CR 94/7

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1994

Public sitting

held on Thursday 10 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 jeudi 10 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
		Shi
		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
Shi
Fleischhauer
Koroma, juges

MM. Valticos,
Ruda, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

H.E. Dr. Najeeb Al-Nauimi, Minister Legal Adviser,

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,

as Counsel and Advocates;

Mr. Richard Meese, Advocate, partner in Frere Cholmeley, Paris,

Miss Nanette E. Pilkington, Advocate, Frere Cholmeley, Paris,

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

The Government of Bahrain is represented by:

H.E. Dr. Husain Mohammed Al Baharna, Minister of State for Legal Affairs, Barrister at Law, Member of the International Law Commission of the United Nations,

as Agent and Counsel;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus in the University of Cambridge,

Mr. Keith Highet, Member of the Bars of the District of Columbia and New York,

Le Gouvernement du Qatar est représenté par :

S. Exc. M. Najeeb Al-Nauimi, ministre conseiller juridique,

comme *agent et conseil;*

M. Adel Sherbini, expert juridique,

comme *conseiller juridique;*

M. Sami Abushaikha, expert juridique,

comme *conseiller juridique;*

M. Jean-Pierre Quéneudec, professeur de droit international à l'Université de Paris I,

M. Jean Salmon, professeur à l'Université libre de Bruxelles,

M. R. K. P. Shankardass, Senior Advocate à la Cour suprême de l'Inde, ancien président de l'International Bar Association,

Sir Ian Sinclair, K.C.M.G., Q.C., Barrister at Law, membre de l'Institut de droit international,

Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., professeur émérite de droit international à l'Université de Londres,

comme *conseils et avocats;*

M. Richard Meese, avocat, associé du cabinet Frere Cholmeley à Paris,

Mlle Nanette E. Pilkington, avocat, du cabinet Frere Cholmeley à Paris,

M. David S. Sellers, Solicitor, du cabinet Frere Cholmeley à Paris.

Le Gouvernement de Bahreïn est représenté par :

S. Exc. M. Husain Mohammed Al Baharna, ministre d'Etat chargé des affaires juridiques, Barrister at Law, membre de la Commission du droit international de l'Organisation des Nations Unies,

comme agent et conseil;

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. Keith Highet, membre des barreaux du district de Columbia et de New York,

Mr. Eduardo Jiménez de Aréchaga, Professor of International Law at the Law School, Catholic University, Montevideo, Uruguay,

Mr. Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law and Director of the Research Centre for International Law, University of Cambridge; Member of the Institut de droit international,

Mr. Prosper Weil, Professor emeritus at the *Université de droit, d'économie et de sciences sociales de Paris*,

as Counsel and Advocates;

Mr. Donald W. Jones, Solicitor, Trowers & Hamlins, London,

Mr. John H. A. McHugo, Solicitor, Trowers & Hamlins, London,

Mr. David Biggerstaff, Solicitor, Trowers & Hamlins, London,

as Counsel.

M. Eduardo Jiménez de Aréchaga, professeur de droit international à la faculté de droit de l'Université catholique de Montevideo, Uruguay,

M. Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international et directeur du Research Centre for International Law de l'Université de Cambridge; membre de l'Institut de droit international,

M. Prosper Weil, professeur émérite à l'Université de droit, d'économie et de sciences sociales de Paris,

comme conseils et avocats;

M. Donald W. Jones, Solicitor, du cabinet Trowers et Hamlins à Londres,

M. John H. A. McHugo, Solicitor, du cabinet Trowers et Hamlins à Londres,

M. David Biggerstaff, Solicitor, du cabinet Trowers et Hamlins à Londres,

comme conseils.

The PRESIDENT: Please be seated. This morning the Court resumes the hearings in the *Qatar/Bahrain* case on questions of jurisdiction and admissibility in order to hear Qatar, the second round of oral arguments. I, therefore, give the floor or His Excellency Mr. Nauimi.

Dr. NAJEEB AL-NAUIMI: [Greetings] Mr. President, Members of the Court,

1. In opening the second round of oral pleadings on behalf of the State of Qatar in these proceedings dealing with the questions of the jurisdiction of the Court and the admissibility of Qatar's Application, I will draw the Court's attention to certain points that I feel obliged to make after listening to Bahrain's first round of oral pleading.

2. *First*, the Court will no doubt have noted that it is Qatar which for many years has been seeking the peaceful settlement of the long-standing disputes. I am here now before the Court because Qatar firmly believes that the 1987 Agreement expresses the consent of the two Parties to refer all the disputed matters to the Court, and that this Agreement contained no reservation that such reference could only be by means of a joint submission.

3. What was agreed and recorded in the text of the Doha Agreement signed by Bahrain on 25 December 1990 was that the Bahraini formula indicating the subject of the dispute was accepted by Qatar. At the same time the seisin of the Court by means of a special agreement was not contemplated and Bahrain's draft Article V was not incorporated in that text. Bahrain entered into this Agreement knowing perfectly well what it was agreeing to or "bargaining for".

4. Qatar firmly believes that it was perfectly entitled to file its Application, and analyses Bahrain's attitude since that filing as an attempted withdrawal of the consent which it gave in 1987 and 1990. Qatar has been accused of "manoeuvring" (CR 94/4, p. 13). Qatar does not see how recourse to the Court under its Statute and Rules could be characterized as a "manoeuvre". If there are any "manoeuvres" in this case, it is Bahrain who is manoeuvring in trying to withdraw its consent to the jurisdiction of the Court. Qatar is convinced that the Court can adjudicate on the dispute covered by the Bahraini formula and that Bahrain is at liberty to file a separate application with respect, for example, to its own claims concerning Zubarah.

Qatar does not want to prevent Bahrain from sharing in justice. But, as Beckett is quoted by Manfred Lachs as saying:

> "It is not correct as a matter of practice and experience to state that the meaning of a treaty cannot be clear, or otherwise the States concerned would not be going to the trouble and extent of litigating about it. It certainly happens that the meaning of a treaty provision is perfectly clear, but that one ... party ... has for one reason or another found the provision inconvenient." (Manfred Lachs, "Evidence in the procedure of the International Court of Justice: the role of the Court" in *Hacia un nuevo ordén internacional y europeo*; Hommaje al Professor M. Diez de Velasco, Editorial tecnos, Madrid, 1993, p. 437).

5. *Second*, I turn to the Bahraini question about the absence of a reaction by Qatar to the two different draft special agreements that it received in September 1991 and June 1992, after the filing of the Application. Bahrain has asked why Qatar rejected these offers. Why? The answer is quite simple. In the first place, Qatar had already filed a valid unilateral Application on the basis of the 1987 and 1990 Agreements. Furthermore, it is obvious that the 1992 Bahraini draft was intended as a trap for Qatar. I am sure that the Court will have been as astonished as Qatar was, to note that, despite Qatar and Bahrain's

acceptance in December 1990 of the Bahraini formula, Bahrain has changed that formula in its June 1992 draft. Quite simply, and contrary to what Bahrain tries to pretend, the draft special agreement of June 1992 is far from being "a perfectly reasonable proposal for a joint submission". In addition, all these attempts made by Bahrain for the signature of a special agreement have been made in full knowledge of Qatar's Application of July 1991. As I said earlier, the Mediator did not depart from his role as Mediator, and Bahrain is using the draft special agreements not only in an attempt to withdraw its consent under the Doha Agreement but perhaps also to evade its consent under the 1987 Agreement.

6. *Third*, last Friday, we were told that "States likely to be faced by boundary questions are reluctant to accept compulsory jurisdictional clauses permitting the unilateral institution of proceedings relating to such matters", and that "the initiation of proceedings in relation to such matters under pre-existing clauses of compulsory jurisdiction or under the Optional Clause is exceptional" (CR 94/4, pp. 19-20). This was repeated again on Tuesday (CR 94/6, p. 48). The truth of the matter is, however, that out of the 57 States which have made Optional Clause declarations, only six have excluded territorial questions from their acceptance of the Court's jurisdiction - only six. In addition, the Court will not need to be reminded that three cases concerning territorial disputes have been brought before it by unilateral application on the basis of an Optional Clause declaration (the *Temple of Preah Vihear (Cambodia* v. *Thailand)* case (*I.C.J. Reports 1962*, p. 6) and, very recently, both the *Maritime Boundary (Guinea-Bissau* v. *Senegal)* case in 1991 and the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (*I.C.J. Reports 1993*)).

7. *Fourth*, I was surprised to hear last Friday that the only members of the GCC Summit who knew anything about the problem between Qatar and Bahrain were Saudi Arabia and the two Parties themselves, and that therefore the first paragraph of the Doha Agreement as drafted by Oman, reaffirming "what had previously been agreed" between the Parties, can only have referred to "*whatever* had been previously agreed", including matters agreed upon in the Tripartite Committee (CR 94/4, p. 55).

Mr. President, Members of the Court, I submit that quite the opposite is true. Oman, like the other members of the GCC, was very well aware of the 1987 Agreement, which had been made public at the 1987 GCC Summit and was reported at the time to the press by the official speaker of the Summit, Prince Saud Al-Faisal, the very person who, in 1988 informed the Tripartite Committee that its work would terminate at the end of December 1988. Oman, and indeed the other members of the GCC, were also aware of the further attempts to try to reach a mediated settlement which had been announced in the subsequent GCC summit meetings, and of the understanding which had been reached by the heads of State at the Doha Summit. What it could *not* have been aware of, and therefore could *not* have had in mind when it produced its draft, were the various so-called agreements reached during the Tripartite Committee meetings. In other words, the phrase "what was previously agreed" in the first paragraph of the Doha Agreement clearly must be understood as referring to the 1987 Agreement.

8. *Fifth*, another point I would like to discuss is the extraordinary presentation by Bahrain of the factual elements of the Doha Agreement. At the outset, I should say that it was astonishing to hear the Agent for Bahrain citing his own statement as if it were objective evidence

(CR 94/2, p. 22). I would also recall that almost no face-to-face discussions took place between the two Parties upon the occasion of the conclusion of the Doha Agreement. The same was the case for the conclusion of the 1987 Agreement by exchange of letters.

On 4 March, however, one of Bahrain's counsel (CR 94/4, pp. 51 ff.) commented on the self-serving statements by Bahrain's Foreign Minister and by the Agent of Bahrain which were manufactured 18 months after the events and were annexed to the Bahraini Counter-Memorial. At the beginning, we heard that "the accuracy of the statement has never been challenged". This is simply not true - it is not true - and I would like to refer the Court to page 34 of Qatar's Reply.

Next, it was said that since Qatar has refrained from filing similar statements or introducing oral testimony to contradict the statements,

> "it is now impossible for Qatar ... to contend that the Court should qualify, question or reject the evidence of these statements regarding what happened at Doha or the understanding that the Minister had of the effect of the texts or the nature of his intentions".

There are two points I wish to make.

As the Bahraini Minister for Foreign Affairs has recognized in his statement,

> "throughout the summit there were no direct discussions on this matter between the Bahraini and Qatari delegations. At all times a representative of Saudi Arabia or Oman shuttled between the two delegations." (CMB, Vol. II, Annex I.25, p. 161, para. 5.)

In these circumstances, how could Qatar provide evidence to contradict a statement concerning discussions at which it was not present?

The direct discussions between the two delegations which are referred to in the Foreign Minister's statement were between the Amir of Qatar and the Prime Minister of Bahrain at the opening session of the

Summit. But Qatar has noted that the Prime Minister of Bahrain did not provide a written statement.

Similarly, Dr. Al Baharna's statement reports no direct contact with Qatar's delegation. It is clear that Qatar could not have provided evidence relating to alleged discussions which took place in its absence.

Is Bahrain really suggesting that Qatar should have produced similar statements? Why would such a statement have more value than the narrative of events appearing in Qatar's written pleadings? The answer is certainly that Qatar did not want to use such statements in an attempt to induce in the Court the false idea that they have the value of an affidavit. In Qatar's view, the evidentiary value of the statements submitted by Bahrain is no greater than the value of the text of Qatar's written pleadings.

Furthermore, counsel for Bahrain insinuated that on the Qatari side, "no one appears ready to come forward and accept responsibility" for having negotiated the Doha Agreement, and that no one would be willing to be cross-examined by Bahrain. This assertion is extraordinary. Qatari are being accused of not having the courage to be responsible; but the words of Bahrain's counsel could also apply to the authors of the two famous statements. For a statement to be an accepted type of evidence, it should be made in the form of an affidavit.

In Qatar's view, witnesses who accept to give a statement under oath no doubt accept responsibility, because they are subject to all the sanctions which a court can apply when it is proven that the particular statement made is incorrect. Qatar notes that the statements made by the two Bahraini Ministers do not involve any responsibility on the part of their authors.

Finally, to end my remarks on the lack of evidentiary value of the two Bahraini Ministers' statements which, I repeat, should not be given more weight than Qatar's statements in its written pleadings, I would remind the Court that, following a request from the Registrar dated 16 November 1993, the two Agents reminded the Registrar of the agreement reached between them that no experts or witnesses would be called (Qatar's letter of 20 November 1993 and Bahrain's letter of 23 November 1993). I am confident that Dr. Al-Baharna will remember that I made this agreement at his request.

To sum up, if the Court were to allow statements of this kind to be used as "evidence" under the Statute and Rules of Court, this would be equivalent to a party, in its oral pleadings, using statements made in its written pleadings as if they were evidence.

9. *Sixth*, I now turn to linguistic issues.

Counsel for Bahrain (CR 94/4, p. 57) addressed the question of the meaning of *"al-tarafan"* in the Doha Minutes, misstating the issue as being whether *"al-tarafan"* means "either of the parties" or "both the parties together". However, as Qatar has repeatedly explained, *"al-tarafan"* means simply "both" or "each of the parties" and there is no suggestion of the need for joint action in the Doha Agreement. In particular, there is no use of the word *"ma'an"* "together".

Bahrain, in oral argument, referred to the "historical context" - which was also described as the emergence of a pattern of usage of the words *"al-tarafan"* by the Parties. Bahrain attempted to show that the Parties had always used the word *"al-tarafan"* to refer to joint action. However, not a single example given from the so-called "historical context" is in fact relevant to an interpretation of the Doha Agreement.

Why? Because in every single example *"al tarafan"* was used where an obligation was placed on both Parties - both Parties *must* take a certain action. But the Doha Agreement does not contain an obligation, but rather gives a *right* to both Parties. Specifically, it uses the word *"yagouz"* ("may") not even mentioned by Bahrain's counsel. This is a fundamental difference. The Doha Agreement gives both Parties the right to submit the matter to the Court. All the experts agree that words must be interpreted in their linguistic context. It is thus significant that Bahrain's counsel sought to use examples which do not reflect the "linguistic context" of the Doha Agreement.

Equally important there are many examples from the so-called "historical context" where *"al-tarafan"* was used where separate action by each Party was envisaged. I referred to a number of such examples in my first round presentation where Dr. Al Baharna himself used *"al-tarafan"* to describe the right of each Party under the Bahraini formula to present their case or claims to the Court (CR 94/3, p. 37).

Bahrain's counsel make much of the fact that Bahrain "rejected" both the Saudi and Omani drafts because they envisaged unilateral application. But did Bahrain really reject these drafts? On the basis of anything known to Qatar the answer is no. From Bahrain's pleadings, it appears that on the Saudi draft, Bahrain simply inserted the following: "as specified in the Bahraini memorandum". I must note that, in his statement, Dr. Al Baharna said that the draft envisaged unilateral action.

In that connection, Dr. Al Baharna stated that he recommended the deletion of the text of the Bahraini formula, replacing it with confirmation that the Parties had agreed on this formula. He also said

that he recommended changing the words "either party" to "the two parties". But neither of these changes appears on the Saudi draft. Rather, it is clear that once again Dr. Al Baharna is mixing up his drafts. These were changes made to the Omani draft, not the Saudi draft. Moreover the reference to the acceptance of the formula was inserted in the Omani draft by Qatar, not by Bahrain.

Now, what about the Omani draft? Again, there is no evidence of a rejection of unilateral application. On the Omani draft, Bahrain simply changed "either of the parties" to "the parties", thus making clear that both Qatar *and* Bahrain had the right to make a unilateral application to the Court. Bahrain also added a reference to the Court's procedures. I believe that these objective changes to the text are not at all rejections of the agreement reached during discussions at Doha that reference to the Court could now be by unilateral application, but rather subjective statements of the alleged intentions of Bahrain's negotiators.

Qatar made clear its understanding of the Doha Agreement in its letter of 6 May 1991 to Saudi Arabia stating that in pursuance of the said Agreement "we [i.e., Qatar] intend to take the necessary measures to submit the matter to the ICJ at the end of the above-mentioned period" (MQ, Vol. II, Ann. II.34, p. 215). This statement could only refer to a unilateral application and simply could not have been understood otherwise. Had the intention been as Bahrain suggests, the letter would have said that "we [i.e., Qatar] intend to enter into contact with Bahrain at the end of the above-mentioned period with a view to the joint submission of the matter to the Court". It did not. The fact that Qatar's action was to be taken alone, without Bahrain, is equally clear in Qatar's letter to King Fahd of 18 June 1991. Saudi Arabia did not

query Qatar's letters, either suggesting that there was no such international agreement allowing Qatar to go to Court after the deadline, or suggesting that Qatar did not have the right to go by unilateral application.

* * *

I should make clear now that Qatar is not going to respond this morning to every argument put forward by Bahrain, but that it will deal only with the matters regarding the essence of the case. In particular, it is not the intention for counsel to deal with each and every distortion and omission in Bahrain's presentation. However, any failure to address an argument put forward by Bahrain cannot be understood to mean that Qatar concedes the argument.

In this second round of oral pleading, Mr. President, on behalf of the State of Qatar, Mr. Shankardass will deal with some of the important factual inaccuracies, contradictions and distortions in Bahrain's presentation.

Sir Ian Sinclair will respond to the Bahraini arguments relating to the status of the Doha Agreement and will demonstrate that the essential elements of the 1987 Agreement and the Doha Agreement support the case advanced by Qatar.

Professor Jean Salmon will focus on the consent concerning the subject and extent of the dispute and on the alleged disadvantages arising from the seisin of the Court by the mean of an unilateral application.

Professor Quéneudec will then deal with Bahrain's contention that there is no ground for the Application made by Qatar.

Mr. President, Mr. Shankardass is ready to deliver his statement upon your invitation. Thank you Sir.

The PRESIDENT: Thank you, Your Excellency. I give now the floor to Professor Shankardass.

Mr. SHANKARDASS: Thank you, Mr. President. Mr. President, Members of the Court, it is my task this morning to try and see if I can help remove some of the cobwebs that might have appeared in the last three hearings of the Court, in particular on some of the factual issues.

I. TRIPARTITE COMMITTEE MEETINGS AND THEIR SIGNED MINUTES

(i) The 1987 Agreement and a Special Agreement

May I first consider some aspects of the Tripartite Committee Meetings and their Minutes.

I have already shown in my first round presentation that when the 1987 Agreement was reached, it was in no one's contemplation that the Agreement had inevitably to be implemented by the negotiation of a special agreement. We have Dr. Al Baharna's own statement that it was only after consulting experts sometime after the 1987 Agreement that Bahrain was advised that contact with the Court should be through a Special Agreement.

In his presentation, Professor Bowett picked out and presented certain observations made on behalf of Qatar by the late Dr. Hassan Kamel in the Tripartite Committee Meetings to show that the Parties had agreed to go to the Court by a special agreement. It is regrettable,

Mr. President, that Bahrain chose to refer to Dr. Hassan Kamel's observations so totally out of context. I have already shown:

First, that the whole object and purpose of the Committee was to try and agree the procedure to implement what Bahrain also agreed at that time was the commitment and undertaking of the Parties to take their disputes to the Court; Dr. Hassan Kamel's statements were made in that procedural context so that they did not in any way affect the Parties' commitment.

Second, that at the First Tripartite Committee Meeting Qatar rejected any language for the procedural agreement which would restrict the reference to Court only by means of a Special Agreement. Of course Dr. Hassan Kamel said the Parties required a further agreement to submit the case to the Court - and, in the event, the Doha Agreement turned out *to be* that Agreement. The Court will recollect it was at the First meeting he also specifically pointed out that under Article 40 of the Court's Statute, cases are brought before the Court either by the notification of a Special Agreement *or* by a written application; and again, at the Legal Experts' meeting, he read out and analysed the requirements of Article 38 of the Rules of Court in the context of the Bahraini formula.

Once the parties proceeded, from the second meeting onwards, to try and reach a special agreement, Dr. Hassan Kamel sincerely applied himself to that task. All his statements now quoted clearly meant that once it had been agreed to try and reach a special agreement, all concerned should act realistically and reasonably, in trying to achieve one. But the fact is that the parties failed to reach a special agreement to submit their disputes to the Court. I have explained, and so have other

of Qatar's counsel, the reasons for the failure. It is therefore wrong to quote Dr. Hassan Kamel to show that Qatar had agreed to submit the disputes *only* by way of a special agreement. I would respectfully draw the Court's attention to some of his observations referred to in Qatar's pleadings and the record of the First and Sixth Meetings of the Tripartite Committee.

Mr. President, as I have said, no one stated or even hinted that in view of the Tripartite Committee's failure the long pending disputes would not be submitted to the Court.

The essence of the 1987 Agreement was in paragraph one - that is the decision of the Parties to submit the nearly 50-year old disputes to this Court, - not in paragraph three which required the Tripartite Committee to finalize the procedure to implement the decision. The attempt to negotiate a special agreement was pursued because it was the preferred method and not because it was a requirement flowing from the 1987 Agreement.

After a whole year's work, the Committee failed in its task and was never summoned again after December 1988.

(ii) The end of the Tripartite Committee

Professor Bowett asks how is it possible to consider that King Fahd terminated the Committee's work and thereby amended paragraph three of the 1987 Treaty without the Parties' consent. He overlooks the fact that under paragraph *four* of the 1987 Agreement, Saudi Arabia had another role and duty - to guarantee the implementation of the decision to refer the disputes to this Court. After King Fahd found that the Committee was going nowhere in search of the procedure to implement the decision, he informed the Committee through Prince Saud at its Fifth Meeting that its

work would terminate by the end of the next GCC summit meeting the following month "whether or not it succeeded to achieve what was requested from it". Prince Saud went on to say

> "I think we as politicians and legal advisors, have expended long and adequate time in our discussions (knowing that we have started our meeting during last December)." (See, Minutes of the Fifth Tripartite Committee Meeting, Qatar's TCM Documents, pp. 208-209.)

Bahrain did not respond to Qatar's amendment proposals made at the Sixth Meeting up to the time of the GCC Summit in December 1988; the Committee ceased to function; and the issue went back to the summit which requested and gave King Fahd some more time to mediate the substance of the disputes. Professor Bowett referred to the Bahraini Foreign Ministers' statement annexed to the Counter-Memorial to show King Fahd had said at Doha "it was the duty of the Tripartite Committee to meet and finalize the procedure for the parties to go to the International Court of Justice". If this statement was ever made, Mr. President, it was obviously made in the context that it was a duty the Committee had failed to discharge - and not to suggest revival of the Committee. It is no one's case that Saudi Arabia attempted to reconvene the Tripartite Committee - not even to discuss the so-called Saudi draft of the September 1991 special agreement. In any event the Doha Agreement, being subsequent in point of time to the 1987 Agreement, replaced the latter to the extent that there were inconsistencies between the two; and by making provision for the Parties to refer their disputes to the Court after the expiry of the five-month time-limit, the Doha Agreement clearly foresaw no further role for the Tripartite Committee even if, which Qatar denies, it was still in existence.

(iii) The December 1988 Minutes and the Doha Minutes

Mr. President, I would now like to refer briefly to the signed Minutes of the Sixth Tripartite Committee meeting. These Minutes, in Bahrain's translation, appear as Annex 1.18 to the Counter-Memorial. These Minutes are a record of certain facts: that "the Committee met in Riyadh"; that it "considered" certain issues; the Committee "listened to the reply of the State of Bahrain" and the "Discussions then turned to the objective of defining exhaustively the matters which would be referred to the Court ..." Five topics were then listed. Thereafter occurs this important sentence:

> "The two parties agreed to these matters, and the delegation of the State of Qatar proposed that there should be two annexes to the agreement which would be referred to the Court one of which would be Qatari and the other Bahraini. Each State would specify in its annex the matters of difference which it wished to refer to the ICJ."

The Minutes next record that Bahrain stated Qatar's proposal "would be studied" and "requested sufficient time". Qatar then "requested clarification" regarding Zubarah and Bahrain "replied".

I respectfully submit, Mr. President, that these minutes are by their very nature demonstrably no more than a mere record of discussions. Where in all this does Bahrain find any agreement that was covered by "what was previously agreed" in the Doha Agreement?

And when the Minutes refer to the fact that the "Parties agreed" on the list of subjects to which the reference was to be *confined*, the same sentence records Qatar's suggestion of two annexes. In other words despite the so-called agreed list the Parties were still to set out their respective claims in separate annexes which the other Party would not sign - in substance not very different from filing separate applications.

In the light of these considerations, Mr. President, I would respectfully invite the Court to compare these Tripartite Committee Minutes with the so-called Doha Minutes.

After its preamble (which refers to the Framework but, unlike the Committee Minutes I have just referred to, makes no mention of the Tripartite Committee), it refers to the Framework and unequivocally records: "Agreement was reached as follows" and then contains three clear agreed declarations of the Parties. This, Mr. President, is totally different in form and content to the Tripartite Committee Minutes.

I submit therefore, Mr. President, that in reaffirming what was previously agreed, the Doha Agreement, recording the understanding reached at a GCC Summit Meeting (with the help of Oman which was not even a member of the Tripartite Committee), was reaffirming the 1987 Agreement. This was the Agreement with which the GCC summit had also been concerned in December 1987; and the Doha Agreement was understood by everyone to be the final step in implementing the 1987 Agreement.

As pointed out by Qatar in its written pleadings, the phrase reaffirming what was previously agreed was put in because Bahrain at the opening meeting of the GCC Summit in Doha had called into question the 1987 commitment to go to Court, which caused an angry reaction from King Fahd. These facts have never been disputed by Bahrain.

So that, Mr. President, it could not be that in reaffirming what was previously agreed, the Parties were preserving what Professor Bowett said the Parties had already agreed: namely, he said, (i) the Parties would use the full Court, not a chamber - this was never discussed; (ii) that the Parties were to go to Court exclusively by means of a special

agreement - something the Tripartite Committee was simply unable to agree on; (iii) that the idea of a unilateral application was not within the contemplation of either Party - the fact is they discussed the idea both at the First and Sixth meetings of the Tripartite Committee; and (iv) the Bahraini formula was a *possible* solution - but this was only accepted under paragraph two of the Doha Agreement.

II. THE MEDIATOR'S ROLE

Mr. President, I will now turn, if I may, to the Mediator's role - for the reason that Bahrain has attempted to exploit some of its actions for its own purposes.

While expressing his admiration and appreciation of the Mediator's role, the Agent for Bahrain drew the attention of the Court to the so-called "September 1991 draft Special Agreement" and claimed it evidences Saudi Arabia's attempt, after Qatar's Application was filed, to persuade the Parties to adhere to the course which had for so long been their preoccupation, and that is, according to Bahrain, that of concluding an agreement to submit their disputes jointly and comprehensively to this Court. Mr. President, in my presentation in the First Round I have already drawn attention to the strange and somewhat mystifying circumstances in which this draft made its appearance in September 1991. I wish to refer to another circumstance to which Dr. Al-Baharna has drawn pointed attention, i.e., that after the Doha GCC Summmit Session, where an understanding emerged that the decision to refer the Qatar Bahrain disputes to this Court should now be implemented, Saudi Arabia presented a draft of a proposal to Bahrain's Foreign Minister which in fact provided that the consultations in Doha

> "had concluded with the agreement of the two parties on the formulation of the question which will be presented to the international Court of Justice *by each of them*".

Here, then, Mr. President, is the Mediator himself confirming that separate applications could be made to the Court by each of the Parties, obviously pursuant to the understanding which emerged at the Summit Meeting earlier. The Court will recollect Oman's later draft based on the same understanding was to a similar effect. Bahrain fails to explain, or even attempt to explain, how this position of the Mediator is consistent with the view or intent that Bahrain tries to attribute to Saudi Arabia by virtue of the appearance of the September 1991 draft, namely, that the Parties were always intended to continue discussions for a special agreement.

In any event, and in fairness to the Mediator, I believe it is important for me to draw attention to the fact that Saudi Arabia has always been anxious to stress the impartiality of its role as Mediator. As will be seen from the records of the Tripartite Committee meetings, Prince Saud repeatedly reminded the Parties of this fact fully realizing that this was an essential requirement for Saudi Arabia to play an effective role as a Mediator. I had occasion to refer to one such statement by Prince Saud at the second Tripartite Committee meeting during the First Round of the oral hearings and would respectully invite the Court's attention to a number of statements to a similar effect at other meetings which are recorded in the proceedings of the Tripartite Committee (e.g., pp. 4, 12, 85, etc.).

So that even if it was Bahrain that somehow persuaded Saudi Arabia to send the September 1991 draft of a Special Agreement it could, Mr. President, at most only have been an attempt by the Mediator to see

if this unnecessary round of jurisdiction proceedings could be avoided. However, given Saudi Arabia's declared impartiality, it must in any event be interpreted as being without prejudice to the right of each Party to go to Court after the expiry of the stipulated deadline, in accordance with the Doha Agreement.

I must therefore reiterate in even stronger terms that no reliance can or should be placed for any purpose on the so-called September 1991 draft Special Agreement which is wholly irrelevant to the issue before the Court, and in any case, on Bahrain's own argument cannot, as a subsequent event, have any effect on the validity of Qatar's Application.

Mr. President, there are two other aspects to which I believe I should draw the Court's attention.

(1) Bahrain's Foreign Minister himself admits in paragraph 8 of his statement filed with Bahrain's Counter-Memorial that the only change he made in the Saudi draft was "as specified in the Bahraini memorandum" (see Bahrain's Hearing Book, Item 12). In his first reaction to the draft there was no disapproval of the reference to each of the Parties presenting their own claims. I submit this is because he was aware these words were consistent with the understanding reached at the Summit Meeting earlier. Between his statement and the Agent's opening address to this Court, we are told that it is only after consultation with other members of the Bahraini delegation that the draft was found "unacceptable" and was "rejected as a whole".

2. Bahrain finds it difficult to believe that Qatar was unaware of the Saudi draft of the Doha Minutes that I have just referred to (Al-Baharna - para. 32, E.L. para. 26). Bahrain claims it found this draft unacceptable. If this is correct it provides a plausible reason

why the Saudi delegation never bothered to present it to Qatar's delegation as it would obviously have served no useful purpose.

III. NO PRIOR NOTICE TO BAHRAIN

(i) Qatar raising the disputes at Doha GCC Summit

May I, Mr. President, turn to another claim that Bahrain's counsel made. Bahrain claims that Qatar raised the issue of the pending disputes at the Doha Summit without notice, suggesting it caught Bahrain by surprise and never approached Bahrain in advance with a draft of a proposed agreement it intended to secure at Doha.

Firstly, there is no basis for the suggestion that Qatar had any prior plans whereby it "intended to secure" the kind of agreement Bahrain mentions. Qatar simply wanted to ensure that the commitment to refer the case to this Court should be implemented. It therefore raised the issue at the Doha Summit and the Doha Agreement was the result.

Secondly, I must say this pretence at being taken unawares is nothing short of amazing and factually incorrect in a number of respects.

Bahrain has apparently forgotten the assertion in Bahrain's own Foreign Minister's Statement (para. 2) that at the meeting of the GCC Foreign Ministers on 8 December 1990, about two weeks before the summit, to discuss the Agenda for the forthcoming summit meeting when Qatar asked for the issue of Qatar-Bahrain disputes to be added to the Agenda, he said

> "I disagreed with this suggestion saying the matter had always been outside the *formal* agenda for GCC meetings and should not therefore he included. This was agreed and the issue was not included on the agenda ..."

This complaint also contradicts Bahrain's admission in its Counter-Memorial (para. 5.38) that

> "the dispute was adverted to at the Gulf Co-operation Council Summit Conference in December 1988 and again at the corresponding meeting in December 1989"

although it was similarly not on the *formal* agenda for either of those meetings.

The fact is that the issue was raised at the Doha Summit in just the same way as at earlier similar meetings: It is true that it was only at the Doha meeting that an understanding emerged that after a period of another five months of mediation, the matter could be referred to the Court; and to facilitate the reference Qatar announced its acceptance of the Bahraini formula. But this was hardly a surprise. The Summit was well aware of the 1987 Agreement to go to the Court. The leaders of the Gulf countries had been troubled by the issue which they had had to discuss and deal with at each of their previous three meetings. King Fahd had indicated that he wished he had not asked for more time for his mediation at the previous two meetings as otherwise the disputes would already have been before the Court. He had further observed that as Qatar had accepted the Bahraini formula, there was no excuse for Bahrain not to refer the disputes to the Court. The accuracy of these statements, Mr. President, adverted to in Qatar's pleadings, has not been challenged.

The Court will see it is against this background and with full knowledge of the failure of the Tripartite Committee to evolve a Special Agreement that at the Doha Summit meeting, in which the senior most representatives of both Parties had participated, the understanding to refer the disputes to this Court, under its appropriate Rules, was reached.

There is thus no basis for Bahrain to feign surprise at the matter being raised at the Doha Summit or the lack of prior notice of an agreement from Qatar. The new agreement - i.e., the Doha Agreement was a consequence of the discussions at the Doha GCC Summit.

In this context I would like to refer to another surprising assertion by Bahrain - namely, that Qatar when raising the matter at the Doha GCC Summit "chose to raise the matter in a body whose members - apart from Saudi Arabia and Bahrain - knew nothing of the subject" (E.L., para. 13, Al-Baharna, para. 46). This ill-conceived submission (apart from being disparaging of members of the GCC) has only to be stated to be rejected. Bahrain forgets that right from the time of the GCC resolution of 8 March 1982, which requested Saudi Arabia to mediate in the disputes, that body, i.e., the GCC Summit, had been fully informed of and even been involved with all important developments including, in particular, at the time of the "Dibal incident" in 1986, and the announcement of the 1987 Agreement. In any event, almost every student of the history of Qatar and Bahrain is aware of the nature of their disputes because almost every book on the subject, including one by the distinguished Agent for Bahrain, Dr. Al-Baharna, tells you the disputes are about the Hawar Islands and the delimitation of the maritime boundary.

Dr. Al-Baharna also declared that in raising the disputes at the GCC Summit most of whose members knew nothing about the matter, "Qatar was trying to push Bahrain into accepting a formula which would have enabled Qatar to proceed unilaterally to the Court on any terms it wished". In the light of what I have just said, this seemed an incredible statement on behalf of Bahrain. At the Summit, Qatar accepted Bahrain's own

formula. Bahrain was most anxious to ensure that this acceptance was recorded in the Doha Agreement. Notwithstanding that, Bahrain itself has now discarded that formula in proposing yet another draft special agreement of June 1992 - a year after Qatar filed its Application.

(ii) Bahrain was unaware of communication between Qatar and Saudi Arabia after Doha Agreement

Mr. President, in my first round presentation I adverted to two letters sent by Qatar to Saudi Arabia on 6 May and 18 June 1991. In these letters, the Court may recollect, Qatar made clear its intention to go to Court unilaterally after the expiry of the deadline. Saudi Arabia never once suggested that Qatar did not have the right to take this action.

Bahrain surprisingly claims it was unaware of any communication between Qatar and the Mediator after the Doha Agreement. I have already shown in the first round that Bahrain's Foreign Minister himself admits in his statement filed with the Counter-Memorial (in para. 15) that King Fahd told the Amir of Bahrain in 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. King Fahd also confirmed that he had sent Prince Saud Al Faisal, the Saudi Foreign Minister, to Qatar with Saudi Arabia's proposals concerning the matter and when Saud Al Faisal returned he would send him to Bahrain".

Furthermore, Mr. President, is it conceivable that when, at King Fahd's request, the Amir of Qatar agreed to give Bahrain three more weeks to respond to Qatar's latest proposals, King Fahd would not have informed Bahrain of the proposals or of the extended time limit ?

In fact a most pertinent conclusion to be drawn is that while these exchanges were going on, Bahrain did not respond by saying "How can Qatar go to the Court before we have negotiated a Special Agreement?" Nor did

Bahrain summon or request Saudi Arabia to call a meeting of the defunct Tripartite Committee. Those ideas clearly developed only after Qatar had filed its Application. If Bahrain really believed that the Doha Agreement contemplated a further round of Tripartite Committee Meetings to evolve a Special Agreement, it would have produced some evidence to show it had asked Saudi Arabia to reconvene the Committee. The fact is that Bahrain took no such initiative after the Doha Agreement and before Qatar's Application was filed because Bahrain fully understood there were to be no further meetings of any Tripartite Committee and no further attempt to reach a special agreement.

Mr. President, Members of the Court, I hope I will be forgiven for repeating what I would respectfully say is a most important submission, and that it that Qatar and Bahrain agreed under the Fifth Principle of the Framework to have their disputes decided according to international law; they agreed to refer their disputes to this Court under the 1987 Agreement; during the Tripartite Committee meetings, they recognized they had distinct claims to make but neither was prepared to sign a special agreement which referred to the other's claims. The issue was resolved when the Doha Agreement gave each of them the right to bring its claims to this Court under a general formula after an agreed time-limit.

Mr. President, Members of the Court, I am not sure whether there is such a thing as harmonious litigation but I have come to learn that this forum is certainly a place where litigation is dealt with in a most harmonious way. May I again, therefore, express my sense of privilege at appearing in this honorable Court and my deep gratitude for the patient hearing that I have been given.

Mr. President, may I suggest that you now invite Sir Ian Sinclair for Qatar's next presentation. Thank you very much.

The PRESIDENT: Thank you Professor Shankardass. I give the floor to Sir Ian.

Mr. SINCLAIR: Mr. President, Members of the Court, my task this morning is to respond to some of the points made in their first round statements by the Agent for Bahrain, and by other Bahraini counsel.

Dr. Al Baharna (CR 94/4, p. 23) reproached me for having drawn attention in my first round statement to his sudden appearance at Doha; and he enquired rhetorically: "If you don't want to enter into a legal commitment, who better than a lawyer to tell you how to avoid it?" I willingly accept the reproach, for it only goes to show that Bahrain's protestations that it has no objection, in principle, to the settlement of the *whole* of the dispute that presently divides the States of Bahrain and Qatar (CR 94/4, p. 10) are mere empty words. For Bahrain has had every opportunity, since the conclusion of the Doha Agreement, to have had the *whole* of the dispute currently dividing Qatar and Bahrain adjudicated by the Court. The Qatari acceptance of the Bahraini formula has ensured this by conceding that the question of Zubarah falls within the jurisdiction of this Court. Yet Bahrain has sought, by every means possible, to frustrate this result. What I therefore understand Dr. Al Baharna to be saying is that he was sent to Doha with the clear objective of preventing any immediate reference to the Court of the matters in dispute between the two States. The question is whether he *succeeded* in this objective; and that is, at least in part, an issue to which I will in due course revert.

I turn now to another point raised by Dr. Al Baharna. In paragraph 41 of his statement of 4 March (CR 94/4, p. 26), he cites a short passage from a book by Hans Blix, which he apparently thinks supports the argument that the Bahraini Foreign Minister was manifestly not competent to bind Bahrain by an agreement falling within the treaty-making power of the executive. I fear however that Dr. Al Baharna may not have fully understood the position taken by Dr. Blix. Only a few pages prior to the passage cited by Dr. Al Baharna, Dr. Blix discusses at some length the significance of the treatment of the Ihlen declaration in the *Legal Status of Eastern Greenland* case. The Court will need no reminding of that case. But what Dr. Blix emphasizes is that

> "the Norwegian Government contended before the [Permanent] Court that, to conform with Norwegian constitutional law and standing instructions for the Government, the declaration - if binding - ought to have been deliberated by the King in Council";

and that

> "since this formality had not been observed, the declaration was one made in excess of the constitutional authority of the minister, and invalid internationally" (Blix, *Treaty-Making Power* (1960), p. 35).

Naturally, the Danish Government took the opposite view and so argued. In giving Judgment, the Permanent Court, in a much cited passage, stated:

> "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his government in response to a request by the diplomatic representative of a foreign Power in regard to a question falling within his province, is binding upon the country to which the Minister belongs." (*P.C.I.J., Series A/B, No. 53*, p. 71.)

This passage is normally cited as authority for the proposition that oral declarations by a Foreign Minister can, depending on the circumstances, be regarded as binding on the State which he represents. But, as

Dr. Blix does not fail to point out, the passage, in fact, has a much wider significance in the Law of Treaties generally:

> "The border-line between 'a reply of this nature' - so formal as to be embodied in minutes and given in the knowledge that a *quid pro quo* would follow - and some treaties in simplified form, like exchanges of notes, or agreed minutes, if at all existent, is very difficult to establish, and rules applying to one category may with good reason apply to the other." (Blix, *op. cit.*, pp. 36-37.)

Now, Mr. President, at this point I am obliged to comment on an issue of much greater significance. In seeking to deny the status of a binding international agreement to the Doha Minutes, counsel for Bahrain repeatedly advance the argument, which they assume to be decisive, that the Foreign Minister of Bahrain did not *intend* to enter into a binding international agreement at Doha. The intention of the Bahraini Foreign Minister is a constant and recurring theme in the Bahraini presentations (see CR 94/4, pp. 23, 24, 25, 26, 50, 61 & 62). But, as a matter of law, how relevant is the *ex post facto* expression by a representative of one of the parties to a bilateral agreement of what was his intention in entering into that agreement? The Agent for Qatar has already addressed this morning the so-called "evidence" presented in the statements of the Bahraini Foreign Minister and Dr. Al Baharna. I would simply ask the Court yet again to note that these statements were prepared some 18 months or so after the events to which they make reference.

I also feel bound to draw to the attention of the Court that this constant reliance by Bahrain on what is alleged to have been the *intention* of its Foreign Minister at Doha does not accord with the general rule of interpretation of treaties codified in Article 31 of the Vienna Convention on the Law of Treaties. At the risk of reminding the Court of what it must already be aware, I would recall that the

International Law Commission, in their commentary to what is now Article 31 of the Vienna Convention, states categorically:

> "The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the text, not an investigation *ab initio* into the intentions of the parties." (*ILC Reports* (1966), p. 51.)

Indeed, as Professor Quéneudec reminded us the other day, the Court itself, in its most recent judgement in the *Libya/Chad Territorial Dispute* case, reiterated the fundamental proposition that "interpretation must be based above all on the text of the treaty" (Judgment of 3 February, 1994, para. 41). It is the text which is the written expression of the intentions of the parties; and it is the text which calls for interpretation. Whatever may have been the doctrinal disputes among publicists prior to the adoption of the Vienna Convention in 1969, it is now, Qatar would submit, beyond dispute that the aim and goal of treaty interpretation is to ascertain the meaning of the text as the agreed *expression* of the intention of the parties; it is most decidedly not to mount a new investigation into what is *ex post facto* alleged to have been the intention of one of the parties at the time of the conclusion of the treaty. Indeed, as one learned authority reminds us, "one has to exercise a considerable degree of caution generally when referring to 'intention' as an element of international legal conduct" (E. Lauterpacht, "Gentleman's Agreements" in *Festschrift für F. A. Mann* (1977), p. 395).

Let us consider the consequences of the view contended for by Bahrain in the context of the interpretation of a multilateral convention. In Bahrain's view, it would be open to any party to that

convention to come along five or ten years later and claim that its representative in the negotiation of that convention had not *intended* at the time that a particular provision might be interpreted in such and such a way; and, on Bahrain's view, the Court would be bound to give effect to what is now claimed to have been the intention of the negotiating State at the time. It would not even be a question of an interpretative declaration made at the time of the conclusion of the treaty. It would be a *subsequent*, interpretative declaration made in the light of a dispute that had arisen with another State.

Mr. President, I would submit that there could be no concept more destructive of the security of treaties than the one I have just outlined. The *ex post facto* subjective view of one of the parties to the written instrument would on this view have to be preferred to an objective assessment of what is the true meaning of the particular provision whose interpretation is in issue.

Now, Mr. President, if that is the consequence of the view contended for by Bahrain in the context of the interpretation of a multilateral convention, the consequence is exactly the same in the context of the interpretation of a bilateral treaty. What Bahrain is doing is asking the Court to give effect to what, in May 1992, Bahrain asserts to have been the intention of its Foreign Minister in signing the Doha Minutes in December 1990. Qatar intends no disrespect whatsoever to the Bahraini Foreign Minister nor indeed to Dr. Al Baharna when it points out that their statements of 21 and 20 May 1992, on which my learned friend, Professor Lauterpacht relies so heavily, are inevitably self-serving. Their evidentiary value has been analysed this morning by the Agent for Qatar.

Mr. President, I must now turn briefly to another point raised by Dr. Al Baharna. He argues, with reference to the Doha Minutes, that the Court should not "impose upon Bahrain an agreement that it never intended to make and that it did not make"; and he immediately follows this statement by the following assertion:

> "Bahrain did nothing whatsoever to change the pre-existing objective of the Parties which was to negotiate a special agreement providing for a joint submission." (CR 94/4, p. 30.)

But, Mr. President, Qatar contests and has always contested that this was the "pre-existing objective" of the Parties. Qatar had always understood that, if the Mediator was unable to find a solution on the matters in dispute between Qatar and Bahrain, the agreed objective of the Parties was to ensure that these matters were referred to this Court for a binding decision. This certainly was the agreed objective recorded in paragraph 1 of the 1987 Agreement. There was admittedly no agreement at that time on *how* the matters should be referred to the Court and it was the task of the Tripartite Committee to investigate this. Yet Bahrain insists that the only method of seising the Court of disputes between Qatar and Bahrain is by "joint recourse", by the conclusion of "an agreement to submit their dispute jointly and comprehensively to the Court", by "joint submission to the Court of its difference with Qatar" or by the negotiation of "a joint submission under the 1987 Agreement". With respect, Mr. President, the Court must have been as wearied with this constant repetition of a theme (and a theme without variations) as were Qatar's counsel. Qatar would only comment that a cracked gramophone record is no substitute for reasoned argument. And what Qatar would instead stress is that it was the *failure* of the Tripartite Committee to

fulfil its task by the end of 1988 which led inevitably to the conclusion of the Doha Agreement.

I must turn now to some further points raised by my learned friend, Professor Lauterpacht in his renewed address to the Court on the morning of 7 March 1994. In commenting on the status of the Doha Minutes, Professor Lauterpacht seeks to argue from the consideration that the Doha Minutes are designated as "minutes" and carry the same title as earlier Minutes of the Tripartite Committee in 1988 that they are not intended to be legally binding. My learned friend is too good an international lawyer to place much reliance on this point, since he knows as well as I do, and as well as the Court knows, that it is not the *title* given to an international instrument, but its *content*, which determines whether or not it is to be considered a treaty. As one noted authority confirms:

> "The term 'treaty' may be taken to cover all international engagements concluded between States and governed by international law, whatever designations may be given to the written instrument or series of written instruments in which such engagements are embodied." (Satow's *Guide to Diplomatic Practice*, Fifth Edition (1979), p. 238.)

So I turn to the next criticism which my learned friend makes of my first round presentation. He immediately distorts my argument by complaining that I have not demonstrated the "intentions" of the Parties but have sought to analyse some operative provisions of the Doha Minutes. But that is precisely what one must do if one takes the pretty well universally accepted view that what is involved in the process of treaty interpretation is *not* a renewed search for the intentions of the parties but rather the meaning to be attributed to a text which is *itself* the agreed expression of the intention of the parties. I must simply leave it to the Court to determine whether the three matters to which I

specifically drew attention in my statement of 1 March (CR 94/2, pp. 30-31) are or are not the written expression of legal commitments undertaken by the Parties or by one specific Party. Qatar entertains no doubt that the answer must be in the affirmative.

Professor Lauterpacht then proceeds to enquire who is the "notional observer" whose authority I seek to invoke in analysing the background against which the Doha text was negotiated (CR 94/5, pp. 12-13). I regret to say that, on this particular point, my learned friend made a Freudian, but perhaps a very revealing, slip. I did not refer to a "notional observer": I referred to "a notional *objective* observer" (CR 94/2, p. 32). And this is sufficient surely in itself to exclude my learned friend's suggestion that I should look instead to the "evidence" of the Bahraini Foreign Minister. Whatever his many positive qualities may be, and I am sure there are very many, the Bahraini Foreign Minister can hardly be accounted an *objective* observer in this particular context. No, Mr. President, by my "notional objective observer", I was seeking to refer, with all due respect, to you, Mr. President, and to the other distinguished Members of this Court who will be called upon to assess the relative weight of the arguments presented by the Parties.

Now, if time permitted, I would like to take issue with some other points of much lesser significance in that part of the argument presented by Professor Lauterpacht which is directed to my submission that the Doha Minutes were clearly intended to be legally binding. Unfortunately, I can at this stage do no more than make a general traverse of any points in his argument which I have not specifically addressed, and invite the Court to reread my earlier statement. I am confident that the Court will

conclude that the Doha Minutes constitute an international agreement between Qatar and Bahrain which is legally binding on the Parties.

I must however conclude on this point by responding specifically to the question posed by Professor Lauterpacht on 7 March. Professor Lauterpacht enquires: How could any negotiator on behalf of Bahrain have known on 23 to 25 December 1990 that the document he was discussing was in any way legally different from earlier documents bearing exactly the same title, introduced by virtually the same words and signed by the same people in exactly the same way? (CR 94/5, p. 16.) The answer is simple - and for this purpose I will ignore the slanted way in which the question is put. On 23 December, there had been a serious and profound discussion among all the heads of delegations present at the Doha Summit. Some progress had been made - or so it must have seemed to the vast majority of the participants, including the representatives of Saudi Arabia and Oman. It was necessary to pin down the parties by putting on record what had been agreed. Three important elements had certainly been agreed:

1. Qatari acceptance of the Bahraini formula;
2. An agreed date after which the parties would be at liberty to go the Court;
3. A reaffirmation of the commitment already embodied in the 1987 Agreement to refer all the matters in dispute to the Court.

So the short answer to the question posed by my learned friend is: certainly, Bahrain's negotiators would or should have known that the Doha Minutes were intended to embody legally binding undertakings.

Mr. President, I would wish to conclude on a more positive note. There has been so much in the Bahraini first round presentations with

which Qatar is obliged to take issue in order to correct the false impressions created that sight may be lost of the many positive features of the total picture which strongly support the Qatari submissions.

There is first of all the basic undertaking of the Parties, expressed in paragraph 1 of the 1987 Agreement, to refer all the disputed matters to the Court. But, Bahrain seeks to persuade us, this was only an agreement in principle and it requires to be completed by being incorporated in a special agreement which would define more closely the scope and subject matter of the disputes. Qatar, believing in the strength of the Bahraini commitment under paragraph 1 of the 1987 Agreement, was prepared in good faith to explore the possibilities of concluding a special agreement with Bahrain. This was clearly a possible method (but not the *exclusive* method) of having the dispute referred to the Court; and Qatar, in all innocence, accepted that the primary objective of both parties in the Tripartite Committee should be to attempt to draw up a special agreement. And what happens? In its first round presentations, Bahrain has been careful to avoid making much, if any, reference to its *first* draft of a special agreement dated March 1988. It is just mentioned in the first statement made by my learned friend, Professor Bowett of 4 March (CR 94/4, p. 40). I would respectfully ask the Court to look again carefully at the proposed formulations of the question to be referred to the Court in Article II of the Qatari first draft (reproduced at MQ, para. 3.36) and in Article II of the Bahraini first draft (reproduced at MQ, para. 3.37). The Court will see at a glance that the Bahraini first draft would have required Qatar to accept *in advance* that the Hawar islands and the Dibal and Jaradah features appertained to Bahrain and would equally have brought

within the jurisdiction of the Court the alleged rights of Bahrain in and around Zubarah. The highly prejudicial expression of the questions in the Bahraini first draft of a special agreement should be compared with the formulation of Article II in the Qatari first draft. Here at least is a genuine attempt to set out in neutral terms the issues to which the Saudi mediation effort had been directed. The comparison of these two texts is enlightening because it will enable the Court to understand why Qatar thereafter became so suspicious of Bahraini tactics.

Mr. President, I leave this point to concentrate on another, my final point. One of the major weaknesses of the Bahraini first round presentation is that it offers no believable explanation of the five-month time-limit in the Doha Minutes after which the Parties would be at liberty to refer the matters in dispute to the Court. We know that, at the GCC Summit in Bahrain in December 1988, it had been agreed, on the proposal of King Fahd of Saudi Arabia, that Saudi Arabia should be given a further period of six months to try to achieve an agreement on the substance of the disputes through mediation. We know that he did not succeed even though *de facto* his mandate continued throughout the whole of 1989. We also know that the unresolved situation was discussed again at the GCC Summit held in Muscat in December 1989, when it was agreed that the Saudi mediation on the substance of the disputes be given a further limited time to achieve its objective. Again, his mandate continued *de facto* throughout the whole of 1990 without any discernible progress having been made (see MQ, para. 3.52).

I have recited these facts, Mr. President, and they are essentially uncontested (see CMB, para. 5.38), in order to point up the significance of the five-month time-limit in paragraph 2 of the Doha Minutes. The

previous GCC Summit decisions (in 1988 and 1989) to extend the time-limit for Saudi mediation had *not* been accompanied by any indication of what consequence would follow if the extended period of Saudi mediation on the merits did not achieve any result. But the Doha Minutes of 1990 *did* indicate what consequence would follow: and that consequence was that, after the end of the new five-month period for which the Doha Minutes made provision, the Parties "may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar and the proceedings arising therefrom". So Bahrain *could not* have anticipated that the consequence of failure of the Saudi mediation effort during the new five-month period would have been the same as it had been in the extended periods of Saudi mediation for which provision had been made at the 1988 and 1989 GCC Summits.

Now, my learned friend, Professor Lauterpacht does not really touch upon the significance of the time-limit in the 1990 Doha Minutes; nor indeed did any of the other Bahraini counsel in their first round of presentations. Professor Lauterpacht analyses at some length whether the expression "*al-tarafan*" is properly to be understood as meaning "the Parties", "the two Parties" or "the Parties together". But Qatar would pose the preliminary question: why a time-limit at all with a particular consequence attached to it, if the consequence was not to permit *either* Party to institute proceedings before the Court on the expiry of the time-limit? If the consequence was only to permit *both* Parties, acting jointly, to take this action, why the time-limit, since it is always open to two States, acting jointly, to invoke the jurisdiction of the Court? Mr. President, I would submit that the time-limit would have had no *raison d'être* in the circumstances if it had not allowed action to be

taken by either Party; and it is, as you Mr. President, and all the other Members of the Court, would be well aware, a cardinal principle of treaty interpretation that a meaning must be attributed to every phrase occurring in a text. Qatar takes the view that this consideration by itself militates strongly in favour of the position for which Qatar contends. And Qatar is reinforced in this view by the consideration that, in the nine hours of oral pleadings already allocated to them, none of the Bahraini counsel touched upon the crucial significance of the time-limit in the Doha Minutes.

Mr. President, that concludes the remarks I wish to make this morning. I am sorry if I have gone a little bit over the time-limit for the coffee break. I would suggest, Mr. President, that we have the coffee break now and on the resumption Professor Salmon will continue to present the Qatari arguments.

The PRESIDENT: Thank you, Sir Ian, it is the moment to have a break. The Court will resume in 15 minutes.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

Le PRESIDENT : Je vous prie de vous asseoir et j'appelle à la barre le professeur Salmon.

M. SALMON : Monsieur le Président, Messieurs de la Cour, deux tâches bien distinctes m'incombent ce matin. Je vous entretiendrai tout d'abord des conditions dans lesquelles le consentement à l'objet du différend sont remplies. Je reviendrai ensuite brièvement sur les prétendus inconvénients résultant d'une saisine unilatérale.

I. VOYONS TOUT D'ABORD LES CONDITIONS DANS LESQUELLES LE CONSENTEMENT SUR L'OBJET DU DIFFÉREND SONT REMPLIES

Selon l'article 38 du Règlement de la Cour

> «1. Lorsqu'une instance est introduite devant la Cour par une requête adressée conformément à l'article 40, paragraphe 1, du Statut, la requête indique la partie requérante, l'Etat contre lequel la demande est formée et *l'objet du différend* («the subject of the dispute»).
>
> 2. La requête indique ... en outre la nature précise de la *demande* («nature of the claim»)».

L'article 49 du Règlement parle des pièces écrites et on y fait allusion à la fois aux «*demandes*» (*claims*) et aux «conclusions» (*submissions*).

Le Qatar a le regret de constater que les plaidoiries orales de Bahreïn mélangent allègrement ces trois concepts : objet du différend, demande et conclusion c'est-à-dire «*subject of the dispute*», «*nature of the claim*» et «*submissions*».

Dans l'espèce qui nous retient, l'objet du différend est régi par l'accord de Doha.

Le paragraphe 2 de cet accord comprend la phrase suivante :

> «A l'expiration de ce délai, les parties pourront soumettre la *question* [et celle-ci en fait s'explique par le préambule, où l'on dit 'le *différend* existant entre Bahreïn et le Qatar'] à la Cour internationale de Justice conformément à la formule bahreïnite qui a été acceptée par le Qatar, et à la procédure qui en résulte...»

Le Qatar soutient qu'en ayant souscrit à l'accord de Doha qui incorpore la formule bahreïnite, les Parties sont maintenant d'accord sur *l'objet du différend* pouvant être soumis à la Cour aux termes de l'article 38, paragraphe 1, du Règlement. Le fondement obligatoire se trouve bien entendu non pas dans la formule bahreïnite prise isolément

mais dans l'accord de Doha contrairement à ce que laissent entendre nos contradicteurs.

Néanmoins, l'objet du différend a été décrit dans la formule en question :

> «Les parties prient la Cour de trancher toute question relative à un droit territorial ou à tout autre titre ou intérêt qui peut faire l'objet d'un différend entre elles; et de tracer une limite maritime entre leurs zones maritimes respectives, comprenant les fonds marins, le sous-sol et les eaux surjacentes.»

Je ne reviendrai pas sur les citations faites dans les écritures du Qatar et au cours de mon propre exposé de la séance du 2 mars (CR 94/3, p. 45-46). Il en résulte que la formule fut mise au point par Bahreïn pour inclure *tous les différends* entre les Parties, en particulier Hawar et Zubarah sans les citer explicitement.

Cette formule de nature générale et abstraite a été conçue pour que chaque Partie puisse présenter les différends qu'elle avait à coeur de présenter. C'est pourquoi elle utilise un mot collectif au singulier : le mot «différend».

On croit donc rêver lorsqu'on entend maintenant les conseils de Bahreïn reprocher à la formule d'être de nature générale et abstraite sans aucune indication de divergences concrètes (CR 94/5, p. 49) et soutenir qu'elle ne serait pas l'expression d'un consentement de Bahreïn.

Bien plus, Bahreïn va maintenant jusqu'à dire qu'il n'aurait jamais consenti, en souscrivant à ladite formule ou de toute autre manière, à soumettre à la Cour ses droits souverains sur les parties essentielles de son territoire que sont les îles Hawar, Dibal et Qit'at Jaradah (CR 94/5, p. 49) ! Ceci nous a été dit - et nous l'avons entendu avec stupeur - par M. Jiménez de Aréchaga.

La Cour jugera de la conformité de ces nouvelles déclarations avec les engagements de Bahreïn.

* * *

Le nouveau thème développé maintenant par Bahreïn est que le Qatar choisit en quelque sorte dans le menu ce qui lui plaît, et laisse le reste par un procédé qualifié de «pick and choose». En ceci, Bahreïn feint de ne pas comprendre que, par sa requête, le Qatar n'a fait que présenter *ses propres demandes* («*its own claims*») et qu'il ne lui appartient pas de présenter celles de l'autre Partie.

Bahreïn pourtant soutient que le Qatar devrait aussi présenter celles de l'autre Partie pour que la *totalité* du différend soit portée devant la Cour.

Plusieurs formes d'argumentation sont avancées pour soutenir cette prétention singulière.

Selon la première, le Qatar aurait violé le premier principe de l'accord-cadre élaboré en 1978 mais, comme vous le savez, définitivement adopté seulement en 1983 et selon lequel toutes les questions doivent être présentées de manière complémentaire et indivisible (CR 94/4, p. 16). Ce premier argument est erroné en fait comme en droit.

Ce premier principe posait en effet que

> «Toutes les questions en litige entre les deux Etats au sujet de la souveraineté sur les *îles*, des frontières maritimes et des eaux territoriales doivent être considérées comme des questions complémentaires formant un tout indivisible qui doit faire l'objet d'un règlement d'ensemble.»

Le pourquoi de cette disposition était simple. Le Qatar réclamait Hawar. Bahreïn n'était pas satisfait de la décision britannique du 23 décembre 1947 sur la délimitation de la frontière sur le fond de la mer. L'un et l'autre contestaient le statut de Dibal et de Qit'at

Jaradah. Bahreïn estimait que ses droits de pêche (notamment perlière) étaient un élément pertinent et il était évident que pour tracer la ligne maritime divisoire entre les deux pays, la prise en compte de ces éléments pouvait se poser. A l'époque, il n'y avait pas d'autres conflits que ceux que je viens de vous citer. A l'époque, l'Arabie saoudite le savait fort bien. Le principe de 1983 ne mentionne donc rien d'autre, il n'y est question que d'*îles* ou de frontières maritimes. Inutile de dire qu'il n'a jamais été soutenu que Zubarah fût une île.

Ceci démontre que la question de Zubarah n'était nullement présente à l'époque. Le professor Bowett et le professeur Jiménez de Aréchaga sont obligés d'en convenir (CR 94/4, p. 33).

Cette situation a-t-elle été modifiée par l'accord de décembre 1987 ?

Le paragraphe 1, qui se lit comme suit, n'apporte aucun élément nouveau sur ce point. Je le lis :

> «1. 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.»

En décembre 1987 le Qatar n'avait aucune connaissance d'une réclamation concernant Zubarah. Le mémorandum secret que Bahrain prétend avoir adressé au roi Fahd en octobre 1986 reste à ce jour inconnu du Qatar et de la Cour. Il est symptomatique à cet égard de noter que ce prétendu mémorandum n'a pas dû rester dans la mémoire du roi Fahd car comment la lettre de ce dernier adressée le 19 décembre 1987 aux deux Emirs décrit-elle l'objet du différend ? La deuxième phrase de la lettre du roi a le contenu suivant :

> «J'ai le plaisir d'adresser cette lettre à Votre Altesse au sujet du différend qui oppose depuis longtemps les Etats frères du Qatar et de Bahreïn au sujet de la souveraineté sur les îles de Hawar, des frontières maritimes de ces deux pays frères, ainsi que d'autres questions.»

Est-il un instant pensable que si le roi avait eu connaissance d'une réclamation aussi importante que celle relative à Zubarah en plein continent qatari il ne l'aurait pas mentionnée de manière spécifique ?

En tout cas, aucun engagement nouveau par rapport à 1983 n'a pu alors être souscrit par le Qatar.

Par conséquent, rien dans la requête du Qatar n'est contraire ni à cet engagement souscrit en 1983 ni à celui souscrit en décembre 1987.

Incidemment, le Qatar regrette que la foi de Bahreïn pour la complémentarité et l'indivisibilité des matières lui soit venue si tardivement. Bahreïn n'était pas mu par de tels scrupules lorsqu'en 1988 il proposait un compromis octroyant d'avance à Bahreïn toutes les îles ou hauts-fonds découvrants contestés, vidant ainsi sans vergogne les accords de 1983 et de 1987 de toute substance.

Certes, en acceptant la formule bahreïnite *à la réunion de Doha* - et *pas avant* - le Qatar a accepté que Zubarah, qui tombe dans cette formule, relève de la compétence de la Cour. Ceci s'est opéré néanmoins dans un nouveau contexte et par un nouveau texte : l'accord de Doha, prévoyant la saisine de la Cour. En tout état de cause, comme il a été dit et répété, le Qatar ne s'oppose nullement à ce que Bahreïn introduise lui-même sa propre demande à ce sujet en application dudit accord.

Le second argument de Bahreïn est le suivant : du fait que le Qatar aurait présenté les différends concrets de manière incomplète, notamment dans ses conclusions («*submissions*»), il y aurait *absence de consentement*

sur l'objet du différend (intervention du professeur Jiménez de Aréchaga, CR 94/5, p. 41 et suiv.).

Ceci dénote encore une fois une confusion complète entre accord sur l'«objet du différend», sur l'expression des «demandes» et la rédaction de «conclusions» !

Bien entendu, lorsque le Qatar a défini dans sa requête et dans son mémoire les différends sur lesquels portait sa demande, il l'a fait, contrairement à ce qui est soutenu par Bahreïn, de manière aussi objective que possible dans de telles circonstances. C'est ainsi que le mémoire du Qatar fait allusion à la divergence d'opinion sur le statut de Dibal et Jaradah, contrairement à ce que l'on nous dit, ainsi que sur la question de Jinan à propos de son inclusion ou non dans le périmètre de la ligne de 1947, contrairement à ce que l'on nous dit. Comme on l'a signalé plus haut, les droits de pêche sont un argument que Bahreïn a utilisé depuis 1964 pour demander une modification de la ligne de 1947 (ce document est signalé par le Qatar et repris à l'annexe I.56 (vol. II) au mémoire du Qatar), contrairement à ce que l'on nous dit. La question des lignes de bases archipélagiques est plus obscure mais - si Bahreïn y a droit - ce serait incontestablement une question implicite à trancher dans le cadre du différend maritime. Le Qatar n'a donc en rien préjugé ces questions par ses demandes ou ses conclusions quoiqu'en prétendent de manière extrêmement légère les conseils de Bahreïn (par ex. Monsieur le professeur Jiménez de Aréchaga (CR 94/5, p. 47) et Keigh Highet, (CR 94/6, p. 49)).

Ainsi, on en revient toujours à l'affaire de Zubarah qui n'est évidemment pas incluse dans les *demandes* du Qatar, ni a fortiori dans ses *conclusions*. Mais ceci ne signifie pas qu'elle soit exclue de *l'objet du*

différend. Le Qatar ne s'oppose pas à ce que Bahreïn indroduise lui-même une demande à ce sujet.

* * * *

On s'aperçoit donc, Monsieur le Président, Messieurs de la Cour, que sous couvert de contestation du consentement sur *l'objet du différend*, Bahreïn s'en prend, en réalité, au *mode de saisine* utilisé par le Qatar, la requête unilatérale.

Un troisième argument est orienté plus franchement de cette manière, c'est celui selon lequel l'accord de Doha prévoit que les parties pourront soumettre «la question» («*the matter*») à la Cour internationale de Justice (CR 94/5, p. 25). Selon cet argument, puisque le Qatar ne peut soumettre *toute* la question, *l'ensemble* du différend, par voie de requête unilatérale, cela signifierait que l'accord de Doha n'avait pas prévu cette forme de saisine.

Ceci n'est cependant qu'une pétition de principe puisque l'interprétation correcte de l'accord de Doha permet ce mode de saisine.

A dire vrai, toute l'argumentation de Bahreïn concernant la prétendue débilité de la requête unilatérale du Qatar repose sur un dogme présenté comme une vérité révélée : que l'action doit être introduite conjointement. Or ce n'est pas le cas. Les deux Etats *peuvent* - selon les termes de l'accord de Doha - introduire une requête à la Cour sur base de la formule bahreïnite après l'expiration du délai de cinq mois.

Comme le soutient Bahreïn, il faut certes se placer à la date de la requête du Qatar pour juger de sa validité. Et bien, à cette date la requête était parfaitement valable, complète et recevable.

Il faudra aussi se placer à la date de la requête de Bahreïn, introduite en conformité avec l'accord de Doha - puisque les *deux* Etats

peuvent saisir la Cour de leurs demandes - pour apprécier sa validité et sa recevabilité.

Entretemps il est incontestable qu'il y avait un accord entre les Parties sur l'objet du différend, que la requête du Qatar n'en est pas sortie, et qu'elle n'avait pas à inclure des demandes et a fortiori les conclusions de Bahreïn.

II. PASSONS MAINTENANT AUX PRÉTENDUS INCONVÉNIENTS RÉSULTANT D'UNE SAISINE UNILATÉRALE

S'agissant de ceux-ci rien de bien neuf n'a été avancé par les conseils de Bahreïn.

Nous nous réjouissons de la reconnaissance par Bahreïn que, tout compte fait, il n'y a pas déshonneur et que l'égalité juridique est respectée. Nous comprenons que l'ambiance d'une requête unilatérale n'est pas nécessairement la même que celle d'un compromis. Encore ne faudrait-il pas sublimer cette dernière au point d'en faire un royaume de Walt Disney.

Nous ne reviendrons pas sur l'article V. Les prétentions que son objet s'est soudainement rétréci comme Alice au pays des merveilles ne nous ont absolument pas convaincu. Nous ne reprendons pas non plus la question constitutionnelle que les défendeurs, la Cour l'aura remarqué, se sont bien gardés d'aborder de front. Tout compte fait d'ailleurs, si ces deux questions étaient à ce point importantes il fallait les introduire dans l'accord de Doha. Les termes mêmes de ce dernier excluent, en tout état de cause, de telles dispositions.

Je m'en tiendrai donc seulement à quelques éléments nouveaux.

Sur Zubarah, tout d'abord, comme l'a dit excellemment M. Bowett, Zubarah est bien un piège («a trap») (CR 94/5, p. 39) mais pas dans le

sens où il l'entend. Il apparaît clairement maintenant que ce que Bahreïn veut obtenir c'est un blanc-seing à propos de la recevabilité de sa demande éventuelle concernant Zubarah sans passer par le contrôle de l'autre Partie et de la Cour. Le Qatar s'y est pourtant soumis à propos de sa demande concernant Hawar. Considérant l'esprit dans lequel Bahreïn se présente maintenant à cette barre, peut-on imaginer un seul instant que s'il avait pu faire valoir une cause d'irrecevabilité à l'égard de Hawar, il y aurait renoncé ?

On ne peut pas laisser passer non plus la prétention de l'agent et d'un conseil de Bahreïn selon laquelle, si l'affaire avait été introduite par un compromis, toute exception préliminaire relative à la recevabilité se serait trouvée exclue par définition (CR 94/4, p. 18 et CR 94/6, p. 54). S'il est vrai, et c'est souvent le cas, il n'y a là aucune conséquence inéluctable. Je ne dois pas rappeler à la Cour l'exemple de l'affaire *Borchgrave*, qui avait été portée devant la Cour permanente de Justice internationale par un compromis entre la Belgique et l'Espagne, ce qui n'empêcha pas cette dernière de soulever des exceptions préliminaires qui firent l'objet d'un arrêt de la Cour.

* * *

L'agent de Bahreïn a prétendu que le Qatar voulait contrôler la procédure à son avantage. A cet effet il présente comme évidences des propositions pour le moins douteuses (CR 94/4, p. 12, par. 9) :

a) tout d'abord déposer le mémoire le premier serait un avantage, alors que de nombreux praticiens sont convaincus du contraire, puisque cette procédure donne le dernier mot au défendeur. Le Qatar pour sa part est un ferme partisan du dépôt simultané des pièces écrites;

b) ensuite parler le premier serait un avantage; tous les praticiens savent qu'en ce domaine il y a deux écoles et que la controverse n'est pas tranchée. Au début de chaque affaire devant la Cour on a de longues discussions dans l'équipe pour savoir qui va parler le premier. La preuve du contraire résulterait plutôt ici du fait que Bahreïn s'est bien gardé de déposer des exceptions préliminaires, ce qui l'aurait placé dans cette position soi-disant avantageuse.

Il a, en tout état de cause, été répondu à cela que pour la phase relative au fond - et c'est celle-là qui compte, le Qatar est favorable au dépôt simultané des pièces.

* * *

L'agent de Bahreïn a également souligné les incertitudes qui existeraient à propos de la jonction des deux instances relatives au même différend.

Il est exact que la jonction des instances dépend d'une décision de la Cour.

Mais l'article 47 du Règlement prévoit cette situation expressément.

Cet article date de 1978, mais déjà auparavant en l'absence de tout article dans le Règlement de la Cour, la Cour permanente de Justice internationale avait admis une telle jonction dans l'affaire du *Statut juridique du Groënland oriental*, dans des conditions qui ne sont pas sans analogie avec la situation présente.

Bahreïn peut donc introduire une action concernant Zubarah. La Cour on l'a dit est compétente. Il s'agit d'un différend prévu par l'accord-cadre de Doha. Qatar n'objecte pas à la jonction - on l'a dit

aussi. On voit mal dans ces conditions pourquoi la Cour refuserait une ordonnance dont le seul but serait de faciliter l'exercice d'une bonne justice.

* * *

Un dernier point enfin : pourquoi le Qatar refuse-t-il la proposition de Bahreïn de conclure un compromis ? Monsieur le Président, Messieurs de la Cour, la réponse est simple et évidente.

1. Depuis longtemps la voie du compromis est bouchée. Je ne reviendrai pas sur ce qui a été exposé longuement par les conseils du Qatar.

2. Quant à la proposition d'un compromis, et sans allusion aucune ici à la nationalité d'un distingué juge *ad hoc* «Timeo Danaos et dona ferentes» («je crains les Grecs même lorsqu'ils apportent des présents»). Le projet proposé par Bahreïn en 1992, après la saisine de la Cour, est un cheval de Troie qui ne peut que conduire à de nouvelles impasses et à la poursuite des impasses anciennes. On en voudra pour preuve deux exemples :

a) Bahreïn change le texte de la bahraini formula, de la formule bahreïnite, excusez-moi de parler franglais (voyez l'article II, paragraphe 3), dont il proclamait pourtant que c'était le seul point acquis à l'accord de Doha !

b) De plus, Bahreïn ne profite pas de l'occasion pour rendre l'article 5 acceptable en le limitant aux propositions de *fond* faites pendant la *médiation saoudienne*, ce qu'il prétend pourtant, contre toute apparence, être son seul objectif.

Le Qatar ne peut donc en conclure qu'une chose : ce projet de compromis n'est qu'une nouvelle manoeuvre dilatoire.

La voie choisie par le Qatar était engagée devant la Cour et donc non seulement conforme à l'accord de Doha; elle est aussi la plus raisonnable.

Monsieur le Président, Messieurs de la Cour, j'en ai terminé avec ces quelques mises au point dont on m'avait chargé. Il me reste à remercier du fond du coeur la Cour de sa patience et de sa bienveillante attention dont j'espère ne pas avoir abusé. Puis-je vous prier Monsieur le Président, d'appeler à la barre, Monsieur le professeur Quéneudec.

Le PRESIDENT : Merci, professeur Salmon. La parole est au professeur Quéneudec.

M. QUENEUDEC : Monsieur le Président, Messieurs de la Cour, de tous les genres littéraires, le conte est sans doute celui qui, de tous temps, a été le plus apte à séduire.

Telle paraît être la réflexion que se sont faite nos amis de Bahreïn, puisqu'ils ont pris le parti de nous conter une belle histoire.

Sur le mode de: «Il était une fois ...», ils ont narré l'histoire d'un Etat dont les représentants signaient des textes où les mots et les phrases présentaient l'étonnante vertu d'être des mots et des phrases «en transit» vers des significations lointaines et inconnues. Et ces textes eux-mêmes, paraît-il, avaient eu le pouvoir magique de rendre aveugles ceux qui avaient l'audace de vouloir les décrypter.

Monsieur le Président, entre l'accord du 21 décembre 1987 et le procès-verbal signé à Doha le 25 décembre 1990, il s'est écoulé plus de «mille et une nuits». Aussi peut-on douter qu'il y ait place ici pour le merveilleux, l'extraordinaire ou l'incroyable. Il nous faut revenir à la réalité.

La réalité, en l'espèce, n'est pas de savoir ce que l'Etat de Bahreïn a voulu ou n'a pas voulu faire. La réalité de la présente affaire consiste uniquement à rechercher s'il existe, dans les textes signés par les deux Etats, une base suffisante de compétence pour que la Cour puisse connaître de la requête de l'Etat du Qatar.

Dans cette recherche, la volonté de l'un des deux Etats en litige ne peut pas planer «comme un vague nuage sur la terre ferme d'un texte contractuel», selon la formule imagée de Max Huber à la session de Sienne de l'Institut de droit international (*Annuaire de l'Institut de droit international*, 1952, vol. I, p. 199).

En 1987, Bahreïn et le Qatar ont conclu un accord international en vue de soumettre leur litige à la Cour. Bahreïn ne conteste pas la valeur conventionnelle de ce texte adopté sur proposition de l'Arabie saoudite.

Sur la base de cet accord, les deux Etats ont tenté en 1988 d'élaborer un compromis. Cette tentative a échoué et l'idée même de négocier un compromis n'a pas été reprise au cours des deux années suivantes. Aucune initiative en ce sens n'est venue ni de l'Arabie saoudite, ni du Qatar, ni de Bahreïn.

En 1990, a été signé le procès-verbal de Doha ouvrant la voie à la soumission du différend à la Cour à l'expiration d'un délai de cinq mois.

Bahreïn dénie à ce procès-verbal toute valeur conventionnelle et conteste qu'il ait donné son accord à une saisine unilatérale de la Cour.

Telles sont, Monsieur le Président, Messieurs de la Cour, schématiquement résumées, les données essentielles du problème sur lequel la Cour est appelée à statuer.

Afin de se prononcer, il ne paraît pas douteux que la Cour aura à répondre à trois questions principales.

La première question peut être formulée de la manière suivante : y a-t-il acceptation explicite et formelle, de la part des deux Etats, de l'obligation de se soumettre à la juridiction de la Cour ?

La réponse, nous n'en doutons pas, ne peut qu'être affirmative. L'accord de 1987 est on ne peut plus net sur ce point. La première disposition qu'il contient est suffisamment connue de la Cour et n'a pas besoin d'être rappelée. Quant à sa deuxième disposition, on ne saurait perdre de vue qu'elle s'ouvre par les mots :

> «Jusqu'à ce que les questions en litige soient réglées définitivement conformément à l'article précédent.»

Tout en insistant sur le fait que cet accord de 1987 constitue «un titre de juridiction imparfait» (CR 94/5, p. 56), Bahreïn reconnaît avoir souscrit à cette obligation.

La deuxième question est de savoir s'il y a accord des deux Etats à l'égard de l'objet des différends pouvant être portés devant la Cour.

La réponse, ici encore, est : oui.

Selon Bahreïn, la référence à la formule bahreïnite dans le procès-verbal de Doha n'aurait pas eu pour effet d'énoncer un consentement à l'objet et à la portée des différends à soumettre à la Cour. La formule aurait été destinée exclusivement à être insérée dans un compromis.

> «It was designed to be used within the framework of a special agreement, the essential idea being that, under such a general and «neutral» formula, each Party would be free to formulate its own claims.» (CR 94/5, p. 39.)

nous a expliqué le professeur Bowett. Comment peut-on croire que cette formule était plus appropriée pour un compromis ? Rédigée en termes

neutres et généraux pour définir le cadre général («*the outline*») des différends, et constituant une sorte d'«*umbrella agreement*», d'accord-cadre sur ce point, la formule bahreïnite supposait par définition - *ab initio* en quelque sorte - que chaque Partie serait libre de formuler ses propres demandes : «each Party would be free to formulate its own claims».

Dès lors, n'était-elle pas, au contraire, plus appropriée à la saisine de la Cour par voie de requête ?

Comme l'a rappelé il y a un instant M. Salmon, lorsque la Cour est saisie par la notification d'un compromis, l'article 39, paragraphe 2, de son Règlement prévoit que :

> «La notification indique ... l'objet précis du différend («the precise subject of the dispute») ... pour autant que cela ne résulte pas déjà clairement du compromis.»

Et lorsque l'instance est introduite par voie de requête, l'article 38, paragraphe 1, prévoit que «la requête indique ... l'objet du différend» («the subject of the dispute»). Et le paragraphe 2 du même article ajoute qu'«elle indique en outre la nature précise de la demande» («the precise nature of the claim»).

Si la formule bahreïnite n'était pas en elle-même assez détaillée pour identifier l'objet précis des différends et si, une fois incorporée dans un compromis, elle devait encore être complétée par les demandes concrètes présentées par chaque Partie, qui ne voit qu'elle se prêtait beaucoup mieux à servir de base à une requête unilatérale de chacune des Parties ?

Dans ces conditions, peut-on venir prétendre, comme on l'a fait de l'autre côté de la barre, que le Qatar a dénaturé la formule bahreïnite ? N'est-ce pas plutôt Bahreïn qui s'est attaché à déformer à la fois la

position du Qatar à ce sujet et l'effet juridique de l'incorporation de la formule bahreïnite dans l'accord de Doha ?

La troisième question qui se pose, enfin, est celle-ci : y a-t-il un engagement définitif des deux Etats de saisir la Cour exclusivement de manière conjointe, ou bien ont-ils laissé ouverte la possibilité d'une saisine unilatérale ?

Mon ami M. Weil a entrepris de démontrer, avec tout le talent qu'on lui connaît, que «le consentement à la saisine par voie de requête» constituait une «composante à part entière du principe général de la juridiction consensuelle» (CR 94/5, p. 71). Sa démonstration a été éblouissante et elle nous aurait presque convaincus du bien-fondé de sa conclusion, si elle n'avait omis une donnée essentielle. L'éminent conseil de Bahreïn a reproché au Qatar d'accumuler «fiction sur fiction»; il me permettra certainement, eu égard à sa grande courtoisie, de lui retourner le compliment. La démonstration qu'il a faite est impeccable, mais présente le vice rédhibitoire de faire comme si l'accord de Doha n'existait pas, comme si la formule bahreïnite n'était «rien d'autre qu'un projet» (CR 94/6, p. 36), comme si les deux Etats n'étaient pas convenus qu'après le mois de mai 1991, ils pouvaient saisir la Cour conformément à cette formule bahreïnite.

L'extraordinaire discrétion dont Bahreïn a fait preuve à l'égard de la date limite mentionnée dans l'accord de Doha doit-elle être interprétée comme une reconnaissance tacite de ce que la simple existence de cette date limite a pour effet de ruiner toute l'argumentation bahreïnite ? Le silence de Bahreïn est ici assurément plus éloquent que «les silences du colonel Bramble».

Il est vrai qu'un autre conseil de Bahreïn a expliqué que le procès-verbal signé en 1990 ne comportait que des «points d'accord provisoires» et que le Qatar avait simplement accepté à titre provisoire la formule bahreïnite : «Qatar provisionnally agreed to accept the Bahraini formula», a dit M. Lauterpacht (CR 94/5, p. 17).

Faut-il en déduire que les Parties avaient aussi «provisoirement» accepté d'aller devant la Cour après mai 1991 et qu'elles avaient également «provisoirement» accepté la continuation des bons offices de l'Arabie saoudite ?

Ce n'est évidemment ni sérieux ni raisonnable et cela suffit à montrer que la Cour ne saurait admettre le point de vue de Bahreïn.

Monsieur le Président, Messieurs de la Cour, les juristes sont un peu comme les pharmaciens d'antan : ils adorent les catégories et les classifications. Comme les anciens apothicaires, ils aiment les bocaux bien rangés avec leurs étiquettes bien distinctes. Mais la vie, surtout la vie internationale, ne se laisse pas aisément enfermer dans les flacons des juristes.

«La théorie est grise, mon ami, et l'arbre de la vie est tellement vert.» Nul doute que la phrase de Henri Heine trouve à s'appliquer à la présente affaire.

Vouloir s'interroger sur le bocal dans lequel pourrait être placé le consentement donné par le Qatar et Bahreïn et affirmer que, puisque la requête du Qatar ne peut trouver place dans aucun schéma prédéterminé, la Cour n'est pas compétente pour statuer sur cette requête, dire cela revient à oublier que l'article 36, paragraphe 1, du Statut de la Cour n'a jamais été interprété de manière littérale.

Peut-être convient-il de rappeler que, si la mise en oeuvre du droit d'ester devant la Cour dépend toujours du consentement des parties (quelle que soit la forme sous laquelle s'exprime ce consentement), la modalité d'introduction d'une instance devant la Cour n'est pas obligatoirement réglée par le texte exprimant le consentement à la compétence de la Cour. Il existe de nombreux textes conventionnels qui ne précisent pas si la saisine de la Cour peut se faire par voie de requête. Et en ce cas, joue généralement la présomption selon laquelle on est en présence d'une clause de compétence obligatoire autorisant le dépôt d'une requête, comme le soulignait Wilfried Jenks (*The Prospects of International Adjudication*, 1964, p. 36).

Aussi, toute la démonstration de Bahreïn prouve-t-elle une chose et une seule. Elle montre la *réticence de Bahreïn à s'engager*, notamment au moment de la signature de l'accord de Doha, mais elle ne démontre certainement pas son *absence d'engagement*.

Il paraît aujourd'hui difficile de se servir du point de vue exprimé par le ministre des affaires étrangères de Bahreïn plus d'un an après la signature de l'accord de Doha pour faire dire à ce texte ce qu'il n'énonce pas et pour puiser dans la déclaration dudit ministre une condition que le texte de Doha ne prévoit pas.

Quelle meilleure manifestation de la volonté d'un Etat peut-on trouver d'autre que la signature apposée par un représentant qualifié de cet Etat au bas d'un texte comportant des engagements de nature et de portée juridiques ?

Ce représentant peut-il venir ensuite s'exclamer, comme l'empereur Guillaume II à l'issue de la première guerre mondiale: «Ich habe nicht das gewollt» - «je n'avais pas voulu cela» ?

Il y a bien eu un engagement qui a été pris à Doha. Et l'engagement pris par les deux Etats dans le texte de Doha a porté sur la possibilité de saisir la Cour à l'expiration d'un délai prédéterminé.

Or, la Cour le sait bien, il n'existe que deux voies - et deux voies seulement - pour saisir la Cour, aux termes de l'article 40 du Statut, «soit par notification d'un compromis, soit par requête».

Eu égard au fait que la voie du compromis était *de facto* abandonnée, et compte tenu de la circonstance que le texte fixait une date à partir de laquelle la Cour pouvait être saisie, les termes de l'accord de Doha excluaient en réalité toute possibilité d'élaboration d'un compromis. Cet accord ne laissait donc d'autre issue que la voie de la requête. Il n'a certes pas expressément indiqué que la saisine pouvait être unilatérale, mais il n'a pas formellement exclu ce mode de saisine.

Contrairement à ce que Bahreïn n'a cessé de soutenir, il n'était nullement nécessaire que le texte de l'accord de Doha le précisât expressément. Sinon, si une disposition expresse autorisant formellement la saisine unilatérale était exigée dans chaque cas, on pourrait juger bien inutile la rédaction de l'article 38, paragraphe 2, du Règlement de la Cour, selon lequel :

> «La requête indique autant que possible («as far as possible») les moyens de droit sur lesquels le demandeur prétend fonder la compétence de la Cour.»

Dans sa requête, l'Etat du Qatar a indiqué que, par les accords de 1987 et 1990, les deux Etats avaient donné leur consentement

- à la soumission de leurs différends à la Cour,
- à l'objet des différends à soumettre à la Cour,
- à la date à partir de laquelle ces différends pouvaient être soumis à la Cour.

Et selon l'Etat du Qatar, il n'y a pas le moindre «doute destructif de la compétence» de la Cour pour connaître de cette requête.

Monsieur le Président, quand va se baisser le rideau des plaidoiries devant la Cour, pour le Conseil d'un Etat, c'est toujours un sentiment mêlé de satisfaction et de confiance qui monte en lui.

Satisfaction, d'abord, du devoir accompli, lorsqu'il s'est efforcé, dans les limites de sa faiblesse, de présenter avec toute la clarté possible les arguments qui, à ses yeux, sont les plus raisonnables et les mieux fondés.

Confiance, ensuite, dans la sagesse des juges auxquels il s'est adressé, parce qu'il sait, au tréfonds de lui-même, et quelle que soit la décision qui sera prise, que la paix et la justice en sortiront renforcées.

Monsieur le Président, Messieurs les juges, je vous remercie de votre attention. Monsieur le Président, l'agent de l'Etat du Qatar doit conclure et souhaiterait pouvoir reprendre la parole à cette fin.

Le PRESIDENT : Merci, professeur Quéneudec. I now give the floor to His Excellency Al-Nauimi.

Mr. AL-NAUIMI: [Greetings] Mr. President, Members of the Court, it is now time for me to conclude Qatar's presentation in the present hearing.

Today I wish to confirm the interest of the State of Qatar in the present proceedings and the importance of this case for the Government of the State of Qatar by indicating that it has closely followed the whole of the presentation made by both States before the Court. I should also

like to confirm the confidence of the Government of Qatar in this Court and especially that, when the Court will come to adjudicate on the merits, it will certainly protect the rights of both States.

My sincere thanks are given to the President and the Members of the Court for the patience and attention which they have devoted to the hearing in this case. In particular, I would like to thank you, Mr. President, for holding this hearing under your high authority. I would also like to convey the thanks of the delegation of Qatar to the Registrar and other staff of the Court for their contribution to the efficient operation of the services put at the disposal of the Parties.

I have also the honour to indicate that the answers to the question posed by Vice-President Schwebel will be handed over, in writing, to the Registry before the close of the present oral hearing.

Finally, I would repeat that the road to this Court has been a long and difficult one, and that Qatar's position is quite clear: there are two valid international agreements with clear texts conferring upon the Court the jurisdiction to adjudicate upon the existing and long-standing disputes which have been admitted by both Parties and have been submitted to the Court by Qatar by means of an admissible unilateral application. Qatar has always held that seisin of the Court by means of a unilateral application is not an unfriendly act. Indeed, as is apparent from the friendly relations which have existed between the Parties during the time they have spent before the Court over the past two weeks, reference to the Court does not create hostility, but on the contrary takes the sting out of the situation.

In accordance with Article 60, paragraph 2, of the Rules of Court, I will now read the final submissions of the State of Qatar.

"The State of Qatar respectfully requests the Court to adjudge and declare, rejecting all contrary claims and submissions, that -

The Court has jurisdiction to entertain the dispute referred to in the Application filed by Qatar on 8 July 1991 and that Qatar's Application is admissible."

Thank you Mr. President and Members of the Court.

The PRESIDENT: Thank you, Your Excellency. The Court takes note of your final submissions. The Court shall now rise. It will continue the hearings tomorrow morning at 10 a.m. in order to hear Bahrain in its second round of oral pleadings. The meeting is over.

The Court rose at 12.50 p.m.
