it was Oman which took on the main work of helping to implement the understanding reached at the GCC Summit Meeting. It was Oman which produced the draft of the Doha Agreement. It was Oman which undertook the negotiations with Qatar and Bahrain which resulted in the final text of the Doha Agreement that was also signed by Saudi Arabia in the context of its role under the Framework and as a guarantor of the 1987 Agreement, under paragraph 4 of that Agreement.

Mr. President, the Doha Agreement was seen as a final resolution of the problem in the way of implementing the 1987 Agreement and of resolving all the disputes between the parties in terms of the Framework "comprehensively together". There was no question of any further negotiations to reach a Special Agreement.

Dr. Al-Baharna, who had so strenuously advocated the proposal to approach the Court by a Special Agreement at the first meeting of the Tripartite Committee in January 1988 and had said "what is required is a special agreement specifying the disputed points", had since lucidly explained the adequacy of the Bahraini general formula in terms of Article 38 of the Rules of Court by showing that it would enable each party to raise its own separate claims before the Court. In December 1990 he no longer found it necessary to suggest that the Doha Agreement, which evidenced the acceptance by both Parties of the Bahraini Formula, should specify the need for a Special Agreement or for the incorporation of the Bahraini Formula in such an agreement. The

Bahraini Formula by its very terms was capable of standing on its own and was understood and accepted as such.

Both Qatar and Bahrain declare in their pleadings that each was most anxious to ensure inclusion of the reference to the Bahraini formula and its acceptance by Qatar in the Doha Agreement. (see, CMB, para. 6.71 and RQ, para. 3.62). I respectfully submit, Mr. President and Members of the Court, that this was obviously to ensure that each could raise its own claims before the Court. Each Party was seeking to secure and secured the other's consent to the Bahraini formula, which, in turn, I submit sustains the Court's jurisdiction to deal with Qatar's application.

(ii) Events following the 1990 GCC Summit Meeting

Let me now turn, Sir, briefly, to the events that followed the Doha Agreement. In accordance with the provisions of the Doha Agreement, Saudi Arabia duly entered upon further efforts to bring about a settlement of the matters in dispute between Qatar and Bahrain. However, because these efforts were unsuccessful, the Amir of Qatar wrote to King Fahd on 6 May 1991 informing him that as the agreed period was approaching its end, Qatar intended to go to the Court after its expiry (see, MQ, Ann. II.34). The Foreign Minister of Bahrain confirms in his Statement annexed to Bahrain's Counter-Memorial (see, CMB, Vol. II, Ann. I.25, p. 165) that King Fahd told the Amir of Bahrain at a meeting on 3 June 1991 "that he had been approached several times by the Amir of Qatar regarding the matter ..." but that he had asked him "not to be in such a rush" - a comment which obviously related to the reference to this Court and not to a settlement by Mediation which was to continue in any event even after the reference to the Court.

After a meeting with King Fahd on 5 June 1991, the Amir of Qatar agreed in a letter to the King of 18 June to give Bahrain three more weeks to respond to Qatar's most recent proposals to settle the dispute after which Qatar said it would go to the Court (see, MQ, Ann. II.35). Having received no response, Qatar filed its Application on 8 July 1991.

Thus, Mr. President, King Fahd was informed several times (and twice in writing) of Qatar's intention to go to the Court. At no time did the King suggest that Qatar was not entitled to go to the Court or should not do so.

Let me turn to another event that Bahrain refers to (see, CMB, paras. 7.22 and 7.33 and RejB, para. 1.14) which it regards as significant, and that is that in September 1991, i.e., *after* Qatar had filed its Application in the Court, Saudi Arabia submitted to both parties a suggested "compromise" Special Agreement. Bahrain claims that Saudi Arabia therefore perceived there had been no agreement between the parties at Doha to abandon the search for a Special Agreement; and furthermore that Saudi Arabia's action is incompatible with Qatar's assertion that the work of the Tripartite Committee had terminated in failure in December 1988 (see, RejB, para. 4.24). I would respectfully draw the Court's attention to the following aspects in considering the validity of Bahrain's argument:

(a) Saudi Arabia did not attempt to convene a meeting of the Tripartite Committee after December 1988 or even after September 1991 to consider any further drafts of a possible Special Agreement. In fact it was at the instance of King Fahd that the work of the Committee was terminated in December 1988. Furthermore, neither Qatar nor Bahrain made any attempt to summon a meeting of the

Committee after that date, nor after the Doha Agreement, either to consider the September 1991 Draft or any other procedural steps for referring the case to the Court.

(b) The circumstances in which the so-called September draft was sent also bear mention. By letter of 23 August 1991 to the Registrar of this Court, Bahrain announced its refusal to attend a meeting of the Parties' Agents (called under Article 31 of the Rules of Court) with the President on 26 August 1991 claiming "it would be inappropriate for it to participate in a meeting which proceeds on the assumption that Qatar has filed a valid Application". After the Registrar of the Court explained the legal position in his letter of 26 August 1991, Bahrain agreed to attend the proposed meeting with the President which was eventually held on 2 October 1991. It was just before this meeting that the so-called "September 1991 draft" of a Special Agreement made its appearance and reached Qatar in a very strange manner, by facsimile, and without the covering Memorandum that Bahrain claims was sent to both Parties. Even the copy of the Memorandum now filed by Bahrain is undated. Until now, Qatar has not received the so-called Memorandum

(c) The recent attempt by Bahrain initiated at the beginning of this year and shortly before the opening of these oral hearings, to secure the leave of the Court under Article 56 of the Rules of Court for the production of further correspondence between the Amir of Bahrain and King Fahd of Saudi Arabia is a further sign of Bahrain's efforts to involve Saudi Arabia in the present proceedings before the Court. This attempt is certainly not consistent with what Prince Saud of Saudi Arabia declared as early as at the Second Meeting of the

Tripartite Committee, which was that Saudi Arabia's role "was limited to proposing certain ideas with the express purpose of avoiding any exploitation of Saudi mediation to strengthen either party's position at the expense of the other party" (see, RejB, p. 129).

In all these circumstances, Mr. President, Qatar cannot but raise a number of questions with respect to the so-called "September 1991 draft" of a Special Agreement. Is it conceivable that Saudi Arabia would have itself entered upon an exercise to draft a Special Agreement (something it had never attempted during the life of the defunct Tripartite Committee)? Is it possible that Saudi Arabia would take this initiative after King Fahd had been informed "several times" by the Amir of Qatar of Qatar's intention to take the disputes to this Court after the expiry of the deadline - with no objection from King Fahd? Or that it would transmit it to the Parties in such a casual manner? Was the whole thing a ploy engineered by Bahrain to distract the Court by raising the "*Aegean Sea* case" type of argument? Frankly, Mr. President, Qatar is simply mystified and left only with these questions.

Qatar suggests that this draft is not only strictly speaking irrelevant to the issues before the Court but also that in the circumstances it is impossible to infer anything either about its provenance or its alleged significance.

CONCLUSION

Mr. President, Members of the Court, I submit with great respect that the circumstances that I have outlined clearly establish that there was never any question once Bahrain and Qatar had been helped by the Mediator to conclude the 1987 Agreement that their disputes would not be

submitted to this Court for adjudication if they could not conclude a Special Agreement. I believe, Sir, I have shown that both Parties understood the 1987 Agreement as recording their *commitment* to refer their disputes to the Court and the work of the Tripartite Committee to be directed only to "consider the procedures" by which their commitment to make the reference could be implemented (see, RB, Ann. 1.1, p. 83). The formation of the Tripartite Committee for this purpose could in no sense be regarded as transforming that commitment to make the reference or turning it into a conditional one.

In conclusion, Mr. President, and Members of the Court, I believe that the events described by me show the following:

(i) By accepting the Saudi Framework in 1983 with the amended Fifth Principle, Bahrain and Qatar agreed to have their long-standing disputes decided according to international law.

(ii) Under the 1987 Agreement the Parties made a firm and acknowledged commitment to refer the disputes to this Court.

(iii) In an effort to agree on the procedure for the reference to the Court the Parties made an attempt to finalize a Special Agreement through the Tripartite Committee; but the attempt failed. This situation was finally resolved by the Doha Agreement, whereby each Party consented to the other moving the Court in terms of the Bahraini formula after a further short period of Saudi Mediation up to May 1991.

Mr. President and Members of the Court, it only remains for me to say again what a very great honour and a privilege and a pleasure it has been for me to address the Court as counsel for The State of Qatar, and

to express my very deep gratitude for the attention and the patient hearing you have given me.

May I suggest, Mr. President, that it would now be appropriate to call upon Sir Ian Sinclair to address the Court on the next part of the submissions for the State of Qatar. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Shankardass. I give the floor to Sir Ian Sinclair.

Sir Ian SINCLAIR:

THE STATUS OF THE DOHA MINUTES OF DECEMBER 1990

Mr. President, Members of the Court, it is my task this morning to address the Court on the status of the Doha Minutes of 25 December 1990, and related issues. In referring to this written instrument as "the Doha Minutes", I am not to be taken as detracting in any way from Qatar's basic contention that these Minutes constitute a binding international agreement. I will, of course, enlarge on this point in a minute. Having regard to the written pleadings of the Parties, it would seem that the following are the more important questions that require analysis in relation to the status and legal effect of the Doha Minutes:

(1) *First*, whether the Doha Minutes constitute an international agreement binding on Bahrain and Qatar.

(2) *Secondly*, whether, if so, they constitute a "treaty" or "convention" within the meaning of Article 36, paragraph 1, of the Statute.

(3) *Thirdly*, whether the Foreign Ministers of Qatar, Bahrain and Saudi Arabia had capacity to enter into an international agreement of the

kind constituted by the Doha Minutes without the need to produce full powers.

(4) *Fourthly*, whether the agreement constituted by the Doha Minutes entered into force on signature.

(5) *Fifthly*, assuming that the Doha Minutes do constitute a binding international agreement in force between Bahrain and Qatar, whether, in the circumstances, Bahrain is entitled to invoke the fact that its consent to be bound by that agreement has been expressed in violation of Bahrain's constitutional requirements, thereby invalidating that consent.

I will deal with the first four questions; and Professor Salmon, who will follow me, will address the fifth question.

1. Do the Doha Minutes constitute an international agreement binding on Bahrain and Qatar?

The Court will need no reminding that there exists no generally accepted definition in customary international law of what is an international agreement. The Vienna Convention on the Law of Treaties incorporates a definition of the term "treaty" as follows:

> "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

But this definition, as the Court will be aware, is expressly stated to be "for the purposes of the present Convention", so it does not purport to be all-embracing. For example, it deliberately omits international agreements concluded between States and international organizations or international agreements concluded between two or more international organizations.

Other definitions of the term "treaty" have been suggested by distinguished writers. Thus, Lord McNair used the term "treaty" to denote:

> "a written agreement by which two or more States or international organisations create or intend to create a relation between themselves operating within the sphere of international law" (McNair, *Law of Treaties*, 1961, p. 2).

Paul Reuter utilized a broader definition in his magisterial work on the law of treaties:

> "A treaty is an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law." (Reuter, *Introduction to the Law of Treaties*, 1989, (English translation of a revised version of the 2nd. ed. published in French in 1985), p. 23.)

Finally, Mme Suzanne Bastid finds three elements which serve to distinguish a "treaty" from other international instruments. According to Mme Bastid, a treaty is an agreement between States, it is designed to have legal effects and it is governed by international law (Bastid, *Les traités dans la vie internationale*, 1985, pp. 19-22).

The commentaries to the final set of draft articles on the law of treaties prepared by the International Law Commission shed some light on the definition of the term "treaty" for the purposes of the Vienna Convention. For example, it is stated in the commentary to the definition of "treaty" which was incorporated without change in the final text of the Vienna Convention:

> "The term 'treaty' is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States. Although the term 'treaty' in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an 'agreed minute' or a 'memorandum of understanding', could

not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties". (*Reports of the International Law Commission*, 1966, p. 21.)

The Commission goes on in its commentary to explain why it preferred to use the term "treaty" rather than "international agreement":

> "First, the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing. Secondly, the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force." *(Ibid.)*

Thus, there can be little argument with the proposition that the term "treaty" is normally used in a generic sense as encompassing all types of international agreement, whatever be the designation of the particular instrument or instruments. In the recently published ninth edition of Oppenheim, the learned editors draw attention to a number of features in the Vienna Convention definition. I need not reproduce them all, but the following perhaps merit attention:

> "(1) 'Treaty' is given a generic meaning, rather than a meaning limited to one particular form of international agreement.
>
> (2) Whether or not an instrument constitutes a treaty does not depend on its designation ...
>
> [I omit (3)]
>
> (4) The agreement must be governed by international law. So agreements subject to some national system of law will not constitute treaties, even though the parties are states, or perhaps more usually in these circumstances, government departments of different states ...
>
> (5) In addition to the traditional form of treaties - i.e., treaties negotiated and signed expressly on behalf of the Head of State by virtue of full powers received from him - treaties may be concluded between governments or departments of governments ..." (Oppenheim's *International Law*, Ninth Ed. (Jennings and Watts), Vol. I, Parts 2-4 (1992), pp. 1199-1200.)

The editors of the ninth edition of Oppenheim go on to point out that the Vienna Convention definition of the term "treaty" does not assist very much with the answer to the question whether a particular instrument is "an international agreement ... governed by international law". They continue:

> "It is suggested that the decisive factor is still whether the instrument is intended to create international legal rights and obligations between parties - an element which the International Law Commission regarded as embraced within the phrase 'governed by international law'. The existence of such an intention will need to be determined in the light of all the circumstances of each case. The registration of an instrument with the United Nations may imply that it was intended and understood to be a treaty." (*Op. cit.*, p. 1202.)

Now, these being the broadly accepted criteria which serve to distinguish treaties (in the generic sense) from other international instruments or transactions, how should one characterise the Doha Minutes of 1990?

We know that Bahrain denies that the Doha Minutes constitute an international agreement. The Bahraini contention is rather that they were no more than a diplomatic document and "non-binding in character" (CMB, para. 6.80). Now, let us look at this contention rather more closely, in the light of existing doctrine and practice. The fact that the Doha Minutes are designated as "minutes" is, of course, far from being evidence that they do not constitute an international agreement. Even Bahrain does not seek to deny that an international agreement can take the form of agreed minutes of meetings (MCB, para. 6.3). Qatar equally does not dispute that agreed minutes can be so formulated as to evidence the intention of the States concerned *not* to regard those agreed minutes as constituting a binding international agreement. Now, the Court will be aware that, in the 1970s, the Institute of International

Law took up a topic entitled (a rather lengthy title) "International Texts of Legal Import in the Mutual Relations of Their Authors and Texts Devoid of Such Import". I apologize for the title, it is not my responsibility. The late and highly respected Michel Virally acted as Rapporteur on the topic, which led to the adoption of a resolution of the Institute at its Cambridge session in 1983. The resolution was essentially of a procedural nature, and in particular the Institute as a collective body took no position on the conclusions presented by the Rapporteur. But some of the conclusions suggested by Michel Virally are of interest in the context of the present case and deserve to be recalled. Thus, he proposes, as paragraph 1 of his conclusions, a definition of international texts of legal import in the following terms:

> "International texts of legal import in the relations between their authors include, irrespective of their form:
>
> *(a)* texts by which their authors agree to define, to amend or to revoke legal commitments;
>
> *(b)* texts by which their authors agree to produce other legal effects, whatever their nature, such as the establishment of a legal framework for future action of the parties, the creation of an organ or institutional mechanism likely to act at the legal level, the recognition of a specific legal situation or claim, and the recognition of the legal authority of principles or rules of international law."

By way of contrast, the Rapporteur seeks to define international texts devoid of legal import in paragraph 4 of his conclusions in the following terms:

> "Subject to what is stated in paragraphs 5 and 6, texts containing commitments which States that accepted them intended to be binding solely at the political level and which have all their effects at that level do not constitute texts of legal import in the mutual relations between their authors. However, a specific text, whatever its name, may contain at the same time provisions of a legal character within the meaning of paragraph 1 and purely political commitments within the meaning of the preceding sub-paragraph."

Paragraphs 5 and 6 of the Rapporteur's conclusions are not immediately relevant in the context of the present proceedings. But paragraphs 7 and 8 are perhaps relevant.

Paragraph 7 provides that commitments set forth in the text of an international treaty within the meaning of the Vienna Convention are legal commitments unless it follows unquestionably from that text that the intention was to the contrary.

And paragraph 8 provides more significantly:

> "The legal or purely political character of a commitment set forth in an international text of uncertain character depends upon the intention of the parties as may be established by the usual rules of interpretation, including an examination of the terms used to express such intention, the circumstances in which the text was adopted and the subsequent behaviour of the parties."

How do the Doha Minutes fit into these prescriptions? The Virally conclusions do not of course amount to a treaty text, and it would be a mistake to interpret them as if they were. But, even with this qualification, Qatar is firmly of the view that the Doha Minutes constitute an international text of legal import within the intended scope of paragraph 1 of the Virally conclusions. Their effect is to confirm and supplement the legal commitments already entered into by Qatar and Bahrain by virtue of the 1987 Agreement, and indeed to produce other legal effects such as the fixing of a time-limit after which the dispute between the Parties could be referred to the Court; and this quite irrespective of whether the reference to the Court should be by the Parties jointly or by each of the Parties individually. Bahrain would appear to be contending that the Doha Minutes embody "purely political commitments" as that expression is described in paragraph 4 of the Virally conclusions. But this can hardly be reconciled with the fact

that the Doha Minutes confirm and indeed build upon the legal commitments already embodied in the 1987 Agreement; and the Court will, of course, recall that Bahrain does not, in relation to the 1987 Agreement, dispute "the existence of an agreement in the terms of the Saudi Arabian proposals" (CMB, para. 5.9). An alternative argument might be constructed to the effect that the Doha Minutes constitute what Virally would refer to as an "international text of uncertain character" as described in paragraph 8 of his conclusions. Qatar would strongly dispute this, but, even applying this test, would submit that the *legal* character of the commitments entered into by Qatar and Bahrain by virtue of the Doha Minutes is wholly confirmed by:

(a) an examination of the terms used to express the intention of the parties;

(b) the background against which the text was negotiated;

(c) the circumstances in which the text was adopted; and

(d) the subsequent behaviour of the parties.

As regards the examination of the terms used to express the intention of the parties, the reaffirmation of what had been agreed previously between the parties certainly covered the legal commitment of both Qatar and Bahrain, expressed in paragraph 1 of the 1987 Agreement, that all the disputed matters should be referred to the present Court for a final ruling; the agreement that "the parties" would be at liberty to submit the matter to the Court after 15 May 1991 is self-evidently a commitment of a legal character, and this is irrespective of the dispute between Qatar and Bahrain as to whether the phrase "the parties" is to be interpreted conjunctively or disjunctively; and the recording of the

acceptance by Qatar of the Bahraini formula is self-evidently the written expression of a legal commitment undertaken by Qatar.

As regards the background against which the text was negotiated, it is self-evident that the would-be interpreter of a treaty must bear in mind that background in seeking to determine the meaning of the terms used in their context and in the light of the object and purpose of the treaty. The background will be of particular significance in ascertaining the object and purpose of the treaty. In stressing the importance of the historical background to the treaty, one noted authority has commented:

> "Il s'agit du cadre historique que forme l'ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confirmer le *statu quo* ou apporter un changement qu'une nouvelle conjoncture nécessite." (Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des Traités", 151 *Recueil des Cours* (1976-III), p. 90.)

Now, any objective observer called upon to consider the historical background to the signature of the Doha Minutes in 1990 will inevitably focus on certain key events. These events include:

(1) the unfortunate failure of Saudi Arabia to secure a substantive solution to the disputes between Bahrain and Qatar, notwithstanding repeated attempts made over 11 years of the mediation effort between 1976 and 1987;

(2) the initiative taken by Saudi Arabia in 1987 leading to the conclusion of the 1987 Agreement;

(3) the setback to the process of referring the disputed matters to the Court occasioned by the termination of the work of the Tripartite Committee at the end of 1988 without having discharged the mandate entrusted to it by virtue of paragraph 3 of the 1987 Agreement; and

(4) the subsequent lack of any progress by Saudi Arabia in 1989 and 1990 to achieve, through its mediation efforts, any agreement on the substance of the disputes between Qatar and Bahrain.

Our notional objective observer would no doubt have anticipated in these circumstances that a major effort would be made at the GCC summit meeting in Doha in December 1990, to breathe new life into the agreed proposal that the matters in dispute between Bahrain and Qatar should be referred to this Court; and our notional objective observer would not have been mistaken.

This brings me to a consideration of the circumstances in which the text of the Doha Minutes was adopted. Here, I would like to begin by drawing attention to what Mr. Sherlock Holmes might have referred to as "the strange episode of the appearance of Dr. Al-Baharna at Doha". In so characterizing this episode, I intend no disrespect to the distinguished Agent for Bahrain. The point I wish to make is, however, of some significance. The Court will be aware that Bahrain has sought to develop the argument that the Doha Minutes are not a binding agreement, are indeed no more than a diplomatic document and were not regarded by the parties as constituting an international agreement (CMB, paras. 6.75 to 6.89). The plausibility of these arguments is severely impaired when one takes into account the following facts which are not essentially, as far as Qatar understands it, in dispute. The final text of the Doha Minutes derives from a text originally put to both parties on the evening of 24 December 1990, by the Foreign Minister of Oman, acting as intermediary. It would appear that the text was put first to the Qatari delegation, since there is clear evidence that the phrase "in accordance with the Bahraini formula, which has been accepted by Qatar" was inserted

into the original Omani draft on the initiative of Mr. Sherbini, Legal Adviser to the Qatari delegation. The Omani draft, with this addition, was then put to the Bahraini delegation, again on the evening of 24 December. The Foreign Minister of Oman reported to the Qatari delegation later in the same evening that Bahrain would like to study the draft, and that it had been sent by fax to Dr. Al-Baharna who would be arriving in Doha early the following morning with his comments (RQ, para. 3.65)

Now, the fact that Dr. Al-Baharna was suddenly summoned to Doha on the night of 24/25 December 1990, to participate in the further negotiation of the Omani text, is hardly consistent with the subsequent Bahraini attempt to downplay the legal significance of the Doha Minutes. One does not suddenly summon one's most senior law officer to participate in the drafting of a mere diplomatic document not intended to have any legal effects. No doubt it was because the Bahraini delegation was well aware that the proposed agreed minutes recording the outcome of the discussion at the GCC Summit on 23 December 1990 were intended to incorporate binding legal undertakings that it urgently summoned Dr. Al-Baharna to Doha.

My second point under this head can be put more briefly. Bahrain places great stress on the two modifications which it succeeded in having made to the original Omani draft of the Doha Minutes, namely the substitution of the phrase "the parties" (*al-tarafan*) for "either of the two parties" and the insertion into the text of the phrase "and the proceedings arising therefrom" (see CMB, para. 6.53 and RejB, paras. 5.20 to 5.22 and 5.31 to 5.36). Other of my colleagues, notably Professor Quéneudec and the Qatari Agent, Dr. Najeeb Al-Nauimi, will be

addressing the significance of these changes and the interpretation to be given to these phrases within the context of the Doha Agreement as signed. The point I wish to make is that, throughout the proceedings of the Tripartite Committee in 1988, Bahrain had been insistent on the need for a special agreement as an essential preliminary to reference of these disputes to the Court. Is it not therefore astonishing that Bahrain made no attempt to secure the inclusion in the Doha Minutes of a reference to the continued need for a special agreement, given that, on Bahrain's own argument, as developed in the written pleadings, the Bahraini formula was only capable of acceptance as part of a special agreement between the parties? Or is it rather that Bahrain was well aware that the other participants in the GCC Summit favoured immediate reference of the disputes between Qatar and Bahrain to the Court, and would not have taken kindly to a further attempt by Bahrain to veto such a reference by striving yet again to insist on the conclusion of a special agreement between Bahrain and Qatar?

Now, Mr. President, my third point is closely related to my second point. If, as Bahrain contends, the understanding between the parties at Doha was that negotiations for the conclusion of a special agreement between Bahrain and Qatar would have to be resumed after the expiry of the extended five-month period of Saudi mediation, why was this not reflected in the Doha Minutes? The answer, Qatar would submit, must be that it was in nobody's contemplation at the time - not even Bahrain's - that the wearisome task of formulating a special agreement would have to be resumed after May 1991, particularly in the light of Qatar's unqualified acceptance of the Bahraini formula in the Doha Agreement. Bahrain might well have subsequently regretted having given its basic

consent to the jurisdiction of the Court in the 1987 Agreement. Certainly, Bahraini conduct after 1987 must give rise to the suspicion that Bahrain was anxious to wriggle out of its commitment to seek judicial settlement of its disputes with Qatar.

My fourth point is more general. The Court will be aware that, in the jurisdictional phase of the *Fisheries Jurisdiction* case between the United Kingdom and Iceland, it emphasized repeatedly the significance of the history of the negotiations in interpreting the compromissory clause in the UK/Icelandic Exchange of Notes of 11 March 1961. Thus, the Court states in its Judgment on jurisdiction of 2 February 1973:

> "The history of the negotiations not only shows the intentions of the parties but also explains the significance of the six months' notice required to be given by the Government of Iceland to the United Kingdom Government."
> (*I.C.J Reports 1973*, p. 13, para. 21.)

I cite this brief passages from the Court's judgment in the jurisdictional phase of the *Fisheries Jurisdiction* case simply in order to stress the importance of the history of the negotiation of a compromissory clause in the context of a challenge by a State to the jurisdiction of the Court based on that compromissory clause. Qatar, for its part, entertains no doubt that the history of the negotiations at Doha leading up to the adoption of the Doha Agreement in the form of Agreed Minutes, particularly when read in the light of the events from 1987 onwards, can lead only to the conclusion that the Court has jurisdiction to rule on the matters submitted to it in the Qatari Application.

Finally, I turn to the subsequent behaviour of the Parties. This confirms the Qatari analysis of the significance of the Doha Minutes.

The Court will recall that, subsequent to the conclusion of the Doha Agreement but before the expiry, on 15 May 1991, of the extended time-limit for Saudi Mediation, the Amir of Qatar wrote two letters to King Fahd of Saudi Arabia. The substance of these letters is reproduced in the Qatari Memorial (para. 3.62). The second of these two letters, dated 6 May 1991, urged King Fahd to renew his good offices as soon as possible in view of the imminent expiry of the extended time-limit agreed at Doha, and informed him that Qatar intended to submit the dispute with Bahrain to the Court thereafter. In a further letter to King Fahd of 18 June 1991, the Amir of Qatar agreed to a further extension of three weeks from 5 June 1991, of the extended time-limit for Saudi Mediation. The Amir repeated his warning that thereafter Qatar would take the necessary measures to submit its dispute with Bahrain to the Court in accordance with the Doha Agreement of 25 December 1990. Thus, Qatar had certainly made clear to Saudi Arabia, in the early months of 1991 and well before the Qatari Application to the Court was filed on 8 July 1991, its intention to refer its dispute with Bahrain to the Court on the expiry of the fixed five-month period for mediation for which provision had been made in the Doha Agreement; and indeed Qatar had given a further demonstration of its extraordinary patience by agreeing to an additional three-week period from 5 June 1991, for the Saudi Mediation effort. We know from paragraph 15 of the affidavit of the Bahraini Foreign Minister dated 21 May 1992 (CMB, Vol. II, Ann. I.25) that, at least on 3 June 1991, the Amir of Bahrain had been informed by King Fahd that he had been approached by the Amir of Qatar several times about the matter since the Doha summit; in the circumstances, Qatar, while in no way impugning in any sense the veracity of the affidavit, finds it

difficult to believe that Saudi Arabia did not even give a hint to Bahraini officials that they must expect Qatar to make a unilateral application to the Court on the expiry of the extended time-limit if no substantive solution had been found. Indeed, this would have been a powerful weapon in the hands of the mediator to urge a degree of moderation on Bahrain. What can be stated with absolute certainty, however, is that Saudi Arabia did not seek to dissuade Qatar from giving effect to its stated intention after 26 June 1991.

To sum up, there can be little doubt in these circumstances that the Doha Minutes incorporated legal commitments confirming and supplementing the agreement of both parties to refer their disputes to the Court. By December 1990, when the GCC summit met in Doha, two years had elapsed since the work of the Tripartite Committee had been brought to an end and three years had elapsed since the conclusion of the 1987 Agreement. Having regard to the history of the previous negotiations in 1988 within the framework of the Tripartite Committee, Qatar could not reasonably have been expected, after it had demonstrated its good faith by its unqualified acceptance of the Bahraini formula, to contemplate a resumption of negotiations with Bahrain for the purpose of concluding a special agreement; and Bahrain could not reasonably have assumed that Qatar would be prepared to contemplate such a resumption of negotiations. For Bahrain to affect surprise at the Application filed by Qatar on 8 July 1991, is no doubt good theatre, but lacks any sense of conviction.

In sum, and for the totality of the reasons given, Qatar submits that the Doha Minutes constitute an international agreement binding on both Qatar and Bahrain.

2. Can the Doha Minutes be said to constitute a "treaty" or "convention" within the meaning of Article 36(1) of the Statute?

Bahrain has of course contended that neither party saw the 1987 Agreement as a treaty or convention for the purpose of Article 36, paragraph 1, of the Statute - in Bahrain's words - "but rather as a commitment to negotiate in good faith a special agreement"; and that "[the] acceptance of the jurisdiction of the Court would arise in due course from such Special Agreement" (CMB, p. 99). Bahrain is, of course, perfectly entitled to set out its own position, but is not entitled to distort Qatar's position. Qatar submits to the contrary that, by virtue of the 1987 Agreement, both States had consented to submit their disputes to the Court for decision, although they had not explicitly agreed upon the way in which the Court was to be approached.

Bahrain equally denies that the Doha Minutes constitute a binding international agreement. I have already dealt with this contention. But, assuming that the Court accepts the Qatari contention that the Doha Minutes do constitute a binding international agreement, can they be regarded, when read with the 1987 Agreement, as constituting a "treaty" or "convention" within the meaning of Article 36, paragraph 1, of the Statute? Qatar submits that the answer is certainly "Yes". I have already demonstrated that the term "treaty" is normally used in a generic sense. It is clearly so used in Article 36, paragraph 1, of the Statute. The reference to "treaties and conventions in force" in that provision is not confined to international agreements designated as "treaties" or "conventions"; it certainly comprehends any international agreement between States which is governed by international law, whatever be the designation of that agreement. A "treaty" or "convention" within the

meaning of Article 36, paragraph 1, of the Statute in fact covers a wider category of treaty instruments than I have just described. The jurisprudence of the Court reveals, for example, that a mandate instrument (that is to say, an agreement between the League of Nations and a Mandatory Power) is regarded as a "treaty" or "convention" within the meaning of Article 36, paragraph 1, of the Statute. Thus, in the *South West Africa* case (jurisdictional phase) the Court unhesitatingly held that: "The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention." *(I.C.J Reports 1962*, p. 330.) This expression of view was advanced precisely in the context of an argument that the Mandate for South West Africa was not a treaty or convention within the meaning of Article 37 of the Statute. It was a view reaffirmed by the Court in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*I.C.J Reports 1971*, p. 46).

The Court will also recall that, in the jurisdictional phase of the *Aegean Sea Continental Shelf* case, it observed:

> "that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement ... Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form - a communiqué - in which that act or transaction is embodied."
> (*I.C.J. Reports 1978*, p. 39, para. 96).

Professor Quéneudec will deal more fully with the significance, in the context of the present case, of the Court's Judgment in the jurisdictional phase of the *Aegean Sea* case.

3. Did the Foreign Ministers of Qatar, Bahrain and Saudi Arabia have capacity to enter into an international agreement of the kind constituted by the Doha Minutes without the need to produce full powers?

I need hardly remind the Court of the terms of Article 7, paragraph 2 *(a)* of the Vienna Convention on the Law of Treaties which provides that:

> "In virtue of their functions and without having to produce full powers, the following are considered as representing their State;
>
> *(a)* Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty."

Bahrain does not appear to contest that, by virtue of the rule which I have just cited, the Bahraini Foreign Minister was ipso jure competent to express the consent of Bahrain to be bound by the Doha Agreement, assuming that the Doha Minutes constitute, as Qatar submits, a binding international agreement. Yet Bahrain advances an argument which seeks to deprive this implied admission of all substance. Bahrain argues that there is nothing in Article 7, paragraph 2 *(a)*, that accords to a Foreign Minister full powers to give immediate effect to his signature to a treaty if he does not intend to do so or is prohibited by his constitution from doing so. With all respect, Mr. President, this is pure casuistry. What Article 7, paragraph 2 *(a)*, does is precisely to entitle the named categories of persons to represent their State for the purpose of performing *all* acts relating to the conclusion of a treaty. This would include the act of affixing his signature to an international agreement either expressly or impliedly designed to enter into force on signature. Bahrain has completely misunderstood the object and purpose of Article 7, paragraph 2 *(a)*, of the Vienna Convention if it believes that the *capacity* of a Foreign Minister to bind the State which he

represents to a treaty which by its terms or by necessary implication enters into force on signature should have been spelt out in that particular provision. Whether the international agreement constituted by the Doha Minutes *did* enter into force by virtue of signature is a quite different issue which I hope to address in a few moments. I would simply add that the International Law Commission specifically disavowed the argument impliedly put forward by Bahrain that a Foreign Minister is not entitled to give immediate effect to his signature of a treaty if he is prohibited by his constitution from doing so. In its commentary to what is now Article 46 of the Vienna Convention, the Commission rejected the view that internal laws limiting the power of State organs to enter into treaties may render voidable any consent given on the international plane in violation of a constitutional limitation. In doing so, the Commission commented:

> "If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc. under Article [7]; they would have to satisfy themselves in each case that the provisions of the State constitution are not infringed or take the risk of subsequently finding the treaty void." (*ILC Reports* (1966), pp. 69-70, para. 2.)

Qatar does not believe it necessary at this stage to analyse in the abstract whether there exists a category of international agreements "in simplified form". Certainly, the fact that the expression "treaty in simplified form" does not appear in the Vienna Convention is not determinative, just as the absence of any reference in the Vienna Convention to the concept of a "restricted multilateral treaty" does not mean that no such concept exists. What Qatar would wish to emphasize is that State practice over the last 50 years or so

undoubtedly confirms the growing trend towards the elimination of formalities in the conclusion of treaties.

In the early years of the twentieth century, it came gradually to be accepted that, as a general rule, ratification was necessary to render a treaty binding. The Court will be aware of the view expressed by the Permanent Court in the *Territorial Jurisdiction of the International Commission of the River Oder* case.

But this traditional view is now out-moded. A detailed study of state practice by Blix in the early 1950s led him to the conclusion that:

> "whenever States intend to bring treaties into force by some procedure other than signature, that intention is evidenced by express provisions or by cogent implication"

and that:

> "in the present practice of States the treaties in which there is no clear evidence, express or implied, of the parties' intentions as to the mode of entry into force almost without exception enter into force by signature" (Blix, "The requirement of ratification", 30 *BYBIL* (1953), p. 380).

Blix had studied 1,760 treaties published in the League of Nations Treaty Series between 1932 and 1940 and 1,300 treaties published in the U.N. Treaty Series between 1946 and 1951 and had pointed out that 53% of the treaties published by the League had been ratified, whereas in only 23% of the treaties published by the United Nations had the same procedure been followed (*loc. cit.*, pp. 359-60). Even more startling figures have been provided more recently by Maria Frankowska who points out that only nine of the 1,579 treaties published in the U.N. Treaty Series between 1963 and 1965 required

ratification (Frankowska, "De la prétendue présomption en faveur de la ratification", 73 *RGDIP* (1969), p. 78). These figures strikingly confirm the following view expressed by the International Law Commission in 1966:

> "Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or other of the contracting States." (*ILC Reports* (1966), p. 30, para. 3.)

The PRESIDENT: This will, I understand, be a convenient moment for the customary coffee break; the Court will adjourn for fifteen minutes.

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

The PRESIDENT: Please be seated. Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court, my fourth heading is:

4. Did the Agreement constituted by the Doha Minutes enter into Force on Signature?

I have already begun to trespass into this area by having cited, just before the coffee break, the authority of Blix and indeed of the International Law Commission in their commentary on the final set of draft articles on the law of treaties. But still something more

needs to be said. Let us look initially at the arguments on this point developed by Bahrain in its written pleadings.

There is, first of all, Bahrain's denial "that the 1990 Minutes, even if amounting to an agreement, constituted an agreement that did not require ratification" (CMB, p. 93). In a rather condescending manner, Bahrain then proceeds to assert that "it is not necessary for this purpose to pursue the question of whether or not the agreement was in a simplified form". The constraints of time have persuaded Qatar not to take issue specifically with this assertion, while reminding the Court that one of the generally recognized features of a treaty in simplified form is that it enters into force on signature, unless the parties specifically provide for ratification or some other form of subsequent confirmation or approval. Thus, one commentator maintains that "the only juridical criterion for distinguishing between 'treaties' and 'agreements in simplified form' is the existence or absence of the requirement of ratification" (Bolinteanu, "Expression of consent to be bound by a treaty in the light of the 1969 Vienna Convention", 68 *AJIL*, 1974, p. 677).

Now, we know that the rule expressed in Article 24 of the Vienna Convention is that a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree; and that, failing any such provisions or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States. As both the 1987 Agreement and the Doha Minutes are silent as regards entry into force, we are driven back to Articles 12 and 14 of the Vienna Convention which set out the circumstances in which the consent of a

State to be bound by a treaty is expressed by signature or by ratification respectively. Article 12, paragraph 1, lists three cases in which the consent of a State to be bound by a treaty may be expressed by the signature of its representative and Article 14, paragraph 1, lists four cases in which the consent of a State to be bound by a treaty is expressed by ratification.

Now let us then analyse the question of the entry into force of the 1987 Agreement and of the Doha Minutes in the light of the rules expressed in Articles 12, paragraph 1 and 14, paragraph 1, of the Vienna Convention. It is convenient to take the 1987 Agreement first. That Agreement contained no provision with regard to entry into force or consent to be bound; nor did the Amirs of Bahrain or Qatar sign their letters of acceptance of King Fahd's proposals subject to ratification. Can it be said that, in the case of the 1987 Agreement, it has been, in terms of one of the three cases listed in Article 12, paragraph 1, otherwise established that the negotiating States were agreed that signature should have the effect of expressing consent to be bound, so that the 1987 Agreement entered into force by virtue of signature and without the requirement of ratification. Qatar confidently submits that it has been so established. Let us look closely at the terms of the 1987 Agreement and at the action taken in implementation of that Agreement. Paragraph 2 of the 1987 Agreement contains three undertakings by the parties to respect the status quo. The first two of these undertakings are expressed to be operative "from to-date". This is consistent only with a common understanding that the proposals are to be operative immediately, that is to say, from 26 December 1987 - the

date of signature of the last of the letters of acceptance from the Amirs of Bahrain and Qatar. This is confirmed by the action taken in implementation of the 1987 Agreement. A preliminary meeting was already held in late December 1987, at Riyadh on the margins of the GCC Summit meeting (MQ, p. 45, para. 3.34). The first formal meeting of the Tripartite Committee took place in Riyadh on 17 January 1988 *(ibid.)*. These undisputed facts demonstrate beyond a shadow of doubt that both Bahrain and Qatar were agreed that the 1987 Agreement should enter into force by virtue of signature, and should *not* be subject to ratification.

Against this background, one can begin to assess whether the Doha Minutes of 1990 are to be regarded as an agreement entering into force on signature or as an agreement entering into force on the exchange of instruments of ratification. The text of the Doha Minutes makes no provision for ratification; nor was the idea of ratification ever raised in Doha by the Bahraini Foreign Minister, who signed the Doha Minutes along with his counterparts from Qatar and Saudi Arabia. Perhaps most significantly of all, the Doha Minutes were aimed at implementing a previous agreement, the 1987 Agreement, which itself had entered into force by virtue of signature. The notion that the Doha Minutes may have been signed subject to ratification is not only totally incomprehensible in the light of its relationship to the 1987 Agreement; it is also contradicted by the internal evidence of the time-limit of May 1991, after which the parties would be free to submit their disputes to the Court. It is the relationship between the Doha Minutes and the 1987 Agreement, combined with the internal evidence of the time-limit

of May 1991, which entitles Qatar confidently to submit that, in terms of the rule expressed in Article 12, paragraph 1 *(b)*, of the Vienna Convention, it has been otherwise established that both Qatar and Bahrain were agreed that signature of the Doha Minutes by their respective Foreign Ministers expressed the consent of the two States to be bound by the agreement constituted by those Minutes.

One final point, Mr President. Qatar has to anticipate a possible Bahraini argument that bilateral agreements to submit a dispute to arbitration or to judicial settlement are, by their very nature, agreements which are subject to ratification. Qatar has carried out a limited study of recent agreements of this type; and the only conclusion which can be reached is that practice is variable and does not support any such rule. Qatar has identified four agreements of this type concluded in recent years which were made subject to ratification, but it has equally identified seven arbitrational similar agreements concluded since 1975 which were expressed to come into force on signature, including the *Accord-Cadre* of 31 August 1989 between Chad and Libya, which provided the basis for the exercise of jurisdiction by the Court in the recent *Libya/Chad Territorial Dispute* case (Art. 8).

Qatar does not claim that it has carried out an exhaustive survey of all recent agreements of this type; but the results of the study which it has undertaken only go to confirm that State practice in this matter is variable and that, in particular, it does *not* support any claim that bilateral agreements providing for reference of disputes to arbitration or judicial settlement or other form of

third-party determination are always concluded subject to ratification.

Before I conclude, Mr. President, I should perhaps make reference to a new argument advanced by Bahrain in paragraph 5.25 of its Rejoinder. This argument is derived from the recent Judgment of the Chamber of the Court in the *El Salvador/Honduras* dispute, where the Chamber determined that it had no jurisdiction to delimit the waters of the Gulf of Fonseca. Bahrain suggests that this conclusion was based upon direct evidence in the form of a statement by the Foreign Minister of El Salvador that he never had the intention of conferring upon the Chamber a power to carry out a delimitation in the area in controversy. Qatar does not read the Judgment of the Chamber in this sense. What the Chamber was saying was that Honduras had not established that the Special Agreement should be so interpreted as to require that the phrase "determine the legal situation of the maritime spaces" must encompass delimitation. In the words of the Chamber's Judgment:

> "In essence, [Honduras] is arguing that a special meaning - one comprising the concept of delimitation - was intended by the Parties to attach to the phrase 'determine the legal situation of the ... maritime spaces'. The onus is therefore on Honduras to establish that such was the case." (*I.C.J. Reports 1993*, p. 585, para. 377.)

The Chamber found that Honduras had not discharged that burden. This is perfectly understandable in the context of the *El Salvador/Honduras* case. The Chamber did *not* in fact, in denying its jurisdiction on this aspect of the case, seek to rely on an *ex post facto* statement by the Foreign Minister of El Salvador that he never

had the intention of conferring a power of *delimitation* of the Gulf of Fonseca upon the Chamber.

5. Conclusions

Mr. President, Members of the Court, this analysis of the status and legal effect of the Doha Minutes has inevitably been somewhat arid and, it might seem, theoretical. Nonetheless, Qatar would urge the Court to look at the totality of Bahraini and Qatari conduct in relation to the 1987 Agreement and throughout the three-year period immediately preceding signature of the Doha Minutes in order to assess what was the implied intent of the parties in signing the Doha Minutes. Qatar is confident that the Court will draw the following conclusions:

(1) that the Doha Minutes were intended to constitute, and did constitute, an international agreement binding upon both Bahrain and Qatar;

(2) that the 1987 Agreement, as confirmed and supplemented by the Doha Minutes, constitutes a "treaty" or "convention" within the meaning of Article 36, paragraph 1, of the Statute so as to afford the necessary basis for the exercise of jurisdiction by the Court in relation to the matters identified in the Application filed by Qatar with the Court on 8 July 1991;

(3) that the Foreign Ministers of Qatar, Bahrain and Saudi Arabia had capacity to enter into an international agreement of the kind constituted by the Doha Minutes without the need to produce full powers; and

(4) that the agreement between Bahrain and Qatar, constituted by the Doha Minutes of 25 December 1990, entered into force by virtue of signature.

Mr. President, Members of the Court, I thank you for your patience and courtesy. I suggest that it would now be appropriate for Professor Salmon to be invited to address the Court on the issue of the alleged violation of Bahrain's constitutional requirements as invalidating Bahrain's consent to be bound by the Doha Agreement.

Mr. PRESIDENT: Thank you, Sir Ian. J'appelle à la barre le professeur Jean Salmon.

M. SALMON : Monsieur le Président, Messieurs de la Cour, c'est toujours avec émotion et humilité qu'un professeur de droit international se présente à cette barre. J'en mesure le privilège. C'est aujourd'hui à la confiance de l'Etat du Qatar que je dois cet honneur et je lui en suis profondément reconnaissant.

Sir Ian Sinclair vient d'exposer à la Cour que le texte de l'accord de Doha est un accord international, entré en vigueur à la signature, qui crée donc des obligations juridiques pour les Parties. Pressentant le caractère inéluctable de ces conclusions, Bahreïn présente une argumentation subsidiaire. Il n'y aurait pas eu de *consentement* valablement donné par le ministre des affaires étrangères de Bahreïn, car le consentement aurait été donné, aurait été exprimé en violation des prescriptions constitutionnelles de cet Etat.

Avant d'examiner la validité de l'argument, encore faut-il en saisir la portée. Bahreïn a été fluctuant sur la nature de l'exception et les conséquences juridiques qu'il attache à la prétendue violation.

A l'origine, dans sa note du 18 août 1991, il a soutenu que le fait que ce consentement aurait été donné en violation de la constitution de Bahreïn faisait tomber la situation sous le coup de l'article 46 de la convention de Vienne sur le droit des traités. La Cour se souviendra *que* cette disposition se trouve dans le chapitre relatif aux nullités. Bahreïn invoquait donc un motif de nullité.

Dans le contre-mémoire du 11 juin 1992, Bahreïn avance qu'il soutient simplement qu'il n'y aurait pas de traité *valide* car il y aurait *défaut de consentement* (contre-mémoire de Bahreïn, par. 6.97) et subsidiairement seulement que s'il y avait un traité il pourrait invoquer l'article 46 de la convention de Vienne (*id.*, par. 6.98). Si l'on interprète convenablement la pensée des auteurs de ce texte, il ne s'agirait plus à proprement parler d'une *nullité* mais bien d'une *inexistence*, pour *défaut de consentement*.

Sans vouloir entrer dans la controverse théorique, il y a sans doute, à première vue, quelque logique à soutenir qu'il n'y a pas d'acte juridique à défaut de consentement. Il n'y a en effet pas d'acte à annuler là où il n'y a pas d'acte du tout. Pourtant, la théorie de l'inexistence trouve difficilement son chemin en droit international. La doctrine sur ce point est d'une insigne pauvreté et c'est tout dire.

Le régime des nullités en droit international étant déjà par lui-même assez fruste, la théorie de l'inexistence, fortement critiquée en droit interne, n'a pas eu de succès en droit international faute d'une structuration suffisante de l'ordre international et à vrai dire d'une utilité concrète quelconque. Le regretté Paul Reuter, dans son cours à l'Académie de 1961, se bornait à consacrer à cette notion une note en bas

de page la qualifiant de "si controversée et polymorphe" (*RCADI*, t. 103, p. 550).

Paul Guggenheim, un professeur sérieux qui consacra quelques pages à la question tant dans son cours de 1949 à l'Académie de droit international que dans les deux éditions successives de son magistral traité, définissait l'acte "inexistant" de la manière suivante:

> "Il y a acte inexistant lorsque des individus ou des entités juridiques élèvent la prétention d'avoir créé un acte juridique, bien que les éléments d'un tel acte fassent à tel point défaut que, de toute évidence, il ne saurait en être question. Un examen sommaire suffit pour dénier validité à l'acte." (2e édition, t. I, 1967.)

Les exemples donnés ensuite par Paul Guggenheim sont dès lors des évidences : actes auxquels procèdent des individus au nom d'une entité n'ayant pas la qualité de sujet de droit international ou bien actes auxquels procèdent des individus qui n'ont aucune qualité pour représenter un sujet de droit international.

Pour que l'inexistence s'impose donc et que le problème de l'annulabilité soit écarté, il faut que *l'absence* d'acte soit *l'évidence* pour tous. Dès qu'il y a contestation sur l'existence, dès qu'il y a *apparence* d'un acte, c'est le problème de sa validité qui se pose. C'est bien le cas ici où l'accord de Doha répond à la définition du traité donnée par l'article 2, paragraphe 1 a), de la convention de 1969 ainsi que vient de vous le démontrer sir Ian Sinclair.

Il est très symptomatique que pendant les longs travaux de la Commission du droit international, puis de la conférence de Vienne sur le droit des traités, et d'aucuns ici se souviendront de tout cela, il ne fut jamais question d'inexistence mais simplement de nullités. Le fait que le *consentement* de l'Etat à être lié par un traité a été exprimé en

violation d'une disposition constitutionnelle est envisagé par la convention de 1969 dans le cadre du régime des nullités.

* * *

Nous examinerons donc si l'article 46 de cette convention peut trouver à s'appliquer en l'espèce. La Cour me pardonnera de citer un texte qui lui est certes familier:

> *"Disposition du droit interne concernant la compétence pour conclure les traités"*
>
> "1. Le fait que le consentement d'un Etat à être lié par un traité a été exprimé en violation d'une disposition de son droit interne concernant la compétence pour conclure des traités ne peut être invoqué par cet Etat comme viciant son consentement, à moins que la violation n'ait été manifeste et ne concerne une règle de son droit interne d'importance fondamentale.
>
> 2. Une violation est manifeste si elle est objectivement évidente pour tout Etat se comportant en la matière conformément à la pratique habituelle et de bonne foi."

Monsieur le Président, Messieurs de la Cour, l'histoire de ce texte vous est bien connue. Deux courants s'opposaient en doctrine: les constitutionnalistes, donnant le primat au respect des textes constitutionnels et les internationalistes estimant que la validité d'un traité conclu selon les *formes reconnues* du droit international par des représentants *autorisés* ne pouvait être remise en cause. Les deux premiers rapporteurs de la Commission du droit international (le Professeur Brierly et Sir Hersch Lauterpacht) penchaient pour la première thèse (la thèse constitutionnaliste). Sir Gerald Fitzmaurice, dans son troisième rapport (1958) prit au contraire fermement parti pour la seconde thèse (la thèse internationaliste). Sir Humphrey Waldock, fut,

pour sa part, à l'origine d'un compromis à dominante internationaliste. Il fut suivi par la Commission et enfin par les gouvernements dans leurs observations. L'équilibre ne fut plus rompu à la conférence de Vienne.

Désormais, l'économie de l'article 46 est la suivante.

En principe, la violation des règles constitutionnelles relatives au pouvoir de conclure les traités ne peut être invoquée comme viciant le consentement d'un Etat à être lié, à moins que - la formule négative a été adoptée à *dessein* pour souligner le caractère exceptionnel de l'hypothèse envisagée - il s'agisse d'une violation manifeste concernant une règle interne d'importance fondamentale concernant la compétence de conclure un traité.

C'est à cette aune qu'il nous faut maintenant mesurer le texte de l'article 37 de la Constitution de Bahreïn qui a été publiée dans le *Journal officiel* de Bahreïn du 26 mai 1973. La traduction française que j'utilise et que je vais lire est tirée du *Corpus constitutionnel*, supplément n° 1, édité par Brill à Leiden en 1976, page 94:

> "L'Emir conclura les traités par décret et les transmettra immédiatement à l'Assemblée nationale avec le rapport approprié. Le traité n'aura force de loi qu'après avoir été signé, ratifié et publié au Journal officiel.
>
> Cependant, les traités de paix et d'alliance, les traités concernant le territoire de l'Etat, ses ressources naturelles, ses droits souverains, ou les droits publics ou privés des citoyens, les traités de commerce, de navigation et de résidence, et les traités qui entraînent des dépenses supplémentaires qui ne sont pas prévues dans le budget de l'Etat, ou qui impliquent une modification des lois de Bahreïn, n'entreront en vigueur que lorsqu'ils auront fait l'objet d'une loi."

L'argument de Bahreïn peut se résumer de la manière suivante. Le traité n'a été approuvé ni par décret ni par une loi. Il y a donc violation de la constitution de Bahreïn, que le Qatar connaît fort bien

puisqu'il y a échange entre les deux pays des journaux officiels. Le ministre des affaires étrangères de Bahreïn, qui connaît ses limites constitutionnelles, n'aurait pas souscrit un accord avec le Qatar sans assurer le respect de sa constitution. La violation de la Constitution de Bahreïn est donc manifeste.

Le Qatar a, de ce texte constitutionnel, une lecture tout à fait différente de celle exprimée dans les écritures de Bahreïn. Le Qatar soutient que Bahreïn fait une confusion entre la procédure relative à la conclusion des traités, qui est régie *par le droit international public* et à laquelle le texte de l'article 37 ne fait aucune allusion, et la procédure relative à *l'introduction d'un traité en droit interne* à laquelle cet article est exclusivement consacré.

L'article 37 ne traite, en effet, que des procédures d'introduction du traité dans l'ordre juridique interne. Cette incorporation peut s'effectuer soit par décret de l'Emir, soit par une loi. Cette seconde forme est réservée aux traités qui touchent les matières relevant de la compétence de l'Assemblée nationale.

Le contrôle parlementaire et démocratique établi par cet article n'a cependant jamais été jusqu'à subordonner le pouvoir de conclure de l'Emir à l'accord de cette Assemblée. On ne se trouve pas ici dans un cas - que l'on trouve dans certaines constitutions - où le pouvoir de l'exécutif serait *partagé* avec le législatif et où l'exécutif devrait être *autorisé* par une loi d'habilitation pour pouvoir conclure internationalement le traité. L'Assemblée nationale n'a aucun rôle dans l'exercice du pouvoir de conclure les traités, ni au stade de la négociation, ni au stade du consentement à être lié. Les traités lui sont simplement communiqués.

Le vocabulaire de l'article 37 est lumineux. Il y est question pour l'Emir de conclure les traités "*par décret*", que le traité acquiert "*force de loi*" après signature, ratification et publication au *Journal officiel*, de traités qui "n'entreront en vigueur que lorsqu'ils auront fait l'objet *d'une loi*". Il est notoire, Monsieur le Président, Messieurs de la Cour, que l'on ne conclut pas un traité internationalement par décret publié au Journal officiel ou par une loi. Cette terminologie est révélatrice qu'il s'agit d'actes de l'ordre juridique interne à des fins propres à cet ordre. A supposer donc qu'il y ait eu, en l'espèce, violation du texte de l'article 37 de la Constitution, cette violation ne porterait pas sur le pouvoir de faire des traités mais sur leur incorporation dans l'ordre interne.

La *ratio legis* de ce type de disposition, que l'on rencontre dans bon nombre de constitutions, est d'assurer un contrôle par une assemblée parlementaire, sans affecter la compétence externe de l'exécutif en matière de conclusion des traités.

C'est donc un partage, mais cette fois-ci sous forme de contrôle démocratique.

Mais ici, entre de discrètes parenthèses, Bahreïn signale que l'Assemblée nationale a été dissoute par un décret de l'Emir de 1975, n° 14, et qu'une ordonnance n° 4 de 1975 a transféré les pouvoirs de l'Assemblée nationale au Conseil des ministres.

Dans le cas de Bahreïn, ce contrôle législatif a été supprimé en même temps que l'Assemblée nationale.

Une telle dissolution de l'Assemblée nationale, opérée au demeurant en contravention, semble-t-il, de la Constitution de Bahreïn dans plusieurs de ces articles, fut certes patente, mais elle n'affecte que le

contrôle interne, sans toucher au pouvoir de faire les traités. Si l'on devait considérer que ce contrôle était une condition de la conclusion internationale des traités, Bahreïn se serait trouvé depuis 1975 dans l'impossibilité de conclure aucun traité requérant l'approbation législative, ce que Bahreïn s'est bien gardé de soutenir.

Il en résulte toutefois qu'au moment des faits qui nous occupent la séparation des pouvoirs proclamée à l'article 32 a) de la Constitution n'existe plus. Le pouvoir législatif appartient à l'exécutif seul. La différence entre décret et loi est donc devenue purement formelle puisqu'elle ne recouvre plus aucun contrepoids réel entre les pouvoirs.

A supposer donc que l'on considère l'accord de Doha comme un "traité concernant le territoire de l'Etat, ses ressources naturelles ou ses droits souverains", le contrôle législatif est désormais sans objet faute d'organe pour l'exercer.

On soulignera en passant qu'il est d'ailleurs discutable que l'accord de Doha tombe dans cette catégorie car si l'accord a pour objet de faire trancher par la Cour un différend entre les deux Etats sur des questions de cette nature, il n'a aucun caractère *constitutif*. Selon la doctrine dominante, un arrêt de la Cour en matière territoriale a un caractère *déclaratif* des droits des parties.

Selon l'article 32 b) de la Constitution de Bahreïn "Le pouvoir exécutif appartient à l'Emir, au Conseil des ministres et aux ministres". Ceci est important en l'espèce car, lors de la réunion du Conseil de la coopération dans le Golfe à Doha, les personnes représentant Bahreïn et ayant avalisé l'accord signé après trois jours de discussions difficiles étaient le premier ministre *représentant le chef de l'Etat*, le ministre des affaires étrangères et le ministre des affaires juridiques, Dr. Al

Baharna. On voit donc mal quel contrôle le pouvoir exécutif pourrait avoir sur une telle délégation. A supposer qu'il y en ait un, encore une fois, il serait, au demeurant, d'effet purement interne, le consentement de l'Etat à l'accord ayant été valablement donné par un organe engageant l'Etat conformément au droit international, c'est-à-dire à l'article 7 de la convention de Vienne sur le droit des traités.

Répondant à Qatar qui demandait où se situait la violation manifeste, Bahreïn se borne à répondre:

> "la règle était d'importance fondamentale puisqu'elle était incorporée dans la Constitution de Bahreïn" (contre-mémoire de Bahreïn, par. 6.98).

Cette réponse est assez inattendue. Tout d'abord parce qu'elle confond "règle" et "violation de celle-ci". Je ne peux pas résister au plaisir de citer ce que déclara à bon escient M. Jiménez de Aréchaga à la Commission du droit international

> "la condition posée par l'article n'est pas que la *disposition* de la constitution nationale qui a été violée doit avoir été 'notoire', mais que la *violation particulière* d'une disposition constitutionnelle doit avoir été manifeste. Autrement dit, c'est la *violation* concrète d'une disposition constitutionnelle qui doit être manifeste; ce n'est pas la disposition constitutionnelle elle-même qui doit être notoire." (888e séance, 12 juillet 1966, *Annuaire*, 1966, vol. 1, 2e partie, p. 332-33, par. 84.)

Par ailleurs, si le simple fait qu'une disposition soit incluse dans la constitution suffisait à en faire une règle d'importance fondamentale, on voit mal ce qui resterait des limites que les rédacteurs de la convention de Vienne sur le droit des traités ont entendu poser en spécifiant qu'il devait s'agir des violations les plus manifestes des règles de son droit interne *d'importance fondamentale*.

En prévoyant cette exigence, les rédacteurs de la convention de Vienne ont eu en vue la difficulté fréquente pour un Etat d'apprécier

l'impact exact des prescriptions et des modifications constitutionnelles d'un cocontractant. Tout d'abord, des textes, bien qu'utilisant des formules identiques ou similaires, peuvent avoir un sens différent d'un pays à l'autre. D'autre part, la coutume constitutionnelle, sous la pression des exigences des relations internationales, joue parfois un rôle d'assouplissement considérable, notamment dans le domaine des accords en forme simplifiée.

L'affaire soumise aujourd'hui à la Cour est une preuve de la sagesse des rédacteurs de la convention de Vienne de 1969. A supposer en effet qu'il y ait eu, en l'occurrence, une division du pouvoir de conclure les traités entre l'exécutif et le législatif, ce qui, en l'espèce, on l'a vu, n'est pas le cas, que peut faire l'Etat cocontractant d'un Etat qui supprime le contrepoids législatif en violation apparente de sa constitution? Monsieur le Président, Messieurs de la Cour, on l'a dit et répété les Etats sont des monstres froids. Ils traitent avec ceux qui sont au pouvoir à peine de ne pouvoir conclure avec personne. Toute remarque sur les modifications constitutionnelles du cocontractant, comme l'a relevé la Commission du droit international (*Annuaire*, 1966, II, p. 263, par. 8) et quoi qu'en prétende Bahreïn (par. 5.61 de sa duplique), risquerait d'ailleurs d'être considérée comme une immixtion inadmissible dans les affaires intérieures de l'Etat qui a pris ces initiatives et ne faciliterait pas les rapports conventionnels. Le seul risque d'une telle attitude est que la violation de la constitution soit invoquée par un pouvoir autrement composé du point de vue politique, mais certainement pas par le gouvernement qui a lui-même violé sa propre constitution.

Mais, encore une fois, on n'est pas ici dans cette hypothèse. Si un décret ou une loi, ou leur publication au Journal officiel de Bahreïn, sont requis par le droit interne de Bahreïn à des fins de cet ordre juridique, ces exigences sont entre les mains de l'exécutif qui a souscrit le traité. La difficulté de droit interne soulevée par Bahreïn est donc le résultat de sa propre inaction. Comme le relevait à bon escient la Commission du droit international:

> "chaque fois qu'il y a inobservation de prescriptions constitutionnelles lors de la conclusion d'un traité, la responsabilité en incombe de toute évidence au gouvernement de l'Etat intéressé" (*Annuaire*, 1966, vol. II, p. 263, par. 8).

Il en résulte Monsieur le Président, Messieurs de la Cour, qu'aux yeux du Qatar Bahreïn n'a pas apporté la moindre preuve qu'il y aurait eu, en l'occurrence, violation manifeste d'une disposition d'importance fondamentale de son droit interne concernant la *compétence pour conclure les traités* et que par conséquent, le consentement donné par le ministre des affaires étrangères de Bahreïn est parfaitement valable et la validité de l'accord de Doha n'est en rien entamée.

Monsieur le Président, Messieurs de la Cour, le conseil du Gouvernement du Qatar vous exprime sa reconnaissance pour la bienveillante attention que vous avez bien voulu lui prêter. Il vous serait reconnaissant, Monsieur le Président, de bien vouloir accorder maintenant la parole à M. le Professeur Jean-Pierre Quéneudec qui doit poursuivre les arguments du Qatar.

Le PRESIDENT : Merci beaucoup Professeur Salmon. Je donne la parole au professeur Jean-Pierre Quéneudec.

M. QUENEUDEC : Monsieur le Président, Messieurs les Juges,

L'interprétation de l'Accord de Doha

C'est un honneur que d'apparaître une nouvelle fois devant la Cour et de vous présenter les arguments qui, selon l'Etat du Qatar, militent en faveur de votre compétence pour connaître des différends qui l'opposent à l'Etat de Bahreïn.

Mon intervention sera consacrée à l'interprétation du texte signé à Doha par les deux Etats le 25 décembre 1990, lequel constitue, comme l'a montré sir Ian Sinclair, un véritable accord international comportant des engagements juridiques de la part des signataires et doit être regardé comme un traité en vigueur, au sens de l'article 36 du Statut.

Avant d'aborder le problème de l'interprétation proprement dite, il paraît toutefois nécessaire d'attirer l'attention de la Cour sur la confusion entre les problèmes de compétence et de saisine que Bahreïn a introduite dans le débat. Une mise au point préalable s'impose à ce sujet.

1. Compétence et saisine de la Cour

Le Gouvernement de Bahreïn conteste la compétence de votre haute juridiction pour connaître du différend porté devant vous par le Qatar, en prétendant essentiellement qu'il n'a jamais consenti à ce que la Cour puisse être saisie de cette affaire par voie de requête unilatérale.

Le coeur de la thèse de Bahreïn sur ce point tient tout entier dans la phrase suivante de sa dernière pièce écrite:

> "In the absence of clear evidence of agreement or consent by Bahrain that the Court should possess jurisdiction on the basis of a unilateral application, the Court has no jurisdiction on that basis." (Duplique, par. 5.24, p. 36.)

Cette phrase est soulignée dans le texte de la duplique de Bahreïn, afin d'en montrer toute l'importance.

Elle est importante en effet. Elle démontre on ne peut plus clairement que la Partie adverse maintient constamment une confusion entre les problèmes de compétence et de saisine de la Cour.

Plus précisément, Bahreïn tend à faire comme si la compétence de la Cour dépendait du mode de saisine, alors que l'on s'accorde généralement pour reconnaître que la saisine n'est possible que s'il existe préalablement une base de compétence - exception faite de la situation de *forum prorogatum* où la compétence suit la saisine.

Dans ces conditions, on ne saurait parler, comme le fait Bahreïn, de la compétence de la Cour sur la base d'une requête unilatérale - *"jurisdiction on the basis of a unilateral application"* - et dire que la Cour n'a pas compétence sur cette base; car la base de compétence de la Cour ne réside pas ici dans la requête unilatérale déposée par le Qatar. La compétence de la Cour en l'espèce repose sur l'accord des deux Etats, qui ont accepté l'obligation de soumettre leur différend à la Cour.

Sans doute existe-t-il un lien assez étroit entre les problèmes de compétence et de saisine, lorsqu'une exception préliminaire d'incompétence vient ouvrir une procédure incidente, ou bien - comme c'est le cas dans la présente affaire - lorsqu'il a été décidé que la première phase de l'affaire porterait sur la compétence de la Cour et la recevabilité de la requête.

Il n'en demeure pas moins cependant qu'il s'agit de deux problèmes de nature différente. La question de la compétence est régie uniquement par le chapitre II du Statut de la Cour (art. 34 à 38). Au contraire, la question de la saisine, en tant que question de procédure, relève à la

fois du chapitre III du Statut (plus précisément de l'article 40) et du titre III, section C, sous-section 1, du Règlement de la Cour, où les articles 38 à 43 sont consacrés à l'introduction de l'instance.

S'il en est ainsi, c'est parce que la compétence de la Cour dépend de la volonté des parties - hormis, bien sûr, les cas particuliers des recours en interprétation ou en revision d'un arrêt ou des demandes d'intervention. Et l'on doit rappeler à ce sujet que, selon le Statut, l'expression de cette volonté des parties n'est nullement assujettie à une quelconque condition de forme, comme l'avait souligné la Cour permanente en 1928 dans l'affaire des *Droits de minorités en Haute-Silésie (écoles minoritaires), arrêt n° 12, 1928, C.P.J.I. série A* n° 15, p. 23.

Quant au mode de saisine - notification d'un compromis ou requête - il n'a pas nécessairement la même base volontariste. Le mode de saisine peut certes être convenu entre les parties; mais, en l'absence d'accord entre elles sur ce point, comme c'est le cas dans la présente affaire, il appartient à la Cour d'apprécier la régularité de la saisine, parce que le mode de soumission d'une affaire à la Cour est réglé par les textes régissant son fonctionnement.

L'appréciation de la régularité de l'acte introductif d'instance consiste alors à vérifier, comme cela avait été fait dans l'affaire du *Détroit de Corfou, C.I.J. Recueil 1947-1948*, p. 28, que tel mode de saisine n'est pas exclu par un texte obligatoire pour les parties en cause.

A la lumière de cette observation préliminaire, il est possible de dire que le Qatar a pu valablement porter la présente affaire devant la Cour par une requête introductive d'instance, parce que la saisine

unilatérale apparaît comme le corollaire inéluctable de la compétence obligatoire. Pour qu'une telle saisine soit possible, il faut que les deux Etats intéressés aient accepté la juridiction de la Cour mais il suffit que cette possibilité ne soit pas expressément ou implicitement exclue par les textes lui conférant compétence obligatoire.

Dès lors, si le Qatar a pu valablement saisir la Cour par voie de requête unilatérale, c'est parce que la compétence de la Cour était définitivement acceptée par les deux Etats en cause et parce que ce mode de saisine n'était pas exclu par les textes pertinents en l'espèce, même si ces textes ne l'avaient pas expressément prévu.

C'est ce que je voudrais maintenant m'attacher à démontrer à travers l'examen de la question relative à l'interprétation de l'accord de Doha de 1990.

A cette fin, il n'est peut-être pas inutile de commencer par rappeler la manière dont nous concevons l'application en l'espèce de la règle générale qui prévaut en matière d'interprétation, dans la mesure où Bahreïn n'a pas hésité, dans ses pièces écrites, à prendre quelques libertés avec les normes les mieux établies en matière d'interprétation. Puis il conviendra d'examiner la signification qui s'attache aux termes employés dans l'accord de Doha, et dont nous verrons qu'elle conduit à la conclusion selon laquelle la Cour est compétente pour connaître de la requête du Qatar. Il ne restera plus qu'à vérifier si cette conclusion est confirmée lorsque l'on prend en considération les circonstances de l'élaboration de cet accord.

2. L'application de la règle générale d'interprétation

Afin d'interpréter l'accord de 1990, il est à la fois nécessaire et suffisant, ici aussi, de s'en tenir à la règle générale d'interprétation énoncée à l'article 31 de la convention de Vienne sur le droit des traités.

Une telle démarche est ici d'autant plus indispensable que chacun sait, depuis l'arrêt de la Cour permanente dans l'affaire des *Zones franches de la Haute-Savoie et du Pays de Gex*, que «toute clause prévoyant la juridiction de la Cour doit être interprétée strictement» (*C.P.J.I. série A/B n° 46*, p. 138-139).

Toutefois, chacun sait aussi que l'interprétation stricte d'une clause de juridiction ne peut pas conduire à une interprétation restrictive qui aboutirait à ce que l'interprète resterait en deçà de ce qui est prévu ou autorisé par les termes employés dans le texte prévoyant la soumission du différend à la Cour.

En effet, selon la belle formule de Charles De Visscher :

> «Le juge international respecte une volonté qui se restreint; il est sans complaisance pour une souveraineté qui se dérobe.» (*Problèmes d'interprétation judiciaire en droit international public, 1963*, p. 201.)

Or, il semble que Bahreïn tente aujourd'hui de se dérober à un engagement préalablement souscrit. Cette tentative de se soustraire à la juridiction de la Cour est menée en se fondant sur les intentions qui auraient été celles des représentants de Bahreïn lors de la réunion de Doha en décembre 1990. Ceux-ci n'auraient pas eu, nous dit-on, l'intention de conclure un accord juridiquement obligatoire, et encore moins celle de permettre la saisine de la Cour sur la base du texte adopté à cette occasion.

Mais c'est oublier qu'un accord entre Etats ne se fait pas nécessairement sur les intentions de telle ou telle partie, mais uniquement sur une formulation écrite de ce qui apparaît comme l'expression de la commune intention des auteurs du texte. C'est pourquoi l'interprétation d'un accord doit avant tout s'attacher à la manifestation de la volonté concordante des Parties telle qu'elle est exprimée dans le texte de l'accord. Cette volonté commune ou concordante n'est pas nécessairement le reflet mécanique de deux intentions rigoureusement identiques, mais elle peut apparaître comme le produit ou la résultante d'intentions plus ou moins divergentes à l'origine. Aussi ne peut-on se fier à l'intention primitive des Parties, ou *a fortiori* de l'une des Parties, car cela reviendrait à supposer ou à présumer que cette intention était unique; ce qui, on en conviendra, n'est pas toujours le cas le plus fréquent. On ne saurait donc s'attacher aux arrière-pensées des négociateurs et leur donner la préférence sur ce que ces mêmes négociateurs ont décidé d'exprimer dans le texte qu'ils ont signé, c'est-à-dire sur une volonté qu'ils ont extériorisée.

Dans ces conditions, le point de départ de toute opération d'interprétation est le texte lui-même, tel qu'il a été rédigé. La Cour l'a encore rappelé tout récemment dans l'affaire du *Différend territorial* : «L'interprétation doit être fondée avant tout sur le texte du traité lui-même.» (Arrêt du 3 février 1994, par. 41.) La soumission au texte n'est en effet pas autre chose que la soumission à l'expression la plus directe de la volonté des parties.

Cette primauté du texte, dans laquelle Paul Reuter voyait «la règle cardinale de toute interprétation» (*Introduction au droit des traités*, 2e éd., Paris, 1985, p. 85), revêt une importance d'autant plus grande

que le texte à interpréter fonde ici la compétence de la Cour, dont «la juridiction n'existe que dans les termes où elle a été acceptée», selon la formule utilisée par la Cour permanente dans l'affaire des *Phosphates du Maroc, C.P.J.I. série A/B n° 74*, p. 23-24.

Partir du texte, ce n'est cependant pas, comme le fait Bahreïn, isoler une ou deux expressions dans un texte rédigé en langue arabe pour tenter d'identifier la ou les formules qui reflètent le mieux en anglais ou en français le véritable sens des termes arabes utilisés (contre-mémoire de Bahreïn, par. 6.8, p. 54). Partir du texte, ce n'est pas davantage vouloir déterminer son effet en considérant uniquement l'interprétation de quelques mots qui y ont été introduits à l'initiative de Bahreïn notamment.

La jurisprudence internationale, et celle de la Cour en particulier, a eu l'occasion à maintes reprises de souligner que, dans tout processus d'interprétation, le sens d'un mot ou d'une expression ne saurait être déterminé isolément, car un mot «tire son sens du contexte dans lequel il est employé» (*Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, C.I.J. Recueil 1960*, p. 158), et lorsque la convention de Vienne sur le droit des traités pose la règle qu'il convient de suivre le sens ordinaire des termes, elle précise en même temps que ce sens est à attribuer aux termes pris dans leur contexte.

Il paraît ici nécessaire de souligner que le contexte *stricto sensu*, tel qu'il est défini dans l'article 31, paragraphe 2, de la convention de Vienne, n'est toutefois pas ce que Bahreïn appelle, dans ses écritures (contre-mémoire de Bahreïn, par. 6.68-6.74, p. 82-84; duplique de Bahreïn, par. 5.42-5.48, p. 45-49), "le contexte général du procès-verbal

de 1990"; car les éléments qui sont invoqués à ce titre par Bahreïn concernent en réalité les circonstances de la conclusion de l'accord de Doha. Il s'agit là, non du contexte auquel la convention de Vienne assigne un rôle spécifique dans le processus d'interprétation, mais d'un moyen complémentaire, extérieur au texte, et permettant de vérifier et de confirmer, le cas échéant, l'interprétation selon le sens ordinaire, comme nous le verrons ultérieurement.

De plus, contrairement à la prétention de Bahreïn, (contre-mémoire de Bahreïn, par. 6.29, p. 63-64; duplique de Bahreïn, par. 5.18, p. 32-33), faire référence au contexte, ce n'est pas replacer le texte signé à Doha dans le cadre de prétendus «accords» qui seraient intervenus préalablement entre les Parties quant à la conclusion d'un compromis et quant à la soumission conjointe de leur différend à la Cour. L'article 31, paragraphe 2, de la convention de Vienne n'envisage, comme faisant partie du contexte ou lui étant rattachés, que les instruments établis à l'occasion de la conclusion de l'accord à interpréter. Ce qui n'est évidemment pas le cas des soi-disant accords préalables invoqués par Bahreïn. Nous aurons également l'occasion de revenir sur ce point.

Faire appel au contexte, c'est envisager les diverses dispositions de l'accord en les considérant dans leurs rapports entre elles. Ce que le Tribunal arbitral chargé de l'*interprétation de l'accord aérien du 27 mars 1946* entre les Etats-Unis et la France explicitait dans sa sentence du 22 décembre 1963 :

> "L'interprétation, en tant qu'opération logique visant à établir avec le maximum de certitude l'intention commune des Parties, ne saurait parvenir à fixer le sens à attribuer à un terme figurant dans une clause du traité que dans le cadre et en fonction de la clause tout entière. A son tour, une clause

> doit être interprétée par référence au contenu du traité pris dans sa totalité..." (*RSA*, vol. XVI, p. 11-71; *RGDIP*, 1965, p. 189-260, à la page 230).

Le contexte interdit donc d'examiner isolément une disposition, en la séparant de l'ensemble dont elle fait partie.

Il s'agit en quelque sorte de ce que le regretté Mustafa Kamil Yasseen appelait "la règle de l'examen global" ("L'interprétation des traités d'après la convention de Vienne sur le droit des traités", *RCADI*, vol. 151, p. 36). Et, dans le cours qu'il avait donné à l'Académie de droit international de La Haye sur l'interprétation des traités, l'éminent juriste arabe insistait sur le fait que le sens ordinaire d'un terme employé dans un traité ne peut pas être conçu dans l'abstrait; car, disait-il, il s'agit "d'un sens ordinaire concret qui ne peut être discerné que par l'examen du terme en question dans le contexte de ce terme et à la lumière de l'objet et du but du traité" (*ibid.*, p. 26).

Cet examen global du texte, en effet, ne peut lui-même se faire qu'en ne perdant jamais de vue l'objet et le but de l'accord, c'est-à-dire en prenant en considération l'éclairage projeté par les finalités d'un texte sur l'interprétation de celui-ci.

Dans l'affaire de la *Compétence en matière de pêcheries*, la Cour avait ainsi accordé une place non négligeable à l'examen de l'objet et du but d'un échange de notes entre le Royaume-Uni et l'Islande, en vue de déterminer s'il existait une volonté commune des parties de reconnaître la compétence de la Cour (*Compétence en matière de pêcheries, C.I.J. Recueil 1973*, p. 17, par. 32).

Si l'on cherche à déterminer l'objet et le but de l'accord de Doha, la question essentielle est celle de savoir ce que les parties ont voulu atteindre dans les limites des dispositions qu'elles ont formulées.

Selon Bahreïn, le texte adopté à Doha n'aurait eu d'autre but que de mettre un terme à une initiative intempestive et malencontreuse prise par le Qatar à l'ouverture de la réunion du Conseil de coopération du Golfe, sans pour autant faire perdre la face à l'auteur de cette initiative. Quant à son objet, le texte en cause se serait borné, aux dires de Bahreïn, à enregistrer l'acceptation par le Qatar de la *"Bahraini formula"*; et les deux parties seraient simplement convenues de prendre les mesures en découlant pour pouvoir ensuite soumettre leur litige à la Cour par voie de compromis.

Mais si l'objet et le but de l'accord de Doha se résumaient à cela, le texte aurait fort bien pu avoir un libellé extrêmement simple. Il aurait alors suffi, par exemple, d'avoir un paragraphe ainsi rédigé:

> "Le Qatar a accepté la formule bahreïnite et les deux Parties poursuivront leurs efforts pour conclure un compromis en vue de saisir la Cour internationale de Justice."

Il ne s'agit pas là d'une caricature; car telle est bien, au fond, la position que soutient Bahreïn.

Or, cela revient à considérer que certaines dispositions de l'accord de Doha devraient être tenues pour des dispositions inexistantes ou non avenues qui n'auraient pas été réellement voulues par les auteurs du texte. En particulier, que devient la référence, qui est faite dans le texte, au mois de mai 1991 ? Le membre de phrase "A l'expiration de ce délai" n'aurait plus aucune signification. Il en serait de même de la clause prévoyant la poursuite des bons offices de l'Arabie saoudite pendant la soumission de l'affaire à la Cour, ainsi que de la disposition faisant obligation aux Parties de retirer l'affaire du règlement juridictionnel en cas de solution amiable.

L'objet et le but de l'accord de Doha, tels qu'ils se dégagent du texte même de l'accord, ne peuvent donc pas se limiter à ce que Bahreïn prétend qu'ils sont, sinon on aboutit à une interprétation du texte qui ne permet pas de donner à toutes ses dispositions, sans exception, la portée et l'effet qui sont normalement les leurs.

L'accord de Doha vise, en réalité, à permettre la mise en oeuvre de l'obligation que les deux Etats avaient antérieurement contractée dans le cadre de la médiation de l'Arabie saoudite. Le préambule de l'accord situe d'ailleurs celui-ci "dans le cadre des bons offices du roi Fahd Ben Abdul Aziz, Gardien des deux saintes Mosquées".

Il convient de rappeler à ce sujet que l'un des principes approuvés dans le cadre de la médiation en 1983 avait prévu qu'en cas d'échec des négociations pour régler le différend,

> "les gouvernements des deux pays s'attacheront, en consultation avec le Gouvernement de l'Arabie saoudite, à déterminer les meilleurs moyens de régler ladite ou lesdites questions, sur la base des dispositions du droit international. La décision que prendra l'instance choisie d'un commun accord à cette fin sera définitive et obligatoire."

Devant l'impossibilité de parvenir à une solution négociée entre les deux parties, le médiateur entreprit en 1987 de mettre en oeuvre le principe en question. Il formula diverses propositions concernant la procédure à suivre, et ces propositions, acceptées par les deux Etats, ont constitué l'accord de 1987, qui comporte notamment l'engagement suivant:

> "Toutes les questions en litige seront soumises à la Cour internationale de Justice, à La Haye, pour qu'elle rende une décision définitive et obligatoire pour les deux Parties, qui devront en exécuter les dispositions."

Dès ce moment-là, les deux Etats avaient ainsi consenti à soumettre leurs différends au jugement de la Cour, sans toutefois se mettre explicitement d'accord sur la manière d'approcher la Cour.

Eu égard à son contenu, l'accord de Doha a eu manifestement pour objet et pour but, d'une part, d'englober dans une référence générale à la "formule bahreinite" les questions en litige qui pouvaient être déférées à la Cour et, d'autre part, de préciser la date à partir de laquelle la Cour pouvait être saisie.

L'accord de Doha se présente donc comme un instrument permettant, à partir de la date qu'il fixe, c'est-à-dire à partir du mois de mai 1991, la réalisation complète de l'engagement souscrit par les deux Etats en 1987.

L'engagement contenu dans l'accord de 1987 constitue, à n'en pas douter, une règle particulièrement pertinente aux fins de l'interprétation de l'accord de Doha. Il y a là une "règle pertinente de droit international applicable dans les relations entre les parties", au sens de l'article 31, paragraphe 3, alinéa c), de la convention de Vienne sur le droit des traités, dont il doit être tenu compte en même temps que du contexte.

C'est pourquoi, lorsque le Qatar affirme que l'accord de Doha rendait possible la saisine de la Cour conformément à l'article 40 du Statut, on est fondé à considérer que l'interprétation ainsi retenue est celle qui répond le mieux à l'objet et au but de cet accord et celle qui est en même temps la plus propre à réaliser cet objectif.

De surcroît, une telle interprétation est celle qui tient le plus compte de l'unité fondamentale de tout processus interprétatif. Celui-ci,

en effet, constitue un véritable creuset où viennent se fondre les différents éléments mentionnés à l'article 31 de la convention de Vienne.

C'est en faisant application de cette démarche qu'il est possible de déterminer le sens véritable et la portée exacte du texte de l'accord du 25 décembre 1990.

Monsieur le Président, j'en viens donc à présent à l'examen de la signification des termes de l'accord de Doha.

3. La signification des termes de l'accord de Doha

Dans la réplique qu'il avait présentée à la Cour, le Qatar avait pris soin d'analyser, paragraphe par paragraphe, l'ensemble du texte signé à Doha. La duplique présentée par Bahreïn a été beaucoup plus sélective sur ce point et s'est bornée - pour l'essentiel - à reprendre le schéma et le contenu de son contre-mémoire.

Aussi, sans nécessairement revenir sur tout ce qui se trouve à ce sujet dans nos pièces écrites, convient-il néanmoins de rappeler les termes qui composent chacun des deux premiers paragraphes de l'accord de Doha. Le troisième paragraphe peut être laissé de côté, dans la mesure où il n'y a pas vraiment de divergence entre les Parties quant à son interprétation. Mais il est évident que l'interprétation des deux premiers paragraphes doit tenir compte de l'existence de ce troisième paragraphe en tant qu'élément du texte dans son ensemble.

A. *Le premier paragraphe* de l'accord tend à "réaffirmer ce dont les deux parties sont convenues précédemment".

A en croire Bahreïn, par cette disposition, les deux Etats auraient purement et simplement réaffirmé en 1990 "a course of conduct" visant à l'élaboration d'un compromis et à une saisine de la Cour par voie de

notification conjointe de ce compromis (contre-mémoire de Bahreïn, p. 62, par. 6.27). Selon la Partie adverse, le texte adopté à Doha se situerait donc dans la suite logique de la Commission tripartite qui avait été constituée en 1987 et dont il viserait en quelque sorte à poursuivre les travaux.

Une telle attitude passe complètement sous silence le fait que cette commission avait échoué dans sa tâche et que, conformément à l'annonce faite par le prince Saud le 5 novembre 1988, elle était arrivée au terme de son mandat à la fin de l'année 1988. Elle aurait certes pu être reconstituée, avec sans doute un mandat différent et plus spécifique, en vertu d'un accord exprès de toutes les parties intéressées. Mais aucun accord de ce type n'a été consigné dans le texte adopté à Doha, qui ne fait d'ailleurs aucune mention de la Commission tripartite.

En raison de la généralité de la formulation du premier paragraphe de l'accord, on ne peut certainement pas interpréter celui-ci comme le fait Bahreïn et prétendre que cette disposition fait renvoi à un engagement qu'auraient contracté les deux Etats de conclure un compromis. Sans doute, la voie de l'élaboration d'un compromis a-t-elle été explorée dans le cadre de la Commission tripartite; mais, outre le fait que cette tentative n'a pas pu aboutir, il convient de souligner que l'accord de 1987 ne fixait pas la manière dont les parties devraient approcher la Cour et n'édictait aucune obligation de conclure un compromis. Il se bornait à prévoir la création d'une commission composée de représentants des deux Etats en litige et de l'Arabie saoudite, en vue d'

> "entrer en rapport avec la Cour internationale de Justice et d'accomplir les formalités requises pour que le différend soit soumis à la Cour conformément à son Règlement..."

Il est évident que le premier paragraphe de l'accord de 1990 ne peut pas être regardé comme réaffirmant la disposition de l'accord de 1987, relative à la Commission tripartite, puisque celle-ci avait cessé de fonctionner. On doit donc considérer que la disposition de l'accord de 1987 concernant cette commission est, de ce fait, devenue obsolète.

A fortiori en est-il de même de ce qui avait été convenu dans le déroulement des travaux de cette commission, contrairement à ce que Bahreïn prétend dans sa duplique (par. 5.18, p. 32-33).

En particulier, le fait que les deux Etats étaient convenus, à un moment donné, de tenter d'élaborer un compromis ne saurait être regardé comme un engagement définitif de leur part d'envisager exclusivement une soumission conjointe du différend à la Cour au moyen d'un compromis; car ce n'était qu'une des voies possibles. On peut, de surcroît, noter que, même si un compromis avait été conclu, cela n'aurait pas nécessairement conduit à une notification conjointe dudit compromis.

En outre, après l'échec de la tentative d'élaboration d'un compromis et à la suite de l'expiration du mandat de la Commission tripartite, il est tout de même difficile de concevoir que les accords partiels intervenus entre les participants à cette commission ont été en quelque sorte réactivés ou réaffirmés par le texte de l'accord de Doha. Une telle position ignorerait le fait que ces "accords partiels" étaient intervenus dans le cadre et à propos des travaux de la commission tripartite et qu'ils ont donc perdu tout intérêt et toute pertinence dès lors que cette commission avait cessé de fonctionner et d'exister.

Qui plus est, cela revient ou reviendrait à réduire le texte de l'accord de Doha à son premier paragraphe, c'est-à-dire à détacher totalement ce paragraphe de son contexte.

Or, nous l'avons vu, aux fins de l'interprétation de la disposition contenue dans le premier paragraphe, celui-ci doit être replacé dans le contexte de l'ensemble des dispositions de l'accord. Il apparaît alors que la position adoptée par Bahreïn sur ce point est difficilement compatible avec les autres dispositions contenues dans l'accord de Doha, en particulier avec la fixation d'une date limite à partir de laquelle l'affaire pouvait être déférée à la Cour.

Le sens naturel et ordinaire des termes employés dans ce premier paragraphe, replacés dans leur contexte et entendus à la lumière de l'objet et du but de l'accord, conduit à dire que la réaffirmation de ce qui avait été préalablement convenu entre les deux Etats n'est rien d'autre qu'une référence aux principes sur lesquels les parties s'étaient mises d'accord antérieurement quant au mode de règlement de leurs différends; ce que confirment d'ailleurs les termes du préambule de l'accord situant celui-ci "dans le cadre des bons offices du roi Fahd". L'interprétation correcte de cette disposition conduit à y voir en réalité une double référence. Il s'agit, pour partie, d'un renvoi au principe adopté en 1983 dans le cadre de la médiation, qui prévoyait le règlement du litige par une instance choisie d'un commun accord et statuant sur la base du droit international. Mais il s'agit aussi plus particulièrement d'une référence à l'accord intervenu en 1987 qui prévoyait ensuite que "toutes les questions en litige seront soumises à la Cour internationale de Justice".

Comme le Qatar a déjà eu l'occasion de le rappeler dans ses écritures, cette interprétation se trouve confirmée par les circonstances dans lesquelles a été conclu l'accord de 1990. Dans la dernière partie du présent exposé, nous reviendrons sur ce caractère confirmatif de l'examen

des circonstances entourant l'accord de Doha. Il suffit pour l'instant de noter que si la disposition du premier paragraphe de l'accord de Doha se présente comme un rappel de la teneur des engagements pris par les deux parties quant à la soumission du litige à la Cour, c'est essentiellement parce qu'un tel rappel est apparu à l'époque d'autant plus nécessaire qu'à l'ouverture de la réunion du Conseil de coopération du Golfe à Doha en décembre 1990, le premier ministre de Bahreïn, qui représentait l'Emir de Bahreïn à cette réunion, avait semblé vouloir remettre en cause l'engagement qu'avait souscrit son Etat d'aller devant la Cour (réplique, par. 3.58, p. 35-36).

Ces différentes raisons mènent à la conclusion que le premier paragraphe de l'accord de Doha doit être interprété comme réaffirmant ou confirmant, purement et simplement, l'acceptation de la juridiction de la Cour par les deux Etats.

Monsieur le Président, si la Cour en est d'accord, je pourrais arrêter ici mon exposé et poursuivre à l'audience de demain matin la présentation de l'interprétation du deuxième paragraphe de l'accord de Doha.

Le PRESIDENT : Je vous remercie, Professeur Quéneudec. La Cour ajourne ses travaux et les reprendra demain matin à 10 heures.

L'audience est levée à 13 h 01.
