INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING MARITIME DELIMITATION

AND TERRITORIAL QUESTIONS

BETWEEN

QATAR AND BAHRAIN

(QATAR v. BAHRAIN)

COUNTER-MEMORIAL

SUBMITTED BY

THE STATE OF BAHRAIN

(QUESTIONS OF JURISDICTION AND ADMISSIBILITY)

VOLUME I

11 June 1992

TABLE OF CONTENTS

PART ONE

PART TWO

THE QUESTION OF JURISDICTION

NOTE REGARDING TRANSLITERATION OF ARABIC MATERIAL

The system of transliteration followed in Volume I of this Counter-Memorial is that set out at page 7 of the *Concise Encyclopedia of Islam*, published by Stacey International, 1989, save for names which are in common use and quotations from experts' reports and the Qatari Memorial.

NOTE REGARDING TRANSLATIONS

In this Counter-Memorial, Bahrain has used, wherever possible, translations which are already before the Court. Nevertheless, Bahrain does not wish to limit its right to raise questions relating to particular points of translation should it at any stage become necessary to do so.

NOTE REGARDING ANNEXES

Material in support of statements made in this Counter-Memorial will be found in the Annexes hereto. Material that is already in the Annexes to the Qatari Memorial is generally not duplicated unless it is material emanating from Bahrain, material of which the translation may be controversial or material to which the text makes frequent reference.

CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN

(QATAR v. BAHRAIN)

QUESTIONS OF JURISDICTION AND ADMISSIBILITY

COUNTER-MEMORIAL OF BAHRAIN

PART ONE

CHAPTER I

INTRODUCTION

1.1 This Counter-Memorial of Bahrain is filed pursuant to the Order of the Court of 11 October 1991. It responds to the Memorial of Qatar on questions of jurisdiction and admissibility.

SECTION 1. Summary of Bahrain's position on jurisdiction

1.2 The present proceedings arise from a dispute between Qatar and Bahrain about the maritime boundary that divides their respective territories in the Gulf, including questions concerning the baselines of the Parties; about the claim of Qatar to the Hawar Islands, which have for long been in the possession of Bahrain and have never been in the possession of Qatar; about Zubarah, on the west coast of the Qatar peninsula opposite Bahrain; and about the status of the Fasht ad Dibal and Qit'at Jaradah features, as well as fishing areas and pearl banks.

1.3 At various times in the past, efforts have been made to resolve these questions. In 1939, after seeking the views of the Parties, Britain confirmed Bahrain's sovereignty over the Hawar Islands (although this was not accepted by Qatar).[1] In 1947, Britain attempted to impose a seabed boundary between the two States, and reconfirmed at the same time Bahrain's sovereignty over the Hawar Islands (except for the island of Janan) and its ownership of the features of Qit'at Jaradah and Fasht ad Dibal.[2] Bahrain rejected the purported boundary (which would have deprived Bahrain of substantial areas of seabed) and confirmed its claim to Janan as part of the Hawar Islands.[3] Qatar would appear to have accepted the purported seabed boundary, but stated that it had reserved its rights to the Hawar Islands, and expressed the hope that Britain would reconsider this matter and the ownership of Fasht ad Dibal.[4] The position of Zubarah was dealt with in two agreements between Bahrain and Qatar in 1944 and 1950, the contents of which have been disregarded by Qatar.[5]

1.4 In 1978 there began what has since been called the Mediation Process. Saudi Arabia offered to act as Mediator between the two countries.[6] During this process, the discussions were initially conducted on the basis that if the dispute could not be settled by agreement it would be submitted to arbitration. In more recent years the general allusion to arbitration has been replaced by specific references to settlement by the International Court of

---

[1] Qatari Memorial, Annex I.38, Vol. II, p.226 and Annex I.40, Vol. II, p.235.

[2] *Ibid.*, Annex I.53, Vol. II, p.311.

[3] Annex III.24, Vol. III, p.117.

[4] Qatari Memorial, Annex I.55, Vol. II, p.323.

[5] See below, para. 2.10.

[6] An important ingredient in the process was the acceptance by both parties of the Five Principles. These were originally proposed by Saudi Arabia in 1978. In 1981 Qatar suggested an amendment to the Fifth Principle, which was accepted by Bahrain in 1983. Qatar's translation of the Five Principles (as amended) is set out at Annex I.1, Vol. II, p.1.

Justice. This stage of the discussions has always been conducted on the basis that any such reference would be by way of a joint submission (an expression which, when used in this Counter-Memorial, means a joint submission in the form of a special agreement between both Parties jointly to submit their differences to the Court, as opposed to proceeding by way of unilateral application).

1.5 No substantive progress was made in the Mediation Process between 1978 and 1986. In the latter year the Parties submitted to Saudi Arabia detailed memoranda setting out their respective positions. Yet even this did not lead to any substantive advance and, from the end of 1987 onwards, discussion centred almost exclusively on the terms of the joint agreement by which the case was to be brought before the Court.

1.6 So it was in December 1987 that the King of Saudi Arabia proposed, and Bahrain and Qatar accepted, that the dispute should be referred to the International Court of Justice and that a Tripartite Committee, consisting of representatives of the Mediator and of the two Parties, should meet to settle the appropriate text.[7] This agreement, though evidently contemplating the eventual submission of the dispute to the Court, was clearly conditional upon the successful negotiation of a special agreement which would state the agreed questions to be put to the Court and would settle a number of associated matters of procedure.

---

[7] Note on terminology. Two texts are much discussed in the Qatari Memorial as well as in the present Counter-Memorial. The first of these is described in the Qatari Memorial as "the 1987 Agreement". (See Qatari Memorial, para. 1.2. The text of the official United Nations translation is set out in Annex I.2, Vol. II, p.5). Bahrain does not find it necessary to question this description though it differs significantly from Qatar in the substantive content that it attributes to the text. Bahrain will therefore adhere to this description.

The second of the documents is the text of the Minutes adopted on 25 December 1990 (Annex I.19, Vol. II, p.115). The Qatari Memorial refers to this as "the Doha Agreement". As will be seen, Bahrain does not accept that these Minutes constitute an agreement in the legal sense of the word and will not, therefore, refer to them as an "agreement" but only as "the 1990 Minutes".

1.7 In the course of 1988 negotiations to this end were actively pursued, with each side presenting its own draft of a possible joint submission. No mention was ever made of the possibility of either side unilaterally starting proceedings against the other. Such a step would have been considered quite incompatible with the Mediation Process as well as with the way in which disputes are resolved between members of the Gulf Cooperation Council. It may be recalled that the only other boundary dispute in the area litigated in this period was the Dubai/Sharjah dispute which had been jointly submitted to arbitration in 1978. This was a precedent of which all concerned were fully aware and which by means of the procedure of joint submission avoided one party being plaintiff and the other being defendant.

1.8 At the Gulf Cooperation Council meetings held in late December 1988, it was agreed that the Mediator should attempt to find a solution between the Parties by negotiation and amicable settlement. Initially a six month period was agreed for this, but in fact the process extended over the next two years, during which time there were a number of meetings involving the Mediator.

1.9 In December 1990, in the midst of the tension arising from the Iraqi invasion of Kuwait and at the very beginning of the Summit Meeting of the Gulf Cooperation Council which, on that occasion, was being held in Dohah, the capital of Qatar, Qatar raised without any warning whatsoever the question of the reference of the dispute to the Court. Qatar began by insisting that the period for the continuance of the Saudi Arabian efforts to achieve an amicable solution should terminate soon after the end of the next Ramadan and that after May 1991 the Parties should be free to take the matter to the Court.

1.10 Evidently Qatar wished at that time to secure for each party the right unilaterally to apply to the Court. During the discussions a first draft of

possible Minutes,[8] typed on the notepaper of the Saudi Arabian Ministry of Foreign Affairs, used the words كل منهما , *kullun minhumā*, "each of them" in introducing the right of the Parties to start proceedings. These words seemed to Bahrain to be open to the interpretation that either party might file a unilateral application, notwithstanding the fact that they recorded Qatar's acceptance of the formula proposed by Bahrain in 1988 for the expression of the question. This formula, as will be seen, spoke of a request by the *two* Parties and used language which clearly contemplated that there would be a single case, submitted by special agreement, within the framework of which each side would be able to present its claims. Accordingly, these words were promptly and firmly rejected by Bahrain.

1.11 A second draft was then presented by the Omani Minister for Foreign Affairs[9]. The draft "Minutes" in his handwriting, whilst again referring to Qatari acceptance of the Bahraini Formula, also stated that if the dispute had not been solved by May 1991, أي من الطرفين , *ayyun min al-tarafayn*, "either of the two Parties" might submit the case to the Court. This draft was also rejected by Bahrain and the final version, as signed by the Foreign Ministers of Saudi Arabia, Bahrain and Qatar, contained no such words as "either" or "each" of the Parties, but simply referred to "the two Parties". The language of the Minutes was, of course, Arabic and the words finally used to refer to "the two Parties" were الطرفان , *al-tarafān*, - words that had been used by Qatar as well as Bahrain several times before in the drafts and in the negotiations to refer to the two Parties together making a joint submission to the Court.

1.12 Nothing having happened during the stated period ending in May 1991, Qatar unilaterally commenced the present proceedings by Application on 8 July 1991 without having given Bahrain any advance notice whatsoever. Paragraph 40 of the Application invoked as the basis of the Court's alleged

---

[8] Annex I.26, Vol. II, at p.183.

[9] *Ibid.*, at p.187.

compulsory jurisdiction the 1987 Agreement and the 1990 Minutes, which were both described as "international agreements". In the English translation of the 1990 Minutes presented with the Application, Qatar translated the words *al-ṭarafān*, as used in the second operative paragraph (though not as used in the first and third paragraphs where the same expression appeared), as "the Parties". The evident intention was that these words should be read as supporting the idea that either party might apply unilaterally.

1.13 Bahrain entirely rejects this attempt by Qatar to change by itself the whole basis upon which the Parties had previously been working towards a reference to the Court. Bahrain does not do this because it is unwilling that the dispute should come before the Court, but only because its willingness to come to the Court is conditioned upon *all pertinent issues* being brought to the Court at the same time, by a joint submission by the Parties, in the same case and in a manner that does not place Bahrain in the position of disadvantage that, in the circumstances of this case, arises from the fact that the initiative has been taken by Qatar. As can be seen, the issue of Zubarah, which to Bahrain is real and important, forms no part of the case as presented by Qatar. In addition, Qatar casts doubt upon whether certain other issues are accepted by Qatar as admissable. Moreover, by starting proceedings unilaterally Qatar has entirely by-passed an important question relating to the admissibility of certain evidence upon which the Parties were at the time of the application still not agreed. Further, Qatar's action seeks to put Bahrain in the position of having become a party to a treaty without satisfying its own constitutional requirements. Bahrain remains willing to come before the Court but only on the basis of a joint submission in terms acceptable to Bahrain. Bahrain's opposition to the manner in which Qatar has behaved should not be read as reflecting any negative attitude towards the Court.

1.14 The reasons why, in the submission of Bahrain, the Court does not possess jurisdiction to proceed with the Qatari Application include the following:

1. The Qatari Application involves reading the 1987 Agreement and the 1990 Minutes together. The 1987 Agreement does not, by itself, give the Court jurisdiction unless completed by a joint submission. The 1990 Minutes (even assuming them to constitute a binding international agreement, which Bahrain denies) do not change this situation or entitle Qatar to commence proceedings by unilateral application.

2. First, the 1990 Minutes do not amount to a legally binding agreement. As appears from the statement of the Bahraini Minister for Foreign Affairs,[10] he did not intend to enter into a treaty on behalf of Bahrain and would have been constrained from so doing by the Bahraini Constitution. The Foreign Minister of Bahrain would not constitutionally have had authority by himself to sign a treaty taking immediate effect to give the International Court of Justice jurisdiction in a case concerning the territory of Bahrain. He was aware of that limitation at the time and, accordingly, had no intention to bind his country in that way.[11] Qatar was equally aware that any agreement giving the Court jurisdiction would require approval in Bahrain. Nor did Qatar regard the Minutes as constituting a treaty; its Government did not take the steps required by its own Constitution to bring a treaty into being. Moreover, despite the requirements of Article 17 of the Pact of the Arab League, Qatar did not file the "agreement" with the Secretary General of the Arab League. That was the position before the Application was filed and remains the position now. The attribution by Qatar of the quality of a treaty to the 1990 Minutes was evidently an afterthought generated for the purpose of simulating a jurisdictional basis for Qatar's unilateral application to the Court. Even the registration with the United Nations of this so-called "treaty or international agreement" was not carried out until a bare twelve

[10] Annex I.25, Vol. II, p.157.

[11] *Ibid.*, para. 13, at p.164.

days before the Application was filed on 8 July 1991 - a course hardly consistent with a belief *ab initio* that the 1990 Minutes amounted to a treaty. The correct view of the Minutes is that they were part of an ongoing political process and did no more than record the stage which the negotiations had reached at the moment of their adoption.

3. But even if the 1990 Minutes could be regarded as a treaty, their words do not support the interpretation that Qatar seeks to put upon them. The relevant words are the Arabic words *al-ṭarafān* in the second sentence of the second operative paragraph. Though translated in the English text presented by Qatar as "the Parties", their correct meaning is "the two Parties", in the conjunctive sense of the two Parties together or jointly.

4. There are many fully persuasive considerations that support this view of the matter, including the following:

(i) Even before 1987 and certainly during the period of active negotiations in 1988, both Parties had acted on the basis that proceedings would be started only by a joint submission;

(ii) Drafts of the joint agreement, emanating from Qatar as well as from Bahrain, used these same words *al-ṭarafān* to describe the Parties to a joint submission;

(iii) Qatar claims in paragraph 40 of its Application to have accepted the Bahraini Formula.[12] However, this formula also used the words *al-ṭarafān* to express the idea that the Parties jointly submit the question to the Court;

[12] Annex I.14, Vol. II, p.89.

(iv) As a matter of the Arabic language generally, *al-ṭarafān* must in this context be translated as "the two Parties", i.e. in the conjunctive sense. There is strong expert evidence to this effect.[13] Moreover, the official translation service of the United Nations has, in connection with the Qatari attempt to register the 1987 Agreement and the 1990 Minutes under Article 102 of the Charter, translated *al-ṭarafān* as "the two parties";[14]

(v) The *travaux préparatoires* of the 1990 Minutes, as is apparent from the narrative portion of this Counter-Memorial, entirely support the Bahraini interpretation of the text. Moreover, these Minutes disclose no evidence that the Parties agreed to abandon their earlier agreement to proceed to the Court by a joint submission;

(vi) Paragraph 1 of the 1990 Minutes reaffirms "what was agreed previously".[15] The idea of a joint submission was one of the principal points thus agreed. The preparation of the necessary agreement was the main subject of negotiation at all material times.

SECTION 2. The scheme of this Counter-Memorial

1.15 The development of Bahrain's arguments in this Counter-Memorial will be presented in three Parts comprising nine Chapters.

---

[13] See the Opinions of Professor Aboulmagd, Annex II.1, Vol. II, at pp.211-215; of Mr. Amkhan, Annex II.2, Vol. II, at pp.251-252; of Professor Badawi, Annex II.3, Vol. II, at pp.267-270; and of Dr. Holes, Annex II.4, Vol. II, at pp.291-293.

[14] Annex I.2, Vol. II, p.5, Annex 1.15, Vol. II, p.93 and Annex I.19, Vol. II, p.115.

[15] Annex I.20, Vol. II, at p.122.

Part One

In the remainder of this Introduction, the Counter-Memorial will deal briefly with the question of admissibility.

Chapter II will seek briefly to rectify in two basic aspects the unbalanced presentation by Qatar of the historical background to the case.

Part Two

Chapter III will identify the principal issues raised by the Qatari Memorial.

Chapters IV, V and VI will deal in detail with the principal aspects of the jurisdictional issues, including, in particular, the effect to be attributed to the 1987 Agreement and the 1990 Minutes.

Chapter VII will restate in succinct form how the 1987 Agreement and the 1990 Minutes cannot, either individually or together, confer upon the Court jurisdiction in respect of the present proceedings commenced by unilateral application.

Part Three

Chapter VIII will explain why, notwithstanding Bahrain's continuing willingness to see the dispute between it and Qatar submitted to the International Court of Justice, Bahrain considers itself as disadvantaged by the substitution by Qatar of a unilateral application to the Court for the agreed method of a joint submission.

Chapter IX will contain some concluding observations and will be followed by Bahrain's formal Submissions.

SECTION 3. The question of admissibility

1.16 The Court's Order of 11 October 1991 requires the Parties to address themselves to the question of admissibility as well as of jurisdiction. Qatar has done so in its Memorial, partly in paragraphs 1.8-1.12 and partly in paragraphs 6.02-6.05, and has formally submitted that Qatar's Application is admissible (at p.139). Understandably, Qatar has addressed the question of admissibility only in terms of the issues which it has itself submitted to the Court. As regards these, Bahrain is prepared not to question that the Qatari claim *as at present framed* is admissible.

CHAPTER II

THE HISTORICAL PERSPECTIVE CORRECTED

2.1 In Chapter II of its Memorial, Qatar has entered into certain historical aspects of the relationship between the parties. The Court will, of course, appreciate that Qatar has presented a historical narrative that suits its case. While Bahrain does not contest the accuracy of many of the individual statements of fact contained in that account, it sees the Qatari presentation as directed towards certain broad conclusions of an erroneous kind. This is not the proper place in which to state the whole of Bahrain's historical case and Bahrain will not attempt to do so. Instead, Bahrain will direct a few paragraphs to correcting the Qatari statement in respect of two main themes of importance. The first concerns the emergence of the State of Qatar. The second matter relates to Qatar's seizure of Zubarah in 1937 - a seizure which (although not so mentioned in the Qatari Memorial) has largely contributed to the friction between the two States over the last five decades.

SECTION 1. The emergence of the State of Qatar

2.2 Qatar seeks, first, to paint a picture of itself as a real and separate political and geographical entity that came into being in 1868 and which was separated from Bahrain by an expanse of open sea, acting as a buffer between the two States.[16] This picture is far from accurate.

2.3 In the first place, Qatar ignores the fact that it was from the Qatar peninsula that the Al-Khalifa State of Bahrain emerged. The Al-Khalifa branch of the Al-Utub were, in fact, the most significant tribe in the Qatar peninsula in the eighteenth century. The centre of their activities was their town of Zubarah, where they built their fortress of Murair. It was from

[16] Qatari Memorial, Paras. 2.08-2.14.

Zubarah that they conquered Bahrain in 1783.[17] Although Zubarah was destroyed by the forces of the Sultan of Muscat in 1811, it remained a possession of the Al-Khalifa, and the town was rebuilt in the 1840's.[18] In the 1870's (and subsequently), Britain wished to avoid complications with the Turks, and accordingly prevented the Ruler of Bahrain from involving himself in the affairs of the mainland. The Ruler responded by confirming his claim to Zubarah and reserving his rights.[19] The town was again destroyed in 1878, but the inhabitants of the area around it remained Bahraini subjects and many of them migrated between Bahrain and Zubarah on an annual basis.[20]

2.4 It was not until the late 1930's that the present ruling family of Qatar, the Al-Thani family, established *de facto* control over the Qatar peninsula, the seizure of Zubarah in 1937 being an important element in this. Previously the pearl merchants of the Al-Thani family had emerged as one of the leading families in the Dohah/Bidaa area on the east coast of the peninsula in the mid-nineteenth century. From 1868 onwards, they intermittently displayed there a degree of local authority either on their own account or as delegates of Turkey during the period 1871-1915. This authority did not, however, extend to the administration or control of the other areas of the peninsula. It was for this reason that a leading expert, Lorimer, writing circa 1908, commonly referred to Shaikh Jasim Al-Thani

---

[17] Lorimer, J.G., *Gazetteer of the Persian Gulf*, (1908-1915), Part IB, pp.839-40, Annex III.8, Vol. III, pp.40-41.

[18] Lorimer, *ibid.*, p.868, Annex III.8, Vol. III, p.42.

[19] Translated purport of Shaikh Isa Bin Khaleefa's statement of 2 September 1873, L/P&S/9/23, Annex III.3, Vol. III, p.11; Shaikh Isa to Ross, 14 June 1875, *Proceedings of the Government of India*, September 1875, P/776, Annex III.5, Vol. III, p.23.

[20] Precis of Conversation Between Major Grant (Assistant Resident) and Shaikh Esau bin Ali, 16 August 1873, IOR L/P&S/9/23, Annex III.2, Vol. III, p.5; Lorimer, *ibid.*, Part IIB, p.1305, Annex III.9, Vol. III, p.45. The inhabitants of the area were still Bahraini subjects in 1937: see, Adviser to the Bahrain Government to PA, 20 June 1937, IOR R/15/2/202, Annex III.16, Vol. III, p.83.

as the "Shaikh of Dohah",[21] whilst another authority, Saldanha, writing in 1904, referred to him as "the Shaikh of Bidaa"[22]. Even the name Qatar was imprecise, being used to refer to the Dohah/Bidaa area on the east coast as well as to the entire peninsula[23].

2.5 There was indeed, a major physical obstacle to any spread of Al-Thani power to the west. Until the different parts of the Qatar peninsula were joined together by a network of tarmac roads from the 1950's onwards[24], the harsh desert at the centre of the Qatar peninsula was in many ways more of a barrier between the Al-Thani and the areas of Al Khalifa control than was the sea. Al-Thani activity, centred on Dohah, was directed south and eastwards to Khor al Udayd and Abu Dhabi, as much as towards Zubarah and Bahrain, as the repeated attempts to gain control over Udayd clearly show.[25] The shallow seas of the Bahrain archipelago made communication easy between the main islands and the Hawar group, and with the Zubarah area and the pearling banks to the north and north east of Bahrain. Thus, part of the Bahraini section of the Dawasir tribe (who were subjects of the Ruler of Bahrain) migrated annually with its flocks from Zellaq and Budeyah on the main island of Bahrain to their villages on Hawar,[26] whilst the Bahraini section of the Naim tribe migrated to and from the Zubarah area.[27]

---

[21] Lorimer, *ibid.*, Part IB, eg. p.910, Annex III.8, Vol. III, p.43.

[22] Saldanha, *Precis of Bahrain Affairs*, Part I (1857-1870) eg. p.64, Annex III.6, Vol. III, p.27.

[23] See for example, *Proceedings of the Government of India*, P/438/3, October 1868, No. 277, Annex III.1, Vol. III, p.1. "Gwuttur" is a variant of the name "Qatar".

[24] El Mallakh, R: *Qatar: Development of an Oil Economy*, (1979), p.96, Annex III.25, Vol. III, p.141.

[25] Saldanha, *Precis of Katar Affairs* (1873-1904), pp.29, 60-1, Annex III.7, Vol. III, p.31.

[26] Pridcaux to Cox, 20 March 1909 IOR R/15/2/25, Annex III.10, Vol. III, p.49.

[27] Lorimer, *ibid.*, Part IIB, p.1305, Annex III.9, Vol. III, p.45.

2.6 Qatari authority did not extend to the west coast of the Qatar peninsula until the late 1930's. Until then the Rulers of Qatar had little, if any, control over the interior, the north and the west of the peninsula. In 1873, the peninsula had been described by a British Political Resident as a "debatable land",[28] and so it remained[29] until the grant of an oil concession by the Al-Thani in 1935, following which they were able to extend their *de facto* control over most of the peninsula. It was as part of this process that they seized Zubarah in 1937. Before that date, at the earliest, it could not be said in any real sense that there was a State of Qatar geographically coterminous with the peninsula of that name.

SECTION 2. The question of Zubarah

2.7 The Memorial of Qatar is guilty of a further serious deflection of historical focus in its total (and certainly not accidental) failure even to refer to the problem that developed in relation to Zubarah. This is a region on the west coast of the Qatar Peninsula (see location map) that is now a barren area of sand.

2.8 It was not always so. Prior to 1783 Zubarah was a prosperous town and the principal seat of the Al-Khalifa. From 1783, however, the Al-Khalifa moved their principal seats to Muharraq and Manama, though without in any way abandoning their authority, property and interests in Zubarah and its environs. They retained the allegiance of the Naim tribesmen in the area, maintained homes there, preserved the mosques, grazed their cattle and regularly visited the area in connection with these interests and for the purposes of hunting. Considerable trade continued between Bahrain and Zubarah. Though inevitably the intensity with which these

---

[28] Ross to Secretary to the Government of India, 4 September 1873, L/P&S/9/23, Annex III.4, Vol. III, p.15.

[29] PR to Secretary of State, 10 January 1934 IOR R/15/1/627, Annex III.11, Vol. III, p.57; "Notes on Qatar" by A.F. Williamson, 14 January 1934 FO/371/17799, Annex III.12, Vol. III, p.61.

activities were carried on waned with time, there was never any formal abandonment of rights in this area by the Al-Khalifa family and their activities there were carried on, and their interests were represented by, the family directly, by other nationals of Bahrain and by the Bahraini section of the Naim tribe, right through until the late 1930's.

2.9 Indeed, this Bahraini section of the Naim tribe were the principal inhabitants of the area. They were Bahraini subjects[30] whose Chief confirmed that the Zubarah area was under the control of Bahrain.[31] In 1937 Qatar attacked and seized the Zubarah area, in the process killing a number of people, injuring many others and causing much terror.[32] Many of the inhabitants (as well as inhabitants of other parts of the northern section of the Qatar peninsula over which Qatar gained control at the same time) fled to Bahrain as refugees.[33] Bahrain did not attempt to meet violence with violence, but made it clear that it maintained its claim to the area.[34] Gradually, the buildings of Zubarah - fort, mosques and homes - fell into ruin and in recent times all relics of Bahraini presence have been bulldozed into the sand.

---

[30] Adviser to the Bahrain Government to PA, 20 June 1937, IOR R/15/2/202, Annex III.16, Vol. III, p.83.

[31] Translation of a letter from Rashid bin Mohomed al Jabor to H.H. Shaikh Hamad bin Isa al Khalifa, 3rd Safar 1356 (equivalent to 16th April 1937), IOR R/15/2/202, Annex III.14, Vol. III, p.75.

[32] PA to PR, 4 July 1937, IOR R/15/2/203, Annex III.17, Vol. III, p.87.

[33] Adviser to the Bahrain Government to PA, 5 August 1937, IOR R/15/2/204, Annex III.20, Vol. III, p.99.

[34] Ruler of Bahrain to PA, 14 April 1937, Annex III.13, Vol. III, p.71; Ruler of Bahrain to PA, 29 April 1937, IOR R/15/2/202, Annex III.15, Vol. III, p.79; Ruler of Bahrain to PA, 6 July 1937, Annex III.19, Vol. III, p.97.

2.10 Qatar's seizure of the Zubarah area in 1937 soured relations between the two states. Bahrain responded with a trade boycott,[35] and made many efforts over the years to regain its rights. Intensive British diplomatic activity managed to persuade the Rulers of the two States to sign an agreement in 1944 [36] which should have led to a restoration of the *status quo* before 1937. Unfortunately, it soon appeared that the interpretations put upon the agreement by the two Rulers were so fundamentally different that it proved unworkable.[37] Persistent Bahraini protests led to a further, unsuccessful, British negotiation towards a *modus vivendi* at the beginning of the 1950's,[38] but the dispute was not satisfactorily settled and still smoulders.

2.11 The dispute over Zubarah thus forms an integral part of the background to the differences between Bahrain and Qatar, and has been entirely overlooked by Qatar in its excursion into the history of the disputes. Evidence that it is still a matter of concern to Bahrain is to be found in a Memorandum filed by Bahrain with Saudi Arabia in 1986. Since the present proceedings are not concerned with the substance of the dispute between the Parties, it is not appropriate to enter further into details of the Zubarah issue. Bahrain is merely concerned at this stage to ensure that the Court is not left under any misapprehension regarding the existence and reality of Bahrain's interest in the area.

---

[35] Ruler of Bahrain to PA, 6 July 1937, IOR R/15/2/203, Annex III.18, Vol. III, p.91.

[36] Agreement between Bahrain and Qatar signed on 17 and 23 June 1944, IOR R/15/2/205, Annex III.20, Vol. III, p.101.

[37] For the Ruler of Bahrain's interpretation, see Ruler of Bahrain to PA, 14 September 1944, Annex III.22, Vol. III, p.109; for the interpretation of the Ruler of Qatar, see Ruler of Qatar to Ruler of Bahrain, 30 January 1945, IOR R/15/2/205, Annex III.23, Vol. III, p.113.

[38] Pelly to PR, 23 April 1950, FO/371/8204, Annex III.25, Vol. III, p.123.

PART TWO

THE QUESTION OF JURISDICTION

CHAPTER III

THE PRINCIPAL ISSUES RAISED BY THE QATARI MEMORIAL

3.1 This section seeks to identify the principal questions which the Court will no doubt wish to bear in mind when considering the substantive chapters that follow.

3.2 Qatar has asserted that the Court now has jurisdiction on the basis of an argument which rests on three essential propositions:

(a) Both parties accepted the obligation to submit their dispute to the Court by accepting the Saudi proposals of 19 December 1987.[39] Qatar states in this respect that:

> "It will be seen from the terms of the Agreement set out in King Fahd's letter of 19 December 1987... that the first item of the Agreement, i.e., that 'All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms' is clear and unqualified. Both Qatar and Bahrain gave their unqualified consent to this proposal".[40]

---

[39] Qatari Memorial, paras. 3.26-3.33 and 4.50-4.51. And note that Qatar invokes Article 36(1) of the Statute of the Court.

[40] *Ibid.*, para. 3.29.

(b) The means of "seisin" - a different matter from jurisdiction - were left open in 1987.[41] Qatar's Memorial states in paragraph 3.32, referring to paragraph 3 of the 1990 Minutes, that:

> "It will be noted that the terms of this item are 'enabling' and procedural in nature and do not in any sense detract from the consent and commitment of the Parties under the first item to refer their disputes to the Court. There is no implication here that any particular method or procedure is to be followed to invoke the jurisdiction of the Court as agreed under the first item."

(c) The Minutes of the meeting at Dohah on 25 December 1990 confirmed the 1987 Agreement on jurisdiction and, in addition, settled the outstanding question of the method of seisin, by allowing either party to file an Application unilaterally.[42] In paragraph 4.64 of its Memorial, Qatar states that "the manner of instituting proceedings was agreed in the Minutes signed on 25 December 1990."

3.3 A full analysis of the 1987 Agreement will be presented in Chapter IV below. However, it is apparent that Qatar's first proposition, which is based on the 1987 Agreement, raises a fundamental question; and it is this question which the Court will wish to keep in mind in analysing the terms of the 1987 Agreement and the subsequent conduct of the Parties in interpreting that Agreement. That question can be posed in the following terms:

> "Did the Parties to the 1987 Agreement accept jurisdiction *so as to be bound by virtue of that Agreement alone*?"

---

[41] *Ibid.*, paras. 3.32 and 4.57-4.64 (especially para. 4.64). Qatar sees "seisin" as being governed by Article 40 (1) of the Statute.

[42] *Ibid.*, paras. 4.57-4.64. The reference at para. 4.61 to the institution of proceedings in the Libya/Chad case is mistaken. Both Libya and Chad agreed that they notified to the Court a Special Agreement (the "Framework Agreement") under Article 40.

or

"Did they merely agree in principle to submit their disputes to the Court, but subject to a Special Agreement to be negotiated subsequently?"

3.4 As Chapter IV of this Counter-Memorial will presently demonstrate, all the evidence is in favour of this second alternative. For, within the Tripartite Committee established pursuant to the 1987 Agreement, both Parties submitted drafts of a Special Agreement.

3.5 From this it follows that Qatar's second proposition, although technically correct, poses a non-existent problem. For "seisin" would follow with the notification of the Special Agreement to the Court.

3.6 As to Qatar's third proposition, the legal effect of the Minutes of the meeting of 25 December 1990 will be examined in detail in Chapter V below. It is, however, self-evident that Qatar's proposition based on these Minutes raises equally fundamental questions which the Court will wish to explore in analysing those Minutes. These questions, briefly stated, are the following:

"Were the Minutes of 25 December 1990 intended to embody a binding agreement?

And, if so,

Was this an agreement to dispense with the need for a Special Agreement, and for notification of that Special Agreement to the Court, and to replace this with an agreement that either Party could proceed by way of a unilateral application to the Court?"

CHAPTER IV

ON JURISDICTION GENERALLY

SECTION 1. Consent as an essential requirement for jurisdiction

4.1 Despite the elaboration and prolixity of the Memorial of Qatar on the questions of jurisdiction and admissibility, the issue in this case is simple and straightforward. Is it possible to identify a text which clearly and compellingly constitutes a sufficient and effective basis for the jurisdiction of the Court? Bahrain submits that the answer is No.

4.2 It is not necessary for Bahrain to follow Qatar into the latter's extended discussion of the theoretical aspects of the Court's jurisdiction. Bahrain sees no particular value in the Qatari exposition of the law relating to the Court's jurisdiction based upon decisions involving elements which do not exist in the present case. Qatar has, for example, quoted dicta of the Court in the *Nicaragua* v. *Honduras* case (1988).[43] However, this was a case involving the effect of declarations made under paragraph 2 of Article 36 of the Statute of the Court, a paragraph which is not invoked in this case. Nor can assertions of the pertinence of a multilateral treaty, the Pact of Bogota, contribute much, if anything, to the question in the present case of whether there has come into being a bilateral agreement establishing jurisdiction within the sense of Article 36(1) of the Statute and enabling one of the Parties unilaterally to commence proceedings against the other.[44]

---

[43] Qatari Memorial, paras. 4.01-4.03.

[44] It is not necessary either to examine the Qatari discussion of irrevocability of consent. It assumes answers favourable to Qatar on a question which is of the essence of this case, namely, whether the texts amount to an agreement giving Qatar a right unilaterally to institute the present proceedings. Since, in Bahrain's contention, not only is the answer to this question No, but also even if it were Yes, the interpretation of the texts would not establish the Qatari case, there is no point in entering into a discussion which, at best, is only of marginal importance. So no more will be said regarding the concept of the irrevocability of consent in so far as it is developed in theoretical terms in

4.3 In one major respect, however, the Parties are in accord. Bahrain shares to the full Qatar's identification[45] of consent as the basis of the Court's jurisdiction. There can be no doubting the proposition that jurisdiction depends absolutely upon the will of the parties.

SECTION 2. The distinction between "jurisdiction" and "seisin" cannot affect the need to establish consent to both

4.4 The Qatari Memorial places much emphasis upon the distinction between "jurisdiction" and "seisin"[46]. Once again, it is not necessary for Bahrain to admit or deny either the distinction as formulated by Qatar or its relevance in the present proceedings, for one thing is in any event quite plain. It is that the existence of a concept of "seisin", in the sense of the steps by which procedure before the Court is commenced, cannot replace the need for the applicant State to show that the respondent has consented both to the jurisdiction of the Court and to the mode of seisin actually used in the particular case. The question of seisin in the present case is the less important by reason of the fact that, as will be presently shown, there is no operative consent of the respondent State to the invocation of jurisdiction in the manner adopted by the applicant State; and the case will be stripped of an unnecessary element of complexity if Bahrain accordingly limits its argument to the basic question of the scope of the consent given by the Parties to the exercise of jurisdiction by the Court.

---

the Qatari Memorial, paras. 4.44-4.46. The manner in which, on the facts of the present case, reference is made in those paragraphs to the effect of the texts of 1987 and 1990 will, of course, be considered presently.

[45] Qatari Memorial, paras. 4.04-4.05.

[46] *Ibid.*, paras. 4.57-4.64.

SECTION 3. The burden of proof and the need for "preponderant force of argument"

4.5 It is noteworthy that, with one slight exception,[47] nowhere in the Qatari Memorial is there any express reference to the question of the burden of proof. Yet there can be no doubt that the onus rests upon Qatar of establishing that the Court has jurisdiction. The parties are, in this respect, not in equal positions. Whether as a matter of general principle, or of the precedents in the Court's jurisprudence, it is clear that if Qatar is to establish its assertion that the Court has jurisdiction, something more is called for from Qatar by way of proving its positive assertion than is required of Bahrain in establishing its denial that the Court has jurisdiction. The general principle is encapsulated in the Latin maxim *ei incumbit probatio qui dicit non qui negat*. Bahrain has no reason to doubt the pertinence in this connection of the precedents which the Qatar Memorial itself cites the statement in the *Chorzow Factory* case that:

> "the Court will, in the event of an objection ... only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant"[48]

and the statement in the *Border and Transborder Armed Actions (Nicaragua v Honduras) Jurisdiction and Admissibility* case that:

> "the Court will ... have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'."[49]

---

[47] See para. 4.9 below.

[48] Qatari Memorial, para. 4.20 *Judgment No. 8, PCIJ, Series A, No. 9*, p.32.

[49] *ICJ Reports 1988*, p.76, quoted at para. 4.20 of the Qatari Memorial.

The relative positions of the plaintiff and the defendant States as regards the establishment of the Court's jurisdiction is well brought out by Sir Gerald Fitzmaurice in a passage which Qatar, despite the frequency of its references to his writings, has not brought to the attention of the Court:

> " ... the outcome of any jurisdictional objection depends not so much on the application of definite rules of law concerning the competence of the tribunal, but rather on deciding (as a mixed question of fact and interpretation, and on a basis that may involve a considerable subjective element) whether a valid consent has been given or not. ... *[T]he onus of establishing consent, if its existence or validity is denied, rests in the last resort on the plaintiff State, and the consent has to be established beyond reasonable doubt* ... "[50]

Sir Gerald himself, in a footnote to the passage just quoted, adverts to the fact that Professor Rosenne expresses the standard of proof required "even higher". The latter distinguished authority had said:

> "..... the Court is the only organ operating within the texture of the United Nations which shields itself from the deleterious consequences .... which come from making decisions on matters of great delicacy, when one of the parties has not consented that it should."[51]

The same author subsequently said:

> "In the *Nottebohm case (second phase)* where the respondent challenged the admissibility of the claim, the Court apparently regarded the applicant as being under the duty of proving that it had a title to seise the Court."[52]

---

[50] Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, (1986), p.437. Emphasis supplied.

[51] S. Rosenne, *The International Court of Justice* (1957), p.260.

[52] S. Rosenne, *The Law and Practice of the International Court*, Vol. II, (1965), p.581.

Similarly, in a passage from another authority much cited in the Qatari Memorial, the position is stated in these terms:

> "What is true is that that undertaking [of commitments of obligatory judicial settlement] must be the result of the intention - express or implied - of the parties and that such intention must, and can, be proved in the same way as any other obligation undertaken in a treaty or an instrument equivalent thereto. The practice of the Court supplies, on the whole, uniform authority for that proposition...."[53]

4.6 The Qatari Memorial approaches the question of the burden of proof in an oblique manner in a sub-section on "The Interpretation of Consent"[54]. This invokes three considerations: the relevance of peaceful settlement of disputes in present day international law; the position of the Court as the principal judicial organ of the United Nations; and the fact that all Members of the United Nations are *ipso facto* parties to the Statute of the Court. In a passage noticeably thin in the citation of positive judicial authority (especially when contrasted with the liberal sprinkling of case references in other, less significant, portions of the argument), the Qatari Memorial asserts: "In view of these commitments, the balance of interests shifts in favour of the applicant State".[55] The only reference given in support of so far-reaching a proposition is to an article by an American professor writing in 1987. No disrespect is meant to that writer in pointing out that it hardly seems likely that such a proposition, being founded on such elementary considerations, should - if valid - not have been noted in the previous thirty years either in the decisions of the Court or in the writings of distinguished publicists. Even the passages quoted by Qatar from the writings of Sir

---

[53] Sir Hersch Lauterpacht, *Development of International Law by the International Court* (1958), pp.338-339.

[54] Qatari Memorial, paras. 4.13-4.30. See in particular para. 4.17 and see para. 4.9 below.

[55] *Ibid.*, para. 4.18.

Hersch Lauterpacht and Sir Gerald Fitzmaurice do not approach the extreme for which Qatar now, so understandably, finds itself obliged to contend.

4.7 Indeed, the inexorable force of the authorities eventually leads Qatar to the admission, expressed in the passages in the *Chorzow Factory* case and the *Nicaragua v. Honduras* case just cited,[56] that the arguments in favour of jurisdiction must be "preponderant".

4.8 However, Qatar appears then to draw a distinction between "facts" and "legal reasoning". It asserts, in its conclusion on this section, that "the Court will affirm its jurisdiction only if the force of the *legal* reasons militating in favour of it is preponderant."[57] This distinction is advanced without any citation of authority. It seems, moreover, to be entirely misplaced. If Qatar is prepared to acknowledge that the burden rests on it to establish "a preponderance of *legal* reasons" for the existence of the Court's jurisdiction, what possible reason can there be for it not also to accept that its case as a whole, including factual as well as legal elements, must be preponderant? There seems to be no basis whatsoever for seeking to distinguish in this manner between "legal" and "factual" elements.

4.9 At one point only in the Qatari Memorial is there a fleeting allusion to the burden of proof as such. It states that "on the other hand reference to 'arguments' does not imply any particular *onus probandi* lying upon the applicant State, since, as indicated above, the question of the Court's jurisdiction is 'not a question of fact, but a question of law to be resolved in the light of the relevant facts'".[58] Yet, though, these words of the Court quoted by Qatar were, of course, actually used by the Court, the Qatari Memorial, by overlooking one central problem, significantly distorts the

---

[56] Qatari Memorial, para. 4.20.

[57] *Ibid.*, para. 4.22. Emphasis supplied.

[58] *Ibid.*, para. 4.21 quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988*, p.76.

nature of the issue now before the Court. The problem is that this case is not solely about the legal effect of an agreement. It is one about the very existence of the agreement itself as well as about the interpretation of that agreement. The primary role of the Court in this case is to determine facts, namely, whether an agreement for the submission of the case to the Court's jurisdiction has come into being and whether the Arabic words used in the pertinent text have been properly rendered into English.

CHAPTER V

THE 1987 AGREEMENT

5.1 The first element invoked by Qatar as the basis of the Court's jurisdiction is the 1987 Agreement.[59] However, before examining the substance of this text, and the Announcement associated with it, a brief look at its background will be helpful as showing how great was the importance attached by the Parties to the basic idea that, whatever path of peaceful settlement might be pursued, it would be pursued by them jointly.

SECTION 1. The Background

5.2 Qatar begins, quite correctly, with the Mediation by Saudi Arabia as the "relevant circumstance".[60] Bahrain does not in any way deny that. Indeed, it is quite clear that the two texts[61] invoked by Qatar must be seen in their proper perspective as part of the Saudi Arabian Mediation Process. That perspective, however, involves taking into account the fact that the two texts invoked by Qatar are no more than episodes in a diplomatic exercise stretching over an extended period. That exercise did not at any time involve the idea that either Party might *unilaterally* start proceedings in the International Court of Justice.

5.3 Although it is probably sufficient to go no further back than the Saudi Arabian draft principles of Mediation of 13 March 1978,[62] it is just worth recalling that even as early as 1966 Qatar was emphatic in its insistence on

---

[59] Qatari Memorial, paras. 3.26-3.33 and 4.50-4.51.

[60] *Ibid.*, para. 4.47.

[61] I.e., the 1987 Agreement and the 1990 Minutes.

[62] Annex I.1, Vol. II, p.1.

the submission of the dispute to arbitration - a process that necessarily involves a joint submission by both sides.[63]

5.4 The Saudi draft principles of Mediation of 13 March 1978[64] themselves contained certain legally pertinent "considerations" or "undertakings" of which the most important was that "all issues of dispute between the two countries" (and sovereignty over the islands, maritime boundaries and territorial waters were then indicated) "are to be considered as complementary, indivisible issues, to be solved comprehensively together". Attention is drawn to the last phrase, following the parenthesis: the issues in the dispute were to be considered indivisible and were to be solved comprehensively together. To the issues identified in this paragraph that of Zubarah was later added.[65] The Parties also agreed to the formation of a committee from both sides with the aim of reaching solutions acceptable to

---

[63] See, for example, the statement made in the Qatari letter of 13 April 1966 addressed to the British Political Agent at Doha in which Dr Hassan Kamel, the Legal Adviser of the Qatar Government, said, *inter alia*,

> "There is no doubt that these details demonstrate the incontrovertible fact, as intimated by us at that time, that all the interested parties had reached express final agreement to referring the existing dispute between Qatar and Bahrain to international arbitration." (Qatari Memorial Annex I.63, Vol. II, p.396).

[64] Annex I.1, Vol. II, p.1.

[65] The question of Zubarah was raised by Bahrain with the Mediator in 1986 as is mentioned at para. 2.11 above. In the 1987 Agreement, Bahrain requested the insertion of a reference to include "any other matters" within the terms of reference, as well as the Hawar Islands and the maritime boundary, so as to ensure that Zubarah was included. So far as Bahrain is aware, Qatar raised no objection to these words. Although Qatar subsequently objected when Bahrain raised Zubarah in the question in Article II of the first draft of its special agreement in March 1988, Qatar subsequently withdrew its reservation at the Sixth Tripartite Committee meeting on 6 December 1988, save to the extent that any Bahraini claim was for sovereignty (see Annex I.18, Vol. II at p.112). See the agreed question known as "the Bahraini Formula" referred to in the 1990 Minutes (see Annex 1.14, Vol. II, p.89). Bahrain will argue that Qatar has also accepted Bahrain's right to bring any or all claims in respect of Zubarah, including one for sovereignty. However, as is shown at paras. 9.6-9.7 below, Qatar has indicated that it reserves the right to oppose Bahrain's claim on the grounds of admissibility.

them both and undertook to settle all disputed matters by agreement through negotiations.

5.5 At a meeting held at the time of the Gulf Cooperation Council session in May 1983, the Principles for the Mediation proposed by Saudi Arabia were accepted, together with the addition proposed by Qatar.[66] For the next three years, however, the mediation appears to have progressed slowly. In 1986 further differences developed between the Parties in relation to the use being made by Bahrain of Fasht ad Dibal and Qatar's action in landing troops on the Fasht and attacking and seizing workmen employed by Bahrain's contractors.

5.6 A letter from the King of Saudi Arabia of 14 May 1986 contained certain proposals for the settlement of the Fasht ad Dibal question, affirmed the continuance of Saudi Arabia's mediation and concluded:

> "In case Saudi Arabia is unable to find a solution acceptable to both Parties, the matter will be submitted to an arbitration commission to be sanctioned by both Parties and whose rulings shall be final and binding upon the two Parties."[67]

The Ruler of Qatar expressly confirmed this point in his reply of 17 May 1986.[68]

SECTION 2. <u>The language of the 1987 Agreement</u>

5.7 Against this background of a general approach that contained no element whatever of unilateral initiative in relation to the institution of

---

[66] See note 6 to para 1.4 above.

[67] Qatari Memorial, Annex II.12, Vol. III, p.79.

[68] *Ibid.*, at p.85.

proceedings, one may turn to the 1987 Agreement itself.[69] Qatar presents it as consisting of two documents - an identical letter from the King of Saudi Arabia to the Amirs of Bahrain and Qatar respectively of 19 December 1987 and a public announcement made by the King of Saudi Arabia on 21 December 1987. The two Amirs indicated their adherence to the proposals: on 26 December 1987 the Amir of Bahrain replied affirmatively[70]; on 21 December 1987 the Amir of Qatar expressed his full agreement to the proposals;[71] and later in the same month Bahrain proposed a draft agreement to implement the agreement. Accordingly, Bahrain will not make an issue of the existence of an agreement in the terms of the Saudi Arabian proposals.

5.8 The Qatari description of the content of the 1987 Agreement focuses on two "items".[72]

5.9 The first element consists of the first operative paragraph of the proposals:

---

[69] There are now before the Court two English-language versions of the original Arabic text. One is the translation included in Annex 4 to the Qatari Application of 8 July 1991. The other is the translation subsequently prepared by the official translation service of the United Nations Secretariat. Although Bahrain considers the United Nations translation to be the more accurate, it will quote both versions because the Qatari Memorial bases many of its arguments on the Qatari translation annexed to the Application. They are shown side by side in Annex I.3, Vol. II, p.13.

[70] Annex I.4, Vol. II, p.23.

[71] Qatari Memorial, Annex II.16, Vol. III, p.109.

[72] Qatari Memorial, paras. 3.29-3.33 and 4.48-4.49.

(UN translation):

"The issues subject to dispute shall be referred to the International Court of Justice at The Hague for the issuance of a final and binding judgement whose provisions must be applied by the two parties."

(Qatari translation):

"All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms."

5.10 The second relevant element consists of the third operative paragraph of the Agreement:

(UN translation):

"A committee shall be formed, comprising two representatives of the State of Qatar and the State of Bahrain and two representatives of the Kingdom of Saudi Arabia, for the purpose of communicating with the International Court of Justice and completing the requirements for the referral of the dispute thereto in accordance with the Court's regulations and instructions, in preparation for the issuance of a final judgement which shall be binding on both parties."

(Qatari translation):

"Thirdly: Formation of a committee comprising representatives of the States of Qatar and Bahrain and of the Kingdom of Saudi Arabia for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon the parties, be issued. "

5.11 As regards the first operative element, Qatar contends:

> "that by the acceptance of this first item, both Qatar and Bahrain unequivocally and unconditionally accepted the reference of their existing disputes to the International Court of Justice".[73]

5.12 Bahrain is not able to share the opinion thus expressed. The provision is certainly not an unconditional undertaking to go to the Court. Quite self-evidently, the commitment was vitally qualified by the provision for the formation of a committee consisting of representatives of the Parties and the Mediator:

> *(UN translation)*:
>
> "for the purpose of communicating with the International Court of Justice and completing the requirements for the referral of the dispute thereto in accordance with the Court's regulations and instructions."[74]

5.13 In other words the agreement to refer the dispute to the Court was not seen as being immediate in its effect. The two paragraphs must be read together. The implementation of the first paragraph was expressed to be dependent upon the subsequent activity of the Tripartite Committee referred to in the third paragraph. Moreover, as will presently be shown in detail, the framework within which the Tripartite Committee operated was that of the preparation of an agreement for a joint submission to the Court. If that had not been the intention and, instead, the objective had been to permit a unilateral application to the Court then, of course, there would have been no need for recourse to that Committee.

---

[73] Qatari Memorial, para. 6.08. See also *ibid.*, para. 5.40.

[74] Qatari translation:

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions..." (Annex I.3, Vol. II, at p.18).

5.14 Accordingly, there is a significant measure of inaccuracy in the Qatari statement[75] that the terms of the provision for the formation and operation of the Committee "are procedural in nature and do not in any sense detract from the consent and commitment of the Parties to refer their disputes to the International Court of Justice in accordance with the first item". The provision may be "procedural" in the sense that it lays down a procedure, but it is not correct to say that the provision does "not in any sense detract from the consent and commitment of the Parties to refer their disputes to the International Court of Justice". For Qatar so to suggest is, in truth, mere assertion. The words of the text as a whole, as indeed of the provision read by itself, clearly make the operation of the general provision conditional and dependent upon the implementation of the stated procedural requirement.

5.15 Furthermore, the Qatari Memorial misrepresents the words actually used when it says in the same paragraph that:

> "the only object of the work of the Tripartite Committee, as foreseen in the 1987 Agreement, was *to ascertain the procedures necessary to obtain from the International Court of Justice* a final ruling binding upon both Parties".[76]

There is a manifest and vast difference between, on the one hand, "ascertainment of procedures" (being the words used in the Qatari Memorial) and, on the other, "an approach to the International Court of Justice" (Qatari translation)[77] to satisfy "the necessary requirements to have the dispute submitted to the Court" (Qatari translation)[78] (being the words actually used in the 1987 Agreement). The former may not, but the latter certainly do,

---

[75] Qatari Memorial, para. 6.09. See also *ibid.*, para. 3.32.

[76] *Ibid.*, para. 6.09. Emphasis supplied.

[77] Or "communicating with the International Court of Justice" *(UN translation)*. Annex I.3, Vol. II, at p.18.

[78] Or "completing the requirements for the referral of the dispute thereto" *(UN translation)*. *Ibid.*

involve the preparation of a joint submission. It would be difficult to treat as credible any suggestion that the three States involved could have been unaware of the procedures available for instituting proceedings in the Court. The records of the meetings of the Tripartite Committee show a sophistication of procedural knowledge on the part of Dr Hassan Kamel, the representative of Qatar until his much-regretted death, quite inconsistent with a need "to ascertain procedures". The task of the Committee was seen to be, and in practice was pursued by the Parties as being, that of drafting an agreement for a joint submission to the Court.

5.16 There is, therefore, no warrant for the statement at another point in the Qatari Memorial[79] that the provision in the 1987 Agreement for the establishment of the Tripartite Committee left "to the Parties the choice of means to achieve the commitment set out in the first item of the proposal". Even if in theory such a choice had been left open, it is undeniable that the Parties immediately interpreted their task to be one of drawing up a joint submission. By reference to the same considerations, it is equally impossible to accept the Qatari assertion[80] that:

> "Bahrain's contention that the Parties only committed themselves to negotiate a special agreement is therefore a misrepresentation of what had been agreed. The choice of method to seise the Court was entirely open."

5.17 Given that the provision for reference to the International Court of Justice was so closely linked to, and dependent for its fulfilment upon, the outcome of the activity of the Tripartite Committee, one cannot say that the initial item can be treated as having had any effect that was "unconditional" or "unequivocal" or otherwise independent of the second item.

---

[79] Qatari Memorial, para. 5.41.

[80] *Ibid.*, para. 5.42.

5.18 Indeed, the conditional character of the undertaking in the first operative item is even recognized by Qatar itself when it states[81] that:

> "The Parties were thus only submitting themselves to an obligation to negotiate in good faith in order to achieve the seisin of the Court."

Of an obligation to negotiate in good faith one thing is certainly self-evident, namely, that the objective of the negotiation cannot be said to have been "unequivocally" and "unconditionally" achieved if it still remains to be negotiated.

5.19 It is also important, in interpreting the 1987 Agreement, to pay regard to the terms of the Announcement made by Saudi Arabia in connection with its acceptance by the Parties.[82] The Announcement placed a very different emphasis upon the two items which Qatar has invoked in its Memorial. The general undertaking to go to the Court in the first operative paragraph of the Agreement is only reflected in the Announcement in the statement that:

> *(UN translation)*:
>
> "The contacts ... have yielded a proposal ... whereby the case should be referred to arbitration in accordance with the principles constituting the framework solution ..."
>
> *(Qatari translation)*:
>
> "The contacts ... have resulted in a proposal ... that the matter be submitted for arbitration, in pursuance of the principles of the framework for settlement..."

---

[81] Qatari Memorial, para. 5.41.

[82] As can be seen from para. 33 of the Application filed by Qatar on 8 July 1991 in the present case, Qatar apparently sees this Announcement as an integral part of the 1987 Agreement. The text of the Qatari and United Nations translations of the 1987 Agreement is set out in parallel columns in Annex I.3, Vol. II, p.13.

The substantive content of the agreement is then conveyed in the following words:

> *(UN translation)*:
>
> "Accordingly, agreement has been reached between the two parties, in accordance with the five principles to establish a committee ... for the purpose of communicating with the International Court of Justice ..."
>
> *(Qatari translation)*:
>
> "Accordingly, it has been agreed by the two parties, under the five principles, to set up a committee ... for the purpose of approaching the International Court of Justice ..."

Again, it is difficult to understand how an agreement described in these words can be seen as anything other than an agreement to negotiate the terms of a joint submission to the Court.

SECTION 3. The subsequent conduct of the Parties, 1987-1990

5.20 This view of the matter is cogently supported by the conduct of the Parties in the period following the acceptance of the Agreement. This shows that they immediately and continuously recognized that they had to negotiate an agreement for a joint submission to the International Court of Justice. The evidence is to be found in the Minutes of the meetings of the Consultative Committee[83] and in the drafts presented by the Parties.

A. The Bahraini and Qatari proposals, 1987

5.21 Even at the Gulf Cooperation Council Summit meeting at which the 1987 Agreement was accepted Bahrain had, in implementation of its understanding of the Agreement, put forward a draft agreement concerning

[83] Sometimes called "the Joint Committee" or, most often, "the Tripartite Committee".

the formation of the Joint Committee. This was, in material respects, expressed in the language of the 1987 Agreement which Bahrain believed to reflect the aim of achieving a joint submission[84]. The idea of "a Committee" contacting the Court necessarily implies collective, as opposed to individual, recourse to the Court. No less was this the view of Qatar, as can be seen from the draft letter of 27 December 1987 to the International Court of Justice, which Qatar put forward at the Summit Meeting.[85] This draft was expressed to emanate from the Foreign Ministers of the two Parties and, in its operative parts, spoke of them as having agreed:

> "1. To submit their aforesaid differences, to the International Court of Justice (or a Chamber composed of five judges thereof), for settlement in accordance with International Law.
>
> 2. To open negotiations between them with a view to preparing the necessary Special Agreement in this respect ..."

5.22 The words of the second of these two points are clear beyond doubt: "with a view to preparing the necessary Special Agreement". Though in theory it would be possible for a Special Agreement to provide that one Party would commence the proceedings and the other would respond, that was not what the Parties had in mind, as is shown by the drafts that each of them proposed.

5.23 The expectation that the submission would be a joint one is confirmed by the reference to "(or a Chamber composed of five judges thereof)". Such a reference can take place only with the agreement of both parties. While it is true that, according to Article 17(1) of the Rules of the Court, an application for the formation of a Chamber may be made by one party alone, it is absolutely clear from that and the following paragraph of the Rule that the agreement of the other party is required before the President can proceed.

---

[84] Annex I.5, Vol. II, p.29.

[85] Qatar Memorial, Annex II.18, Vol. III, p.122.

Indeed all "Chambers" cases up to that time had been constituted by a joint submission to the Court by both Parties.[86]

B. First Tripartite Committee Meeting, January 1988

5.24 One may turn now to the meetings of the Tripartite Committee. There is nothing in the Minutes of the First Meeting of the Committee to suggest that any of those involved was thinking in terms of anything other than a joint submission. Indeed, the manner in which the Qatari Memorial reports the outcome of this meeting is quite misleading. The Memorial merely notes the paragraph in the final Minutes which stated:

> "The Committee met to consider measures through which the commitment of the State of Bahrain and the State of Qatar to submit the dispute existing between them to the International Court of Justice will be carried out."[87]

The Qatari Memorial omitted, without even a passing allusion, the agreement

> "that each side will submit the draft agreement it proposes for referring the dispute to the International Court of Justice to the Foreign Ministry of Saudi Arabia on 19 March 1988..."[88]

---

[86] The *Elettronica Sicula* case, *ICJ Reports 1989*, p.15, was brought before the Court after the 1987 Agreement. This case was commenced by a unilateral application under Article XXVI of the Treaty of Friendship, Commerce and Navigation between the USA and Italy, 1948. Italy did not contest the Court's jurisdiction, although it raised an issue of admissibility.

[87] Qatari Memorial, para. 3.35.

[88] Annex 1.7, Vol. II, at p.39. See also the text of the Minutes, Qatari Memorial, Annex II.20, Vol. III, p.131.

Nor did the Memorial make any reference - understandably, because it was contrary to Qatar's interest - to the views of Dr Hassan Kamel, the legal adviser of the Qatari delegation at the meeting, who repeatedly observed that at that stage the obligation to submit the case to the Court was of a moral, not a legal, nature. For example, he is recorded as having said:

> "... Commitment to submit the case to the Court is a moral rather than a legal commitment. There will be a legal commitment when I register at the Court to submit the dispute to the Court. So I want to find out a means for that."[89]

C. The Qatari draft agreement, 15 March 1988

5.25 Passing to the draft agreements submitted by each of the Parties following this meeting, Qatar's first draft Special Agreement of 15 March 1988[90] is itself expressed as a joint submission. The "joint" quality of this draft while not actually suppressed in the representation of it in the Qatari Memorial, paragraph 3.36, is passed over in silence in favour of an extended quotation of the provision dealing with the description of the dispute. In proposing this draft, Qatar apparently did not feel that the requirements of the existing arrangements between the Parties contemplated anything other than a joint submission. As the Amir of Qatar stated in his letter to the King of Saudi Arabia dated 25 March 1988:

> "You should have, my dear brother the King, noticed that *it is drafted in accordance with what has been required and agreed upon as well as with the traditional way of drafting similar Special Agreements for*

[89] Annex I.6, Vol. II, at p.35. Later in the same meeting, he said: "We may agree to certain texts then differ. In the past it was agreed to take the case to arbitration then it was given up. What I want to say is to differentiate between legal commitment and moral commitment." Annex I.6, Vol. II, at p.36.

[90] Annex I.8, Vol. II, p.41.

the submission of such international disputes to the International Court of Justice".[91]

The Amir reiterated his wish to:

> "reach a sound, joint form to be agreed upon to achieve the true purpose of drawing a 'Special Agreement' on the basis of which the dispute would be submitted to the International Court of Justice". [92]

D. The Bahraini draft agreement, March 1988

5.26 The Bahraini first draft Special Agreement, also submitted in March 1988[93], is likewise expressed in the form of a joint submission. As can be seen from the letter of the Amir of Qatar just cited, no objection was raised by Qatar to this draft on the ground of its form but only on grounds related to such matters as the description of the dispute and the so-called "Article V point" dealing with the exclusion of certain categories of evidence.

E. Second Tripartite Committee Meeting, April 1988

5.27 Continuing on this theme of the acceptance by the Parties that the submission to the Court was to be joint not unilateral, it may once more be noted that the Minutes of the second meeting of the Tripartite Committee reveal no doubt at all that the objective was the preparation of a joint submission.[94] As was pointed out by H.R.H. Prince Saud, Foreign Minister of Saudi Arabia, in opening the proceedings, "close scrutiny" of the drafts presented by the Parties "reveals that most of the remarks concern formal

---

[91] Qatari Memorial, Annex II.23, Vol. III, p.148. Emphasis supplied.

[92] *Ibid.*, at p.149.

[93] Annex I.9, Vol. II, p.47.

[94] Annex I.10, Vol. II, p.53.

issues such as language, ratification and similar questions".[95] The representatives of the Parties did not dissent from this assessment. Certainly the Qatari representative, Dr Hassan Kamel, must have been thinking in terms of a joint submission because at one point he says:

> "The above [definition of the dispute] is important as article 40 of the Court's statutes attaches great importance on the necessity to include in a special agreement the subject matter of the dispute."[96]

As is evident on the face of Article 40 of the Statute, "a special agreement" is to be contrasted with "a written application" as a way of bringing a case before the Court.

F. Third Tripartite Committee Meeting, April 1988

5.28 Likewise, at the Third Meeting of the Tripartite Committee held later in April 1988, Qatar's understanding of the 1987 Agreement was again made quite plain by Dr Hassan Kamel:

> "We are meeting today for the third time to pursue our task. That is to come to an agreement on the format of the special agreement by which the substantive aspects of the dispute between our two countries can be referred to the International Court of Justice... Previously, I said that it was agreed between us that by special agreement we refer our dispute to the International Court of Justice."[97]

G. Qatari letter of 7 May 1988

5.29 Again, on 7 May 1988, the Amir of Qatar wrote in a letter to the King of Saudi Arabia:

---

[95] *Ibid.*, at p.56.

[96] *Ibid.*, at p.61.

[97] Annex I.11, Vol. II, at pp.77-78.

> "... it has been agreed that the Committee's task is to formulate a draft special agreement by which *both* parties will submit their disputed subject-matters to the Court ..."

and again:

> "Performance of the Committee's task requires it to heed the Statute and Rules of the Court, and prepare a draft special agreement acceptable to both parties ..."[98]

H. Fourth Tripartite Committee Meeting, June 1988

5.30 The basic approach was maintained, once more, at the Fourth Meeting held on 28 June 1988. As on previous occasions, H.R.H. Prince Saud said:

> "I would like to stress that the main aim of this Committee is the preparation of a Draft Agreement to refer the dispute to the International Court of Justice."[99]

5.31 On this occasion, and evidently in the context of a continuing consideration of the text of a joint submission, Bahrain put forward another formula, also worded on the assumption that the whole dispute, as seen from the points of view of both Parties, would be dealt with in a single set of proceedings initiated by a joint submission. This is plain on the face of the text.[100] On what basis would Bahrain have formulated a set of questions that included a challenge to its own title to possess the Hawar Islands unless it believed that there was going to be a single case submitted to the Court by a joint agreement and that it was necessary to incorporate a question that would enable each side to raise before the Court the issues that concerned it particularly?

---

[98] Qatari Memorial, Annex II.26, Vol. III, at p.176. Emphasis supplied.

[99] Annex I.13, Vol. II, at p.87.

[100] Annex I.12, Vol. II, p.81.

I. Qatari letter of 9 July 1988

5.32 Following this, on 9 July 1988, the Amir of Qatar again wrote to the King of Saudi Arabia[101] complaining about the Bahraini draft agreement and saying that Article II in both the Bahraini and the Qatari draft agreements (setting out the question to be referred to the Court) was "the *basic* article in both drafts". He continued:

> "Thus the new Bahraini draft is utterly unrelated to the draft Special Agreement which is required of Bahrain in order to propose for reference of the dispute between the two countries to the International Court of Justice for its decision in accordance with International Law."

In a further significant passage in the same letter the Amir said:

> "The causes leading to the present situation, which cannot be further endured, have become very clear. To get out of this situation, there is no other course than that Bahrain abides - as did Qatar - by what has been agreed upon under the mediation, and by the rules of the procedural regulations of the International Court of Justice which stipulate that *the two sides* submit their *agreed* upon disputes to the Court and request its decision in accordance with International Law ..."[102]

J. The Bahraini Formula, October 1988

5.33 On 26 October 1988 an amended and shortened version of the Bahraini Formula was sent to Qatar. This was in a generalized form to

---

[101] Qatari Memorial, Annex II.28, Vol. III, p.187.

[102] Qatari Memorial, Annex II.28, Vol. III, pp.188 and 190 respectively. Emphasis supplied. Qatar's correspondence at this time also shows Qatar's resistance to Article V of the Bahraini draft. See letter to the King, 25 March 1988 (*ibid.*, Annex II.23, Vol. III, p.147) and memorandum of 27 March 1988. (*ibid.*, Annex II.24, Vol. III, p.157).

enable the Parties to present to the Court, within the framework of a joint submission, the issues which really mattered to each of them. It read as follows:

> "The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters."[103]

As can immediately be seen, the formula begins with the words "The Parties request ...", a form of words that clearly indicates that the formula was designed to fit into a joint, not a unilateral, submission to the Court. Bahrain will return to the significance of the Arabic text of this draft when it comes, in Chapter VI, Section 1 below, to consider the proper translation of the Arabic text of the 1990 Minutes.

K. Fifth Tripartite Committee Meeting, November 1988

5.34 The formula was discussed three weeks later on 15 November 1988 when the Tripartite Committee held its fifth meeting. The Foreign Minister of Qatar, Shaikh Ahmad Bin Saif, said:

> "I am happy to say that the State of Qatar welcomes discussing this proposal as a basis for formulating Article Two in the Special Agreement, to which we hope to reach very soon a common text acceptable to both of us."[104]

---

[103] Annex I.14, Vol. II, at p.91. The original language of this text as submitted by Bahrain was English. The United Nations text (Annex I.15, Vol. II, p.93) is a translation back into English from the Arabic translation of the original.

[104] Annex I.16, Vol. II, at p.99.

He was not alone in his approach. Dr Hassan Kamel, also speaking on behalf of Qatar, expressed his views "... regarding Article II of the special agreement under which the dispute will be referred to the International Court of Justice...". He welcomed the draft as "a good step forward" because "it leaves to the Court ... to decide on the claims of both parties ..".[105]

L. Sixth Tripartite Committee Meeting, December 1988

5.35 The Sixth Meeting of the Tripartite Committee was held on 6 December 1988. Once more the discussion took place by reference exclusively to the preparation of a joint submission. Dr Hassan Kamel said, for example, that:

> "we have to do two things ... secondly, to agree precisely on the subjects that we will submit to the Court in two appendices to the agreement".[106]

In a later session he said:

> "Generally speaking, each party may claim whatever it wants, but we should agree before going to the Court on the subjects which will be submitted by the two countries."[107]

5.36 The Minutes[108] were to the same general effect, in the sense of contemplating a joint submission, and contained a list of the subjects to be submitted to the Court.

---

[105] *Ibid.*, at pp.100-101.

[106] Annex I.17, Vol. II, at p.105.

[107] *Ibid.*, at p.108.

[108] Annex I.18, Vol. II, p.109. For Qatar's translation see Qatari Memorial, Annex II.31, Vol. III, p.201.

SECTION 4. The difficulty of concluding an agreement pursuant to the 1987 Agreement

5.37 The Sixth Tripartite Committee meeting was the last before the Gulf Cooperation Council Summit meeting of December 1990. Although it is not strictly relevant to the question of the interpretation of the 1987 Agreement, it may nonetheless be helpful to the Court to know why it was that the Parties could not reach agreement on the content of a joint submission during the period between December 1987 and December 1990.

5.38 (1) Despite the fact that the Tripartite Committee held six meetings in the course of 1988, no meetings of that body were held in the course of 1989 and 1990. It was left that the points mentioned in the signed Minutes of the 7 December 1988 meeting would be studied, which shows that the Tripartite Committee negotiations had not been concluded.[109] As is stated in the Qatari Memorial, paragraph 3.52, the dispute was adverted to at the Gulf Cooperation Council Summit Conference in December 1988 and again at the corresponding meeting in December 1989. On each occasion it was agreed that the Saudi Arabian mediation should continue - on the first occasion for six months and on the second for two months; but no positive action developed. Moreover, there were a number of intervening meetings between representatives of the Parties directly as well as between the Parties individually and Saudi Arabia, all directed to achieving a mediated settlement of the matters in dispute.[110]

5.39 (2) The second reason for the failure of the Parties to conclude a joint submission was the difference between them regarding the formulation of the

---

[109] *Ibid.*, at p.112.

[110] At the end of February 1989 the Crown Prince of Bahrain visited Qatar and discussions then took place. The Amir of Bahrain visited Saudi Arabia in July 1989 and a further meeting between the Amir of Bahrain and King Fahd took place in December 1989. In February 1990 the Saudi Foreign Minister informed Bahrain that the Saudi mediation efforts were continuing.

question. Initially Bahrain was not inclined to permit its sovereignty over the Hawar Islands to be made an issue. Eventually, however, it was persuaded to change its position on the understanding that it would be able to assert its claim in respect of Zubarah. While it appears from the Minutes of the Sixth Meeting of the Tripartite Committee that Qatar was willing to include Zubarah in the list of subjects to be submitted to the Court, it seems that later in the meeting Qatar qualified its consent by rejecting the possibility that Bahrain might claim sovereign rights in the area - a possibility that Bahrain was not prepared to renounce.[111]

5.40 (3) A further and substantial point of disagreement was over the Bahraini proposal of the so-called Article V - a provision intended to exclude evidence of substantive proposals made by either side in the course of the negotiations conducted between them directly or through third parties and not finalised into an agreement. The extent of Qatar's concern in this connection is shown by the length at which it treated the subject in the Amir's letter to the King of Saudi Arabia of 25 March 1988.[112]

5.41 (4) Finally, there was a difference between the two sides as to the manner in which the Joint Submission was to be brought before the Court. The Bahraini draft contained no provision in this connection.[113] The Qatari draft, on the other hand, contained (in its Article V) specific provision for the Parties by a joint letter to notify the Agreement to the Court and, if such notification was not effected within one month of the entry into force of the Agreement, for either party to be permitted so to notify it.[114] Such notification was not, however, expressed to alter the character or content of the agreement for joint submission.

---

[111] Annex I.18, Vol. II, p.109.

[112] Qatari Memorial, Annex II.23, Vol. III, p.147.

[113] Annex I.9, Vol. II, p.47.

[114] Annex I.8, Vol. II, at p.45.

5.42 When these differences are reviewed closely it is difficult to detect in them any insuperable barrier to the conclusion of a special agreement. If in the years 1989 and 1990 Qatar had manifested any active interest in promoting an agreement which took into account Bahrain's concerns, Bahrain would have been willing, as it is now, to join in making an agreement for a joint submission. The reasons why Bahrain insists on a joint submission, rather than acquiescing in a unilateral one, are set out in Chapter VIII below. In conclusion, however, it may be said that there was nothing in these differences between the Parties, or in the stated position of Qatar, that could have led Bahrain to expect that at the end of 1990 Qatar would attempt to secure a right to submit the case to the Court unilaterally.

SECTION 5. Summary and conclusion of this Chapter

5.43 By way of recapitulation of the arguments developed in this Chapter, Bahrain submits that the 1987 Agreement was not intended to pave the way to a unilateral approach to the Court by either side. Rather, every element pertinent to its interpretation, and in particular the background to the agreement, the ordinary meaning of the words used and the subsequent practice of the Parties, indicates that the Agreement foresaw the presentation of the dispute to the Court only by means of an agreement for a joint submission. Thus:

(i) The Agreement emerged from the mediation process undertaken by Saudi Arabia during which no suggestion was ever made that Qatar might unilaterally start proceedings against Bahrain. Even the initial idea of submitting the dispute to arbitration necessarily implied a joint submission.

(ii) The language of the Agreement - in using the words that "the disputed matters shall be referred to the International Court of Justice" coupled with the immediately following provision that a committee shall be formed consisting of representatives of Bahrain, Qatar and Saudi Arabia, for the purposes of approaching the Court - clearly foresees further joint action for

the purpose of placing the matter before the Court. Whatever generality there may have been in the first operative paragraph of the Agreement was immediately and totally qualified by the provision in the third operative paragraph for the formation of the Committee for the purpose of approaching the Court. The words used excluded the seisin of the Court by any other method than one adopted by the Committee or pursuant to its collective decision.

(iii) This interpretation of the 1987 Agreement is borne out by the subsequent conduct of the Parties and is the only one that is consistent with it. Each side, by its actions in putting forward draft agreements and by its statements made in meetings of the Tripartite Committee, clearly represented its belief that the object of their discussions was the elaboration of a joint submission to the Court. The Bahraini Formula is particularly important in this connection being, both in its expression ("The [two] parties request ...") and in its substance, clearly indicative of the submission of the case jointly by the Parties and on a footing of equality. Qatar has subsequently accepted this formula.

(iv) This unity of approach of the Parties to a joint submission was totally undisturbed until, quite without warning, Qatar in December 1990 attempted to impose a radical change of direction.

CHAPTER VI

THE 1990 MINUTES

6.1 As has already been emphasized in the preceding chapter, Qatar's case on jurisdiction rests on two totally interdependent legs - the 1987 Agreement and the 1990 Minutes. Without the 1990 Minutes, the 1987 Agreement achieves nothing. Conversely, without the 1987 Agreement, the 1990 Minutes can achieve nothing. Qatar has not attempted to raise any doubt about this interdependence.

6.2 Bahrain hopes that in the previous Chapter it will sufficiently have demonstrated that the 1987 Agreement did not by itself establish the jurisdiction of the Court. The Agreement did no more than open the way to the next step, which was intended to be the negotiation of a joint submission to the Court. It is now necessary to examine the 1990 Minutes to see whether they serve to convert the fact that the Parties did not complete the negotiation of a joint submission in the period 1987-1990 into a right for one of them to commence proceedings on its own. In the submission of Bahrain, the answer to this question must also be an emphatic No.

6.3 At the outset, however, Bahrain should indicate that it does not take issue with Qatar regarding any question of the *form* of the claimed agreement. There is so much of a *substantive* and *substantial kind* that is wrong with the Qatari case regarding the 1990 Minutes that there is no point in spending time denying the possibility that an agreement can take the form of minutes of meetings. Ultimately, it is a question in each case of scrutinizing the documents in question to see whether they sufficiently evidence a common will of the participants to be legally bound to pursue a particular course of conduct. In the present case the sole question is whether the 1990 Minutes rise to the status, and have the effect, which Qatar has attributed to them. Accordingly, there is no need for Bahrain to deal further

with the abstract question of form to which paras. 4.31-4.39 inclusive of the Qatari Memorial are directed.

6.4 Nonetheless, the form of the 1990 Minutes calls for note in one respect. These Minutes were in much the same form as the Minutes of the meeting on 6 December 1988[115] - a document which Qatar does not invoke as constituting a legally binding international treaty. Just as the 1990 Minutes use the expression "the following was agreed", so the December 1988 Minutes state that "The two parties agreed to these matters". Just as the 1990 Minutes were signed by the representatives of all three participants (Saudi Arabia, Bahrain and Qatar), so were the 1988 Minutes. It is, therefore, difficult to see why one set of Minutes should be a treaty and the other not. And if they are both treaties, is it not a little strange that the second treaty should have been concluded without any consideration of how its terms were to be reconciled with those of the first treaty - particularly in the light of the provision in the 1990 Minutes "to reaffirm what was agreed previously between the two parties"?

6.5 There are two principal points to be developed in connection with the 1990 Minutes. The first in logical order is Bahrain's contention that the Minutes do not have the status of a binding agreement and cannot, therefore, serve as a basis for the Court's jurisdiction. The second is that, even if they possess such a status, their content does not support the Qatari submission that the text accords each Party the right unilaterally to commence proceedings. It will be convenient to begin this consideration of the 1990 Minutes with the second of these arguments, namely, that the Minutes do not have the meaning that Qatar seeks to put on them.

---

[115] Annex I.18, Vol. II, p.109. See also Qatar Memorial, Annex II.31, Vol. III, p.201. See also paras. 5.35 and 5.36 above. The same comment may also be made about the minutes of the earlier meeting held on 17 January 1988 (Annex I.7, Vol. II, p.37), though there was less substance in their content, being limited to recording an agreement that each side would submit to Saudi Arabia a draft of the agreement that it proposed for referring the dispute to the International Court of Justice. See para. 5.24 above.

SECTION 1. The Meaning of the 1990 Minutes

A. The relevant language is Arabic

6.6 It is not disputed by the Parties that the 1990 Minutes were drafted and signed in the Arabic language. The English language played no role in the formation of the text. Accordingly, the task of the Court is basically the determination of the meaning of the relevant Arabic words. This is not as daunting a task as it may at first sight appear.[116] Major disagreement between the Parties is limited to the meaning of two phrases which appear in italics in the text that follows.

The Arabic words represented by the two phrases may be transliterated as follows:

- "the two parties" (UN translation) or "the parties" (Qatari translation) = الطرفان *al-ṭarafān*

- "and the arrangements relating thereto" (UN translation) or "and the proceedings arising therefrom" (Qatari translation) = الاجراءات المترتبة عليها *'al-'ijrā'āt al-mutarattibah 'alayhā*

Of these two phrases *al-ṭarafān* is the one of principal importance and it is to this that Bahrain now turns.

---

[116] Qatar presented an English translation of the text in its Application. Bahrain has presented a translation by its expert, Dr. Holes, in an attachment to the letter from the Minister of Foreign Affairs to the Registrar of the Court of 18 August 1991. This is also included as Attachment "C" to Annex I.25, Vol. II at p.176, and, again as Attachment "C" to Annex I.26, Vol. II, at p.193. And the United Nations translation services have produced a further translation of the 1987 Agreement (Annex I.2, Vol. II, p.5) and the 1990 Minutes (see Annex I.19, Vol. II, p.115) to which fuller reference is made below, para. 6.21. The three translations of the 1990 Minutes are set out side by side in Annex I.20, Vol. II, p.119.

1. The meaning of *al-ṭarafān*

6.7 The issue to which the words *al-ṭarafān* are relevant is the controlling one of "who may submit the matter to the Court?" May this be done by one party alone (as Qatar contends) or only by both parties acting together (as Bahrain contends)?

6.8 The issue has hitherto been presented to the Court partly in the form of a dispute between the Qatari translation "the parties" and the Bahraini translation "the two parties".[117] But now that Bahrain has the opportunity to present an extended statement of its position, it is bound to emphasize that the task of the Court is not to choose one or the other of these English expressions but instead to identify a form of words that best reflects in English[118] the true sense of the Arabic words.[119] Bahrain submits that the sense of the Arabic words is conjunctive. *Al-ṭarafān* means "both the Parties" or "the Parties together". The Arabic expression is not open, in the context in which it is used in this case, to the disjunctive or distributive interpretation put upon it by Qatar to the effect that either Party may proceed alone. In proof of this, it is necessary to look at the way in which the words *al-ṭarafān* have been used not only in the text in question but also in other texts of a similar nature previously prepared or adopted by either or both of the parties.

---

[117] See the Annex to the letter from the Minister of Foreign Affairs, Bahrain to the Registrar of the Court, 18th August 1991.

[118] And, of course, French. However, both Parties are presenting their pleadings in English so it is in terms of that language that Bahrain will express itself.

[119] In this particular respect the Parties appear to be largely in agreement. In para. 5.48 of its Memorial Qatar says:

> "Accordingly, there is no real difference if the second paragraph of the Doha Agreement is translated to read 'After the end of this period *the parties* may submit the matter to the International Court of Justice' or '... *the two parties* may submit...' (emphases added). From a substantive point of view the difference in the translation is immaterial."

(a) The use of *al-tarafān* in earlier texts

6.9 Upon examining earlier pertinent texts generated by the Parties it is quite clear that the words *al-tarafān* have been used by both Parties to express the conjunctive idea of "both parties together" and not any distributive idea of "either" or "each" of the Parties.

(i) Use in the Qatari and Bahraini draft joint submissions of 1988

6.10 Perhaps the simplest and shortest way of disposing of this case in the sense for which Bahrain contends is to adopt the view of the matter presented by one of Qatar's experts, Professor El Kosheri.[120] Part II of his Opinion is entitled "Response to the Questions which raised Linguistic Problems ...." In Section I he deals with "The significance of the Arabic Language with regard to the usage of the dual as distinguished from the singular and the plural."

6.11 There, in paragraph 43, Professor El Kosheri states that:

> "there is nothing wrong in terms of English linguistics when using the word 'parties' to express what is known in Arabic as *'Tarafan'* or as *'Atraf'*, since the English language does not distinguish between the dual and the plural."

He goes on to say:

> "Therefore, there is *prima facie* no issue in objecting to Qatar's translation of the word *'Al-Tarafan'* as meaning 'the parties' in the second paragraph of the signed Minutes dated 25 December, 1990."

[120] Professor El Kosheri's opinion is contained in the Qatari Memorial, Annex III.1, Vol. III, p.251.

6.12 Then comes the most crucial passage:

> "In fact the State of Bahrain itself acted in the same manner as witnessed by Attachment 7 to the Annex submitted to the International Court of Justice with the letter from the Bahraini Minister of Foreign Affairs dated 18 August 1991. The said Attachment 7 comprised what is referred to as 'Copy of original draft Bahraini Special Agreement of 19th March, 1988,[121] as amended in October 1988 in English and Arabic'. Article I in the English version started with the reference to 'The Parties'."
>
> "The same reference to 'The Parties' is repeated as follows: at the beginning of Article II.1. ... In all seventeen instances, the Arabic version of the Bahraini draft agreement referred to '*Al-Tarafan*'."
>
> "It is difficult to understand why what was linguistically correct for Bahrain in 1988 has become incorrect for Qatar in 1991."

6.13 Professor El Kosheri has hit the nail on the head and has made in unexceptionable terms the very point that Bahrain seeks to make. The words *al-ṭarafān*, which are used in paragraph 2 of the 1990 Minutes and which Bahrain maintains means "the two parties" in the sense of "both the parties together", were also used in the Bahraini Draft Special Agreement of 19 March 1988. There they were used in exactly the same sense as meaning "both the Parties" or "the Parties together". They were so understood by Bahrain and by Qatar, and by Saudi Arabia as well, because at that time there was no thought in anyone's mind of the case going before the Court other than by a joint submission. Indeed, Qatar itself used the same Arabic words *al-ṭarafān* to describe a joint submission in its own Draft Special Agreement of 15 March 1988.[122]

---

[121] Annex I.9, Vol. II, p.47.

[122] Qatari Memorial, Annex II.21, Vol. III, p.135. For the Arabic text see p.135 of Qatar's "List of the Arabic Versions of the Documentary Annexes deposited with the Court".

6.14 Thus, Professor El Kosheri, in his anxiety to prove that Qatar was correct to translate *al-ṭarafān* in the 1990 Minutes by the words "The Parties" has in fact proved beyond any possibility of contradiction that *al-ṭarafān*, whether translated as "The Parties" or "The two Parties", must mean both Parties together. Qatar has adopted Professor El Kosheri's Opinion as an integral part of its case and has not entered any reservation in respect of this aspect of it.[123] By itself, this should be sufficient to dispose, without further argument, of Qatar's claim to be entitled unilaterally to institute the present proceedings.

(ii) Use in the Bahraini Formula 1988

6.15 This use of the words *al-ṭarafān* was not isolated or exceptional. In its Application in the present case, Qatar referred to the so-called Bahraini Formula as an integral part of its contention that the Court has jurisdiction in this case. The Bahraini Formula for the question to be put to the Court was put forward in its present form in English, with an Arabic translation, on 26 October 1988 for inclusion in the evolving draft joint submission. The text is set out in paragraph 5.33 above and in Annex I.14 hereto. Qatar stated in paragraph 37 of its Application that:

> "during the 11th Gulf Co-operation Council summit meeting ... [it] declared that, in order to arrive at an agreement for submitting the disputes to the Court, it accepted the Bahraini Formula."

It has adhered to that position in its Memorial.

6.16 As has already been stated, this formula was proposed by Bahrain as a contribution to the text of a joint submission to the Court and was received and seen by Qatar as such. The opening words of the formula, "The Parties", thus could only be taken to mean conjunctively "both the Parties". The words used to render this idea into Arabic were *al-ṭarafān*. If those

[123] See Qatari Memorial, para. 5.46.

Arabic words meant "the Parties together" or "both the Parties" then they could only mean the same thing where used again in the 1990 Minutes. It is elementary logic that if A equals B and A equals C, then C must equal B. If in the Bahraini Formula *al-ṭarafān* (A) equals "both the parties" (B) and in the 1990 Minutes *al-ṭarafān* (A) equals the expression translated by Qatar as "the parties"(C), then the words "the parties" (C) must equal the words "both the parties" (B).

6.17 This cogent evidence of the manner in which the Parties themselves accepted the words *al-ṭarafān* in their previous discussions effectively serves to estop either of them (though, effectively, in this case, Qatar) from now asserting that the words do not carry a conjunctive meaning. It is, therefore, hardly necessary for Bahrain to carry the matter further. However, as the point is central to the present proceedings, Bahrain will now refer to a number of additional considerations that support the Bahraini interpretation.

(b) The translation of *al-ṭarafān* as "the two Parties"

(i) Elsewhere in the Qatari version of the 1990 Minutes

6.18 Even if there could be any real doubt about the conjunctive effect of the English words "the parties" in relation to the second operative paragraph of the 1990 Minutes, there can be even less doubt about the conjunctive effect of the words "the two parties" which is the manner in which the Arabic words *al-ṭarafān* (though in a different grammatical case) are translated in the first and third operative paragraphs of the 1990 Minutes. This applies equally to the Bahraini, the Qatari and the UN translations.

6.19 The expression first appears in paragraph 1 of the operative part as part of the phrase "to reaffirm what was agreed previously between the *two parties*". This is the translation given in the English version of the 1990

Minutes annexed to the Qatari Application.[124] The words are clearly used in the conjunctive sense.

6.20 The expression also appears in the third operative paragraph of the 1990 Minutes:

> "should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration".

Here, if anything, the words convey even more clearly the conjunctive sense since, within the framework of the Court's procedure, even if a case is commenced by one State alone, its discontinuance can be achieved only with the consent of the other.[125]

(ii) In the translation prepared by the United Nations

6.21 Bahrain has obtained from the Treaty Registration Section of the United Nations a translation of the 1987 Agreement, the 1987 Announcement and the 1990 Minutes prepared recently following the steps taken by Qatar in June 1991 to procure registration of those texts under Article 102 of the Charter as international agreements.[126] This translation is of particular importance and value, having been made independently by experts in the Secretariat of the Organization of which the Court is one of the principal organs, and not in response to any request from Bahrain. The translation of

---

[124] Qatari Application, Annex 6.

[125] See Rules of the Court, Article 88. The only exception is under Article 89, which permits unilateral withdrawal by the applicant only if the respondent has not yet taken any step in the proceedings.

[126] On 9 August 1991 Bahrain protested to the United Nations Secretary General against the registration of these texts, Annex I.21, Vol. II, p.125. See Attachment 8 to Bahrain's letter of 18 August 1991 to the Registrar of the Court. The translations by the Secretariat appear to have been made subsequent to this date. The texts of the new translations are appended in Annexes I.2, Vol. II, p.5; I.15, Vol. II, p.93 and I.19, Vol. II, p.115.

the 1990 Minutes uses the words "the two parties" to represent *al-ṭarafān* as it appears in the second sentence of the second operative paragraph.

(iii) The opinions of the experts

6.22 The opinions of the experts have hitherto been directed exclusively towards the translation of *al-ṭarafān* as a matter of linguistics and, in particular, to the question of whether it should be properly translated as "the parties" or as "the two parties".

6.23 In the light, however, of the connection which even the Qatari Memorial recognizes between the use of *al-ṭarafān* in the 1990 Minutes and its use in previous texts prepared by the parties when its function was clearly to convey the idea of both "the parties" or "the parties together", it is now evident that the principal question on which it is desirable to secure expert guidance is whether the use of *al-ṭarafān* in these earlier texts can properly be identified with its use in the 1990 Minutes. Bahrain has, therefore, put precisely that question to four experts: Professor A.K. Aboulmagd; Mr. Adnan Amkhan; Professor Badawi and Dr. Holes. Each has confirmed that the use made of the expression *al-ṭarafān* in the earlier texts, in particular in the Qatari and Bahraini draft joint agreements and in the Bahraini Formula, is identical with the use made of it in the second sentence of the second operative paragraph of the 1990 Minutes. As there can be no doubt that each of these earlier texts was intended to convey the idea of the two parties acting together, it follows that that is also the sense in which it is used in the 1990 Minutes.[127]

[127] See Annex II, Vol. II, for the opinions of Professor Aboulmagd, Mr. Amkhan, Professor Badawi and Dr. Holes respectively. See in particular, the opinion of Professor Aboulmagd, Annex II.1, para. 3.9, at p.215, the section of the opinion of Professor Badawi, Annex II.3 entitled "(b) The togetherness of the dual noun *al-ṭarafān*" at pp.267-270, and the opinion of Dr. Holes, Annex II.4, at p.292, bottom paragraph. Note also Mr. Amkhan's comparison with the use of *al-ṭarafān* in the signed Minutes of 7 December 1988 at paras. 36 and 37 of his opinion, Annex II.2, at pp.251-2. See also below, paras.

6.24 Thus Professor Badawi states in his Opinion:[128]

"Now we turn to the use of the dual *al-ṭarafān* in all the Arabic documents related to the period of mediation between the two States, in particular the minutes of Dec. 25, 1990.

1. More than 50 Arabic documents (totalling 245 pages) were included in the Memorial submitted to the Court by the State of Qatar...

2. The word *al-ṭarafān* occurs in the above Arabic documents 145 times (some of which are quotes from previous documents). In all these occurrences the word *al-ṭarafān* is used in the basic sense of the dual and whenever there is a question of action it always applies jointly and uniformly to the two parties. Not even once does there occur a single qualification to alter this uniform use of the word *al-ṭarafān*...

4. Of particular significance here is the use of the dual *al-ṭarafān* by the Qatari side, especially in their first draft Special Agreement dated 15 March, 1988[129] and in their Note Verbale dated 27 March, 1988 commenting on the Bahraini's draft Special Agreement of March 1988:

Notwithstanding the Qatari translation of *al-ṭarafān* as 'the parties'... *al-ṭarafān* is clearly used in these two documents in the context of joint submission to the Court.....

7. The use of *al-ṭarafān* in the Minutes of Dec. 25, 1990 is in no way different from its use anywhere else in the 142 other places in the set of documents. It signifies the *two parties acting together* in their preparation for the approach to the Court..."

6.33 and 6.49-6.53, for the significance of the changes made in the two drafts of the December 1990 Minutes before they were finally adopted.

[128] See Annex II.3, Vol. II, at pp.268-270.

[129] Annex I.8, Vol. II, p.41. For the Arabic text see the Arabic version of the documentary annexes deposited with the Registry by Qatar, p.137.

6.25 The experts have also commented on the other more technical linguistic points made in the expert opinions attached to the Qatari Memorial.[130]

B. Consistency of the Bahraini interpretation with the rest of the 1990 Minutes

6.26 Bahrain's interpretation of the words *al-ṭarafān* in the 1990 Minutes is supported by the consistency of this interpretation with other aspects of the rest of the text.

1. The significance of reaffirming "what was agreed previously"

6.27 The first operative paragraph of the 1990 Minutes provides that it was agreed "to reaffirm what was agreed previously between the two parties". Reference has already been made to the correspondence of the Arabic words *al-ṭarafān* in this provision with the words *al-ṭarafān* in the second and central operative paragraph. It is not the object of this sub-section to repeat that argument. Rather, it is necessary to point out that in re-affirming what had previously been agreed, the parties were intending to reaffirm a course of conduct pursued exclusively on the basis that the Parties would jointly submit the entirety of their dispute to the Court by a special agreement.

6.28 It is to be noted that the Qatari Memorial proceeds on the assumption that the previous agreement "reaffirmed" in the first operative paragraph of the 1990 Minutes is the 1987 Agreement and nothing else. The Qatari Memorial states at paragraph 4.49:

> "It may be concluded, *first*, that according to the terms of the Doha Agreement [the 1990 Minutes], reference must be made, on the one

[130] See Annex II, Vol. II. See in particular Professor Badawi's analysis of the semantic structuring of the crucial sentence in the second operative paragraph of the 1990 Minutes contained in Section II of his opinion, Annex II.3, Vol. II, at pp.264-266.

hand, to the previous December 1987 Agreement where the Parties committed themselves to refer all matters in dispute to the Court."

A similar point is made later in the Qatari Memorial when dealing specifically with the points in Bahrain's initial objection to the jurisdiction of the Court. The Qatari Memorial states, in para. 5.40:

> "Bahrain fails to mention a basic element of the Mediation, that is - to use the wording of the Doha Agreement - the reaffirmation of 'what was agreed previously between the two parties'. It is necessary, therefore, to repeat the proposals set out in the identical letters dated 19 December 1987 from King Fahd which were accepted by Bahrain and Qatar."

6.29 Thus, on no less than two occasions the Qatari Memorial equates the first point in the 1990 Minutes ("to reaffirm what was agreed previously between the two parties") with the 1987 Agreement. However, the Qatari Memorial makes no attempt to establish that the words in the first paragraph of the 1990 Minutes actually do refer to the 1987 Agreement and not to some other agreement. Nor are there any words in the Minutes that necessarily connect them exclusively or, indeed, primarily with the 1987 Agreement. As has been pointed out in the review in Chapter V, Section 3[131] above of the conduct of the Parties subsequent to the 1987 Agreement, there were other "agreements" between the Parties which could have been the subject of "reaffirmation", notably the "agreement" contained in the minutes of the Sixth Meeting of the Tripartite Committee of 6 December 1988.[132] This records the agreement of the parties on the subjects to be submitted to the Court within the framework of a joint submission and is no less an agreement pertinent to the content of the 1990 Minutes than is the 1987 Agreement. Qatar appears entirely to have overlooked this point. These 1988 Minutes may as much be seen as "an agreement" as may the 1990 Minutes themselves. If the 1990 Minutes constitute an agreement because they contain

[131] See paragraph 5.20 and following.

[132] Annex I.18, Vol. II, p.109.

the words "the following was agreed",[133] then the presence of comparable words in the 1988 Minutes, namely, "the two parties agreed on these subjects" must likewise be read as constituting an agreement between them - an agreement concluded previously to the 1990 Minutes and thus falling within the scope of its first operative paragraph. And what was it that was thus agreed in December 1988? The answer is very clear - a list of subjects which were "to be submitted to the Court" quite evidently in a special agreement to be concluded between the Parties. Otherwise, what would have been the purpose and sense of the proposal by the Qatari delegation

> "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"?[134]

6.30 Thus the reaffirmation in the first operative paragraph of the 1990 Minutes of "what had previously been agreed" meant quite simply the reaffirmation of the various points upon which agreement had previously been reached, including agreement that the approach would be by a joint submission pursuant to a single special agreement. It is with this approach that the Bahraini interpretation of *al-ṭarafān* as used in the second operative paragraph of the 1990 Minutes is fully consistent.

2. The significance of the use of the singular number in the expression "the matter", or "the case" as the object of the verb "submit"

6.31 An additional factor militating in favour of the Bahraini interpretation of "the parties" lies in the fact that paragraph 2 of the Minutes describes the object of the litigation as "the matter" (in the singular) not as "the matters"

---

[133] See the opinion of Professor El-Kosheri, Qatari Memorial, Annex III.1, Vol. III, p.266.

[134] Annex I.18, Vol. II, at p.112.

in the plural. The translation prepared by the United Nations Secretariat uses the word "case" instead of "matter". The argument which follows applies, whether "matter" or "case" is used, though its force is even stronger if the word "case" is used.

6.32 The Qatari interpretation of "the parties" is that it means "each or either of the parties" and claims that the expression foresees that each of the parties may independently and unilaterally start any proceedings against the other that fall within the framework of the Bahraini Formula. If this approach is correct, it means that - if there is to be more than one application - there must be more than one matter or case. In technical terms it is difficult to conceive of two separate applications in respect of the same matter or case. This being so, one would have expected that, if separate applications were foreseen, then the plural number would have been used to describe the object of such applications; the text would thus have referred to "the matters" or "the cases" not "the matter" or "the case". The fact that it did not is an indication that only one step commencing proceedings was contemplated. That means that the commencement could have been only by joint submission.

3. The significance of the words "and the procedures arising therefrom"

6.33 The Bahraini interpretation of *al-ṭarafān* is further supported by the meaning to be given to the words (as translated by Qatar) "and the proceedings arising therefrom" that also appear in the same sentence. In the opinion of Bahrain these words should more accurately be translated as "the *procedures* arising therefrom"[135]. They were introduced into the 1990 Minutes at the proposal of Bahrain, as part of the revision of the Saudi Arabian and Omani proposals, in order to make it quite clear that Court proceedings could only be begun by both Parties together and, therefore, that

[135] The translation prepared by the United Nations reads: "and the arrangements relating thereto". Annex I.19, Vol. II, at p.118.

further steps would need to be taken by the two parties jointly to bring the case to the Court. The point was originally made in paragraph 15 of the Bahraini letter to the Court of 18 August 1991.

6.34 The Qatari response to this point argues that "the procedures arising therefrom" were "those relating to and arising from the seisin of the Court in accordance with its Statute and Rules". In effect, Qatar thus attempts to attach the phrase to the idea of submission to the Court, whereas Bahrain relates the phrase back to the Bahraini formula and the procedures or arrangements ensuing upon its application.[136] Thus on Bahrain's interpretation (and this phrase was supplied by Bahrain) the procedures would arise from the Special Agreement.

6.35 The correctness of the Bahraini interpretation of these words is attested by three considerations. The first is that H.E. Dr. Al Baharna, who formulated the phrase, declares in his statement[137] that his intention in using the words was to emphasize that the Parties would need to take further steps jointly to bring the case to the Court. The second is that the United Nations Secretariat translates the line as follows:

> "... the two parties may submit the case to the International Court of Justice, in accordance with the Bahraini formula accepted by the State of Qatar and the arrangements relating thereto".[138]

This translation confirms the direct linkage between the Bahrain formula and "the arrangements relating thereto", in the sense that the Bahraini formula was seen as requiring further arrangements to bring it into effect as part of a jurisdictional clause. The third is the strength and clarity of the linguistic

---

[136] Qatari Memorial, para. 5.60.

[137] Annex I.26, Vol. II, para. 8 at p.181.

[138] Annex I.19, Vol. II, at p.118.

support provided for this interpretation by both linguistic experts, Professor Badawi and Dr. Holes, as well as the legal experts, Professor Aboulmagd and Mr. Amkhan (all on behalf of Bahrain). [139] Professor Ayyad, the linguistic expert on behalf of Qatar, is clearly of the same view - as Professor Badawi points out in his comments on the former's opinion.[140] Only Professor El-Kosheri supports Qatar's contention, but even he admits that:

> "From a purely linguistic point of view, it has to be assumed that the reference goes *prima facie* to the closest antecedent which is '*the Bahraini formula*' as accepted by Qatar".[141]

6.36 The final Qatari observation on this point is as follows:[142]

> "Should the Parties have agreed to have recourse to a further round of negotiations in order to arrive at a special agreement, the Doha Agreement would not have failed to spell out such a major requirement."

That observation assumes what has to be proved, namely, that the 1990 Minutes did not spell out this major requirement. In truth, as Bahrain sees the matter, that is precisely what the 1990 Minutes did do in re-using the words *al-ṭarafān* against a background of its constant use in the past as a description of joint action by both Parties.

---

[139] See, respectively, in Vol. II, Annex II.1, para. 4.2 at p.215; Annex II.2, paras. 38-39, at pp.253-254; Annex II.3, the Section entitled: "The antecedent of the pronominal suffix hā" at p.266 and Annex II.4, para. 6, at p.297.

[140] Annex II.3, Vol. II, at p.281, bottom paragraph. For Professor Ayyad's view, see Qatari Memorial, Annex III.II, Vol. III, p. 322.

[141] Qatari Memorial, Annex III, Vol. III, p.275 at para. 35.

[142] *Ibid.*, para. 5.60.

C. The *travaux préparatoires* leading to the adoption of the 1990 Minutes support the Bahraini interpretation

6.37 The circumstances in which resort to *travaux préparatoires* is permissible are laid down in Article 32 of the Vienna Convention on the Law of Treaties:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

6.38 The main text of the Qatari Memorial accepts the relevance of this provision. In paragraph 4.28 of its Memorial, Qatar says:

> "In fact, treaties and conventions in force within the meaning of Article 36, paragraph 1, of the Statute are agreements between States governed by international law, and they must be interpreted in accordance with the general rules on interpretation now embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties."

6.39 The Qatari Memorial later[143] quotes from the Advisory Opinion of the Court on the question of the *Competence of the General Assembly for the Admission of a State to the United Nations*[144] to the following effect:

> "If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter. If, on the other

[143] Qatari Memorial, para. 5.57.

[144] *ICJ Reports 1950*, p.8.

hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."

6.40 Bahrain, with the greatest respect, fully accepts the validity of these words of the Court. What Bahrain cannot accept is the bald assertion, unsupported by any reasoning, next made by Qatar:

> "therefore ... it is not necessary to have recourse to such supplementary means of interpretation, as the conditions laid down by Article 32 of the Vienna Convention and by the Court are not fulfilled in the present case. The Arabo-Islamic legal tradition is in conformity with this approach."

6.41 It is, of course, a fact that both the Parties in this case consider that the words in dispute are neither ambiguous nor obscure nor lead to an unreasonable result. The difficulty is that each Party puts a different interpretation on these supposedly clear and unambiguous expressions. In these circumstances, it is as difficult for Qatar as it would be for Bahrain to pretend that Article 32 of the Vienna Convention is inapplicable.

6.42 Moreover, the contention that "the Arabo-Islamic legal tradition is in conformity with this approach"[145] does not assist the Qatari case in any way. This "tradition" is not adduced to support the assertion that the text is clear and unambiguous (which thus remains totally unsustained) but rather to challenge the permissibility of use by the Court of *travaux préparatoires*. As such, the contention is unsound. For one thing, there is no Arabo-Islamic legal tradition which excludes recourse to preparatory work, even in the field of the interpretation of agreements within the domestic law of the various Arab countries. This is a point more fully developed in the opinions of

[145] See Qatari Memorial, para. 5.57.

Professor A.K. Aboulmagd and Mr Adnan Amkhan [146] annexed hereto. For another, even if it should be assumed that there were such a concept within the Arabo-Islamic legal tradition, it could not override the terms and binding effect of Article 32 of the Vienna Convention on the Law of Treaties as declaratory of universally accepted customary international law operative between the parties. So far as Bahrain is aware from its examination of the evolution of the Vienna Convention, at no point during that process did anyone, Arab, Islamic or otherwise, suggest that there was a relevant tradition in the sense now advanced by Qatar. Even if such an assertion had been made, it could not affect the universally binding quality of the rule now stated in Article 32.

6.43 Indeed, such evidence as there is shows quite strikingly that the position taken, for example, by the members of the International Law Commission of, respectively, Iraqi and Egyptian nationality, was unreservedly supportive of the principle of recourse to *travaux préparatoires* in proper circumstances. Thus Mr Mustafa Kamil Yasseen said, in the course of the Commission's consideration of the draft article dealing with use of preparatory work that:

> "... the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer to the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself being often influenced by the consultation of the same sources."
>
> .....

[146] See Annex II.1, Vol. II, paras. 2.7-2.14 at pp.207-209 and Annex II.2, Vol. II, paras. 13-31 at pp.234-247.

"... a text could not be deemed clear until its entire dossier had been studied. ..."[147]

Mr. Yasseen reiterated that view two years later and stated that:

"The rule laid down for recourse to preparatory work was a reasonable one: reference was to be made to it in order to verify or confirm the apparent meaning of the text, so as to make sure that that meaning was in fact what the parties had intended. In sub-paragraph (b), the Commission had even gone a little further - a course of which he approved - by providing that if textual interpretation led to a result which was absurd or unreasonable it was justifiable to assume that the wording was defective and to rely on the statements of those who had formulated the text. Such a case was very similar to that of material error, and no one denied that an error could be corrected. There was no reason to believe that an examination of the preparatory work and of the circumstances in which the text had been drawn up would not make it possible to arrive at a reasonable meaning."[148]

6.44 Similar views were expressed in the same debate by Mr El-Erian, the distinguished Egyptian professor who later became a Judge of the Court:

"... he would first deal with the general question of the place of subsidiary means - especially the preparatory work - in the process of interpretation, a question which some writers considered to be one of the admissibility of certain evidence rather than of substantive law.

He congratulated the Special Rapporteur on not showing the bias of most English lawyers against preparatory work. As Lord McNair had said, an English lawyer approached the question

[147] *Yearbook of the International Law Commission, 1964*, vol.1, pp.313 and 314.

[148] *Ibid., 1966*, vol. 1, part II, pp. 203-4.

'with a bias against resort to preparatory work, as that is, in general, contrary to his legal tradition and instinct in dealing with legislation and contracts'.[149]

In 1964, the Commission had wisely adopted a balanced formulation with regard to the place of subsidiary means in the process of interpretation. That remark applied in particular to preparatory work."[150]

6.45 In like vein, the late Judge Badawi observed, in his joint dissenting opinion in the *Case Concerning the Rights of Nationals of the United States of America in Morocco* that: "...Assuming that the text is ambiguous, the examination of the *travaux préparatoires* might throw some light on its interpretation".[151] Indeed, as the opinion of Mr. Amkhan also notes, "it is nowhere to be found that any Arab international lawyer advocates rules of interpretation different from those which exist in articles 31, 32 and 33 of the 1969 *Vienna Convention on the Law of Treaties*".[152]

6.46 With the point of principle thus established, it is now possible to consider the substance of the argument advanced by Bahrain on the basis of the *travaux préparatoires*.

6.47 At the outset, it should be recalled that Qatar gave no notice to Bahrain or to Saudi Arabia, the Mediator, of its intention to propose in December 1990 so basic a change in the approach which had previously characterized the discussions in the Tripartite Committee. In Qatar's own list of documents pertinent to developments, there is a complete gap between the

---

[149] See McNair, *The Law of Treaties 1961*, p.411.

[150] *Yearbook of the International Law Commission, 1966*, vol. 1, part II, p.204.

[151] *ICJ Reports 1952*, p.229. This opinion was written jointly with Judges Hackworth, Levi Carneiro and Sir Benegal Rau.

[152] Annex II.2, Vol. II, at p.234.

Minutes of the Sixth Meeting of 6 December 1988 and the so-called Agreement of 25 December 1990. Nonetheless, the Qatari Memorial (at para. 5.42) states that

> "... in view of the deadlock which was reached [in 1988], Qatar was entitled to expect that Bahrain would comply with its undertaking to go to the Court, by means other than a special agreement. That was to be achieved by the Doha Agreement, in which no reference is made to the conclusion of a special agreement. ..."

6.48 If the passage just quoted is intended by Qatar to describe its state of mind in the run-up to the Doha meeting, then one can only say that it is extraordinary that Qatar did not think fit to give Bahrain some prior indication of this new line of thought. And this absence of prior notice has an important bearing upon the substance of what was determined at Dohah in that Bahrain, not having been previously made aware of the change in Qatar's position, was not able to express its reactions to the proposed change in reasoned and written form. In the press of the moment, Bahrain's sole objective was, while eventually sharing the view that some form of words was necessary in order to enable Qatar to emerge without undue loss of dignity from the difficulty which its precipitate action had occasioned, to ensure the maintenance of the process of preparing a joint submission to the Court.

6.49 The most relevant *travaux préparatoires* consist of two drafts presented to Bahrain in the course of the discussions on 24 December 1990. The first was put to it through the Saudi Arabian delegation and was written on the headed notepaper of the Saudi Arabian Ministry of Foreign Affairs. This contained in its first operative paragraph the words, referring to the discussions at the Gulf Cooperation Council Summit Meeting:

> "These consultations have 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 which is as follows: as specified in the Bahraini Memorandum."

These words, particularly the words "by each of them", were read at the time by the Bahraini Minister of State for Legal Affairs, H.E. Dr. Al Baharna, as opening up the possibility that each State might unilaterally institute proceedings before the Court. He, therefore, advised the Bahraini Government not to accept this proposal. [153]

6.50 Following this objection, the first draft was then replaced by one prepared by the Foreign Minister of Oman. The second paragraph of this originally provided:

> "The good offices of the Custodian of the two Holy Mosques will continue between the two countries until next May. Either of the two parties may, at the end of this period, submit the matter to the International Court of Justice.The good offices of the Kingdom of Saudi Arabia will continue during the period when the matter is under arbitration."[154]

6.51 The appearance in this draft of the words "either of the two parties" and the absence of any reference to the question made it unacceptable to Bahrain. In consequence, the words "either of the two parties" were replaced by the words "*al-ṭarafān*" ("the two parties") and after the words "the International Court of Justice" there were inserted the words "in accordance with the Bahraini formula which Qatar has accepted". These changes are

---

[153] See Dr. Al Baharna's Statement, Annex I.26, Vol. II, paras. 4 and 5 at p.180. The translation of the draft is attached at p.186.

[154] *Ibid.*, at p.189.

fully reflected in the final text of the Minutes signed on 25 December 1990.[155]

6.52 The Qatari Memorial deals with these developments at paragraph 5.58. It observes, first, that the first draft was never shown to Qatar. As regards this point, the fact that one of two parties to a negotiation may not have seen a draft presented by an intermediary does not mean that the text is thereby excluded from the *travaux préparatoires* or becomes inadmissible. The existence of the third-party draft and consideration of it by one party remains a relevant fact that may have influenced the intention of the latter party.

6.53 Turning to the second draft, it may be observed that Qatar, in contrast with its denial that it saw the Saudi draft, does not deny that it saw this draft. The draft is important because it evidences the major change in words from "either of the two parties" to simply "the two parties". *Such a change, made as it was upon the initiative of Bahrain and reflecting Bahrain's declared unwillingness that proceedings before the Court should be unilaterally initiated by one party alone, gives rise to an inescapable inference: the proposal that "either party" might start the proceedings was quite simply abandoned.*

6.54 Paragraph 5.58 of the Qatari Memorial does not grapple with this relevant aspect of the matter at all. It merely restates, without any supporting analysis of the facts, the conclusion that it wishes to reach. To say, as does the Qatari Memorial, that the text "clearly envisaged seisin of the Court" is

---

[155] Authoritative analyses of these changes are contained in the expert opinions of Professor Aboulmagd, Annex II.1, Vol. II, paras. 3.7-3.10, at pp. 214-215, Professor Badawi, Annex II.3, Vol. II, at p.272, and Dr Holes, Annex II.4, Vol. II, para. 1, at pp. 291-293 and para. 4, at p.295. As Dr Holes states at p.295:

> "The point at issue is no mere quibble or question of style, but rather a substantive difference in meaning between the rejected form of words meaning 'either of the two parties' and the form of words 'the two parties' which was accepted".

to say nothing, for the question is not whether the words envisaged seisin but by whom and how such seisin was to be effected. And to continue by saying that "the amendments ultimately adopted neither modified that aim nor introduced any hint of the necessity of a special agreement" is particularly far-fetched. Even if one accepts that the subject of the sentence was seisin of the Court, what possible significance can attach to the abandonment of the words "either of the two parties" other than that the idea of "either of the two parties" was specifically dropped in favour of the words "the two parties" so that the two parties would have to act together, that is to say, on the basis of a special agreement?

6.55 In conclusion on this point, it need only be said that the Qatari treatment of *travaux préparatoires* in this case is marked by an evident inability, and corresponding reluctance, to meet the Bahraini argument based on the evolution of the final text of the 1990 Minutes. *The fact of the matter is that Qatar's attempt completely to change the basis on which the case was to be presented to the Court was not accepted by Bahrain and found no place in the 1990 Minutes.*

D. Incompatibility of the Qatari approach with the idea of a single, fully dispositive, case

6.56 As has already been stated, by the date of the unilateral commencement of these proceedings by Qatar, it was fully apparent that Bahrain attached great importance to the consideration, as part of the dispute between it and Qatar, of its claim to Zubarah. Indeed, at the Sixth Tripartite Committee Meeting Qatar had agreed (albeit with some eventual reservations) that Zubarah was one of the issues to be resolved in the contemplated judicial proceedings. It will be recalled, too, that the first of the principles of the Saudi Arabian mediation was that:

> "all issues of dispute between the two countries ... are to be considered as complementary, indivisible issues, to be solved comprehensively together."[156]

If not at the time when this principle was formulated, at any rate by the date of the 1990 Minutes, Zubarah was one of these issues, to be solved "comprehensively" and undivided from the rest. It is, therefore, difficult to conceive that so fundamental an element in the approach of all three interested States should have been totally jettisoned in the space of a few hours of forced negotiation.

6.57 It is important in this connection to bear in mind the clear jurisprudence of the Court to the effect that the adequacy of an application must be tested as at the moment that it is made. In both the *Nottebohm*[157] and the *Right of Passage*[158] cases the Court took the view that the sufficiency of the jurisdictional link between the claimant and the respondent States should be determined only by reference to the state of affairs at the moment of the filing of the application. It is at the date of the application that there must be present and operative all the ingredients required to perfect the Court's jurisdiction. In the present case this requirement has not been met.

6.58 An essential element in the Qatari case - which is fully acknowledged in the Qatari Memorial - is the acceptance by Qatar of the Bahraini Formula for the question to be put to the Court. As has been stated in the Bahraini letter to the Court of 18 August 1991, this question was framed by Bahrain on the basis that it would be incorporated in a joint submission to the Court in a manner that would enable Bahrain, on a footing of perfect equality, to raise before the Court the question amongst others, of its claims to Zubarah,

---

[156] Annex I.1, Vol. II, at p.3.

[157] *ICJ Reports 1953*, p.111, at p.123.

[158] *ICJ Reports 1957*, p.125, at p.142.

the fishing areas and the pearl banks. In other words, it was foreseen that at the moment at which the case was put to the Court in accordance with the procedures contemplated in Article 40 of the Statute, the foundation would be laid for all the issues outstanding between the Parties to be presented to the Court as part of a single, integrated case. Qatar is thus in a position of clear inconsistency. If, having purported to accept the Bahraini Formula on Bahrain's terms, Qatar then in its Application did not include all the items which the Parties agreed would be referred to the Court,[159] it failed to match its conduct to its acceptance; and the acceptance becomes ineffective. If, on the other hand, Qatar argues that the Bahraini formula does not include all these items, then this amounts to an admission that the Parties were not *ad idem* and no consensual arrangement could have been reached.[160]

6.59 The essence of the difference between Bahrain and Qatar as regards the interpretation of the 1990 Minutes lies in the Qatari insistence that the Minutes completely abandoned the "joint submission" approach previously operative between the Parties and, instead, authorized each of them to commence proceedings separately. Qatar contends that by "accepting" the Bahraini Formula it satisfied an essential condition precedent to its invocation of the Court's jurisdiction and that it also thereby left it open to Bahrain to start its own independent proceedings for the purpose of raising the Zubarah issue.

---

[159] The signed Minutes of the Sixth Meeting of the Tripartite Committee, 7 December 1988, record that the Parties, in discussing the Bahraini Formula, agreed that it covered the following matters:

> "1. The Hawar Islands, including the island of Janan.
> 2. Fasht ad Dibal and Qit'at Jaradah.
> 3. The archipelagic baselines.
> 4. Zubarah.
> 5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries." Annex I.18, Vol. II, at p.112.

[160] For the contradictions in Qatar's position, compare its Memorial, para. 3.48 and para 4.56.

6.60 It is this assertion that Bahrain can put itself in a position of procedural equality with Qatar by raising the Zubarah issue in a separate case that constitutes a fundamental defect in the Qatari case. It means that, regardless of such procedural steps as the Court may, but not necessarily will, take to join the two sets of proceedings that would thus arise, Bahrain is involved in the Qatari case in an unequal and imperfect position in that scope was not provided at the moment of the Qatari application for the Zubarah issue to be considered on a footing of procedural parity with the issues raised by Qatar.

6.61 To put the point another way, Qatar was not entitled on the date of its Application, 8 July 1991, to assume that the conditions for the application of the Bahraini Formula (namely, Bahrain's equal right to be able to present the Zubarah claim as part of the case) would be met by any subsequent independent initiation of proceedings by Bahrain coupled with the possible exercise by the Court of its discretion to join two separate cases. Unless all the conditions for the complete application of the Bahraini Formula were present at the moment of the Qatar application, Qatar's use of the Bahraini Formula was imperfect. Its Application was in that major respect defective and, therefore, as a whole invalid.

E. The failure of Qatar to insist on clear language authorizing a unilateral application

6.62 As is already overwhelmingly obvious - and, indeed, is not denied by Qatar - the interpretation placed by Qatar upon the second operative paragraph of the 1990 Minutes involves a total and fundamental change of position by both the Parties. From their previous position of negotiating towards the conclusion of a joint submission the Parties are said to have suddenly moved to agreement that each of them might unilaterally start proceedings in the Court by application.

6.63 Bahrain has already submitted that the burden of proof lies upon Qatar to show that it was the intention not only of Qatar and Bahrain, but also of Saudi Arabia, to make this change. Yet Qatar advances nothing to support its argument except the very words of which the meaning is in dispute. Qatar presents no evidence of conversations or documents between the parties that could presage the sudden change of approach. Qatar launched its initiative with no warning.[161] It presented no draft. It left it, first to Saudi Arabia and then to Oman, to present texts which, as ultimately amended and incorporated in "Minutes", are said to represent the agreement so strikingly to change direction. Qatar is entirely silent upon its role in the negotiations and offers no explanation of why, if its contentions are correct, it failed to insist upon the use of words that could have put its claims beyond doubt, e.g. "each of the parties" or "either of the parties". Reference has already been made to the significance of the *travaux préparatoires*. Here it is enough to point to the total failure of Qatar to take any positive step towards the elimination of doubt regarding its position.

6.64 Bahrain may indeed echo the thought underlying the suggestion made by Qatar in its paragraph dealing with the interpretation of the words which it translates as "and the proceedings arising therefrom:" [162]

> "Should the Parties have agreed to have recourse to a further round of negotiations in order to arrive at a special agreement, the Doha Agreement [the 1990 Minutes] would not have failed to spell out such a major requirement."[163]

---

[161] See above, para. 1.9 and the statement of H.E. Shaikh Mohammed Bin Mubarak Al-Khalifa at Annex I.25, Vol. II, paras. 1-3, at pp.159-160.

[162] See above, para. 6.36.

[163] Qatari Memorial, para. 5.60.

Could it not equally, if not more compellingly, be said:

> "If the Parties had agreed in the 1990 Minutes to change the whole basis on which they had previously been negotiating, then they would not have failed to spell out that major transformation in their ideas."?

As is pointed out in the opinion of Professor Badawi:

> "There is no way that *al-tarafān* ... can denote 'either of the two parties' as is claimed by the Qatari side. If this were intended then something like أي من الطرفين ? *ayyun mina al-tarafayn*, 'either of the two parties', أحد الطرفين ? *ahadu al-tarafayn*, 'one of the two parties', أي طرف ? *ayyu taraf*, 'any party', or one of many similar expressions, should have been used. In fact, expressions such as these were quite frequently used elsewhere in the rest of the Arabic documents where the purpose was deliberately either to single out one or the other of the two parties or to caution against unilateral action by one of the two parties..."[164]

6.65 It is not as if there was a total absence of any international practice relating to the wording of compromissory clauses in bilateral treaties. If States wish to permit recourse to the Court at the instance of either of them, they say so specifically, just as in a few cases when they wish the reference to be a joint one, they say so specifically. Bahrain contends, of course, that in the present case, the use of the words *al-tarafān* is the equivalent of saying expressly "both the parties" and it certainly is not the equivalent of "either of the parties". Moreover, having regard to the question which arose in the *Case concerning United States Diplomatic and Consular Staff in Teheran*[165] as to the effect of a provision in a bilateral jurisdictional clause that "any dispute between the ... Parties ... shall be submitted to the International Court of Justice", it might have been expected that prudence

---

[164] Annex II.3, Vol. II, at (b), p. 272.

[165] *ICJ Reports 1980*, p.4, especially at pp.26-27; 61 *ILR*, p.530, at pp.552-3.

would have led Qatar to insist upon an explicit provision entitling it to institute proceedings unilaterally if that was what it wished to achieve.

F. The general context of the 1990 Minutes

6.68 The Qatari Memorial, in paragraph 5.49, argues that Bahrain's interpretation of paragraph 2 of the 1990 Minutes "does not make sense at all" in the context of the Agreement as a whole.

6.69 Qatar asks:

> "what would be the point of proclaiming that if after a further five months the Mediation failed to reach a settlement of the disputes on the merits the Parties may seise the Court jointly after negotiating a special agreement?"

6.70 The answer is basically that Qatar's ill-conceived and precipitate action in placing an obstacle in the way of the conduct of Gulf Cooperation Council's discussions at a time of grave crisis gave rise to a situation in which something had to be done, not by way of concession to Qatar, but in order to get it off the hook and enable it to allow the work of the Summit Meeting to proceed. There was a general feeling that, as host State, Qatar had abused its position and was delaying the Council in dealing with these very urgent issues arising from the invasion of Kuwait. It was not expected that Bahrain should make concessions to Qatar in order that Qatar should be able to withdraw its unwelcome initiative over its dispute with Bahrain and allow the Council to get on with the real business at hand. There was no way in which Bahrain would at that stage have given in to Qatar's pressure; nor was Saudi Arabia, as the Mediator, itself prepared to go any further on behalf of Qatar than its one attempt at putting Qatar's ideas to Bahrain. Once Bahrain made it clear that it was not willing to accept the possibility of a unilateral submission, that was accepted as the end of the matter. In other words, the purpose of the Minutes as finally adopted was not primarily to

achieve a major alteration in approach, but, by any appropriate means short of major change, to put a diplomatic end to an untimely and ill-conceived Qatari initiative.

6.71 Nonetheless, it should be recalled that there was one positive element in the situation which needed to be placed on record, namely, Qatari acceptance of the Bahraini Formula. This was a major step forward by Qatar and, if negotiations had been pursued, would clearly have been of great importance in reaching a solution. Had Qatar not made its Application, the way would have been open after the end of May 1991 for settlement in the Special Agreement of the points still outstanding.

6.72 Qatar also asks:

> "Why provide that if the Saudi good offices succeed, the case shall be '*withdrawn from arbitration*', if the sole commitment of the Parties ... is to resume negotiations to make a special agreement?"[166]

The answer lies in the Minutes themselves. Saudi Arabia's good offices were to continue even if the Parties put the case to the Court. The possibility existed, therefore, that a settlement might be reached after the Parties had agreed to go to the Court and before the Court's final decision. In that event, the Court proceedings were to be brought to an end.

6.73 Qatar repeats its contention that if the Bahraini interpretation were right "it is certain that the Minutes would have been phrased totally differently". This argument of Qatar has already been answered[167] and Bahrain need now say no more than, reciprocally, that if Qatar's view of what the Minutes were intended to achieve were correct, it is to be expected,

---

[166] Qatari Memorial, para. 5.49.

[167] See above, para. 6.64.

in the light of the previous use of *al-ṭarafān* to describe a joint submission, that the Minutes would have been phrased entirely differently.

6.74 The Qatari contention that "the general interpretation proposed by Bahrain effectively renders meaningless three-quarters of the Doha Agreement"[168] [the 1990 Minutes] involves as a necessary premise that the Minutes were intended to do more than record Qatar's acceptance of the Bahraini Formula. There is, however, no basis on which such an assumption can rest.

SECTION 2. The 1990 Minutes are not a binding agreement

6.75 Bahrain has, for convenience of exposition, left to the last a point that, logically, should have been taken first as a threshold objection to Qatar's reliance on the 1990 Minutes. The point is that the 1990 Minutes do not constitute an agreement in the sense of a binding legal undertaking.

At the outset, the most important point to make is that the question of whether a particular instrument to which two States have subscribed their signatures is to be regarded as a binding international agreement is dependent upon their intentions. In the absence of requisite intention on the part of either or both of the States concerned, the document cannot constitute a binding agreement.

The determination of the intention of the parties can be controlled by subjective or objective considerations. If the subjective considerations alone are sufficient for this purpose then the declaration by one of the States that it had not intended to conclude a binding agreement would be sufficient to dispose of the matter. Bahrain submits that that is an acceptable approach to the problem and its declarations to that effect incorporated in its letter to the Secretary-General of the United Nations of 9 August 1991, in its letter

[168] Qatari Memorial, para. 5.50.

to the Court of 18 August 1991 and in the present Counter-Memorial are effective for this purpose. Insofar, however, as the matter is one to be dealt with on the basis of objective evidence, then Bahrain contends that in this respect also the indications of the attitudes of the parties in the present case, as developed in the paragraphs that follow, compel the conclusion that the 1990 Minutes were not intended to be, and are not, binding.

A. The 1990 Minutes are no more than a diplomatic document

6.76 It is convenient to begin by observing that the Qatari Memorial uses the noun "agreement" or the verb "agree" indiscriminately to describe both events which even Qatar would hardly contend constitute legally binding agreements and events to which Qatar is anxious to accord this status. By way of example, reference may be made to the Qatari Memorial, paragraph 3.19 which begins with the words "Pursuant to an agreement ...." The so-called "agreement" was reached, so Qatar asserts, at the Gulf Cooperation Council Summit in November 1982 and was to the effect that "a preliminary meeting" should be held in Riyadh to discuss the dispute on the Hawar Islands and the maritime boundaries. Bahrain entirely accepts that there was such an "agreement", but does not accept that this "agreement" was a treaty. Here Qatar is failing to distinguish between a social and a legal "agreement"; the breach of the former might be a discourtesy, but it would not have the legal consequences which attend a breach of the latter.

6.77 A further example of the Qatari inclination to accord legal significance to every use of the words "agreed" or "agreement" is to be found in paragraphs 21 and 22 of the Opinion of Professor El Kosheri.[169] There he says:

> Whenever the parties use the past tense in formulating their declarations [i.e., when they state: *'tam al-itifaq'* (it was agreed), or

[169] Qatari Memorial, Annex III.1, Vol. III, p.266.

'itafiqua' (they agreed)] , this should necessarily lead to construing their manifestation as creating a legally binding relationship ..."

In paragraph 22 Professor El Kosheri states that Professor Chehata explains:

> "that when the parties use a formula, *'sigha'*, in the past tense to express that they have already 'agreed' or that it 'was agreed' among them about something to be done, the consent has to be considered definitively acquired without any need to establish what was their real intention ...."

6.78 Following on this, Qatar develops the argument that any document containing the words "it has been agreed" is a legally binding agreement and, because the 1990 Minutes contain those words, they constitute an agreement. Bahrain must take issue with this submission which Bahrain believes fails to reflect properly the diplomatic and political, as opposed to the legal, character of the process in which Bahrain and Qatar were engaged under the benevolent auspices of Saudi Arabia. That process was from the first described as a mediation; and it was foreseen that it would be an extended process. On one occasion, Dr Hassan Kamel, speaking for Qatar, said:

> "I share Sheikh Muhammad's view on the benefit of these meetings for the expression of opinions and sentiments, thus facilitating mutual understanding between the parties."[170]

Such a process cannot develop without meetings and the conclusions of meetings cannot normally be recorded other than in minutes. The verb generally used to describe the achievement of such conclusions is "agreed". But the fact that in an evolving diplomatic process the steps along the way are recorded with the verb "agree" does not transform the documents of record into agreements in the sense of internationally binding treaties.

---

[170] Annex I.11, Vol. II, at p.79.

6.79 As has already been pointed out, the Minutes of each of the meetings of the Tripartite Committee contained "agreements" with varying degrees of content. The Minutes of the First Meeting, 17 January 1988, stated that:

> "it was ***agreed*** to hold another meeting ... on ... 2 April 1988, and that each side will submit the draft agreement it proposes for referring the dispute to the International Court of Justice ...."[171]

The Minutes of the Second Meeting noted in their closing paragraph that:

> "it was ***agreed*** that the three countries would keep in contact in order to agree on the date of the third meeting."[172]

At the fourth meeting:

> "it was ***agreed*** that the next fifth meeting would be agreed upon in due course."[173]

And at the sixth Meeting the "two parties ***agreed***" on a list of subjects to be submitted to the International Court of Justice.[174]

6.80 It was this belief, that the agreements reached at the various meetings were diplomatic and non-binding in character, that enabled the Foreign Minister of Bahrain to sign the Minutes. He could not possibly have done so

---

[171] Annex I.7, Vol. II, at p.39. Emphasis supplied.

[172] Annex I.10, Vol. II, at p.74. Emphasis supplied.

[173] Annex I.13, Vol. II, at p.88. Emphasis supplied.

[174] Annex I.18, Vol. II, at p.112. Emphasis supplied.

if he had thought that he was thereby committing his country to an internationally binding agreement or treaty.[175]

6.81 Moreover, if in 1987 it was thought that an important step in the process should be given the form of an "agreement", why was it thought in 1990 that a step of presumably even greater importance (in that it reaffirmed what had previously been agreed and, at the same time, so Qatar maintains, modified the approach of the Parties in a major respect) need not take the same form? The answer, Bahrain suggests, is that the development of 25 December 1990 was not seen by those involved as having the same level of significance; and, even if Qatar wished to believe that the Minutes possessed the quality of an agreement, it was not willing to propose that they should be given that form because, if it had, and its proposal had been rejected, the non-treaty character of the text would have been demonstrated even more clearly. So Qatar took the deliberate gamble of accepting the text as eventually worked out in the meetings notwithstanding the inadequacy, from its point of view, of its wording. Qatar must have known full well that that text would not upon close scrutiny be found to support its position.

6.82 This leaves open the question of the legal effect of Qatar's acceptance of the "Bahraini Formula". In principle, if the Minutes are not a binding agreement, then no commitment contained in those Minutes can be binding. Thus the statement in item 2 of the Minutes that "the parties may submit the matter to the International Court of Justice in accordance with the Bahraini Formula" is not a statement of a final, legally binding, obligation. Such an obligation could arise, as a perfected obligation, only if and when incorporated in an operative Special Agreement.

[175] See below, section D, paras. 6.91-6.104.

B. The 1990 Minutes were not regarded by the Parties as constituting an international agreement

6.83 The question of whether a text can properly be regarded as an international agreement must, of course, be largely determined by the manner in which the parties subsequently treated it.

6.84 So far as Bahrain is concerned, it is evident from all that has so far been said, as well as from what the Foreign Minister of Bahrain has affirmed regarding his intentions at the time of the adoption of the 1990 Minutes,[176] that Bahrain did not regard those Minutes as constituting a binding international agreement.

6.85 So far as Qatar is concerned, at any rate until it decided to try to make capital out of the Minutes, the position would appear to have been the same. There are three indications of this.

6.86 The first is the failure by Qatar to take the steps required of it by its own Constitution in relation to the conclusion of treaties. Article 24 of the Qatari Constitution provides as follows:

> "The Amir concludes treaties by a decree and communicates same to the Advisory Council attached with appropriate explanation. Such treaties shall have the power of law following their conclusion, ratification and publishing in the Official Gazette".

The Constitution is, of course, a public document the contents of which are known to Bahrain. Bahrain could quite reasonably expect that if Qatar regarded any instrument as a treaty it would take the steps required of it by its own domestic law. But Bahrain never became aware of any decree relating to the alleged treaty, or of any communication of it to the Advisory

[176] Annex I.25, Vol. II, para. 13, at p.164.

Council, or of any "appropriate explanation", or of any act of ratification or of any publication in the Official Gazette of Qatar. And the reason why Bahrain never became aware of such steps is because they were never taken. Moreover, Qatar has not alleged that they were taken.

6.87 Thus nothing was done to put Bahrain on notice of the intention of Qatar to regard as a treaty or international agreement something that Bahrain had certainly not expected would or, indeed, could be treated in such a way. If Qatar had done what its Constitution required it to do, Bahrain would certainly have learned of it and would then have had an opportunity to object. In addition to the evidential significance of this inactivity on the part of Qatar, it can be said that Qatar is now estopped by its own conduct from asserting the treaty quality of the 1990 Minutes.[177]

6.88 The second indication is that Qatar appears not to have considered that the Minutes warranted the treatment that Article 17 of the Pact of the League of Arab States requires in respect of treaties and international agreements concluded by its Members. This Article provides as follows:

> "The member States of the League shall file with the General Secretariat copies of all treaties and agreements which they have

---

[177] That Qatar is in other circumstances both respectful of its Constitution and quite ready to invoke its provisions when convenient in relation to Bahrain is shown by the manner in which Qatar referred to it in a Memorandum dated 31 March 1986 asserting its sovereignty over the Hawar Islands. This Memorandum was annexed to an undated Memorandum by the Government of Qatar later submitted to the Council of Ministers of the Gulf Cooperation Council (including Bahrain) in reply to a Bahraini Memorandum of 29 June 1986. Qatar said in the Memorandum of 31 March 1986:

> "Article (2) of the interim basic system of rule in Qatar issued in 1970 and amended in 1972 stipulates that the State "exercises its sovereignty over all land and territorial waters falling within its boundaries. It may not relinquish its sovereignty or abandon any part of its land or waters."

This Constitution, though described as "Provisional", is still in force in Qatar. It is published in English translation in Amos J. Peaslee, *The Constitutions of the Nations*, vol. II, p.1247.

concluded or will conclude with any other State, whether a member of the League or otherwise."

Qatar and Bahrain were both Members of the Arab League in 1990. Bahrain has enquired of the General Secretariat of the Arab League whether Qatar has filed the text of the 1990 Minutes and, indeed, that of the 1987 Agreement. The General Secretariat has replied that neither text has been filed.

6.89 The third indication that, at any rate initially, Qatar did not regard the 1990 Minutes as constituting a treaty is the fact that it was not until almost the last possible moment before the Application was filed (8 July 1991) that Qatar communicated the text of the Minutes to the Secretary-General of the United Nations on 26 June 1991 for registration as a treaty pursuant to Article 102 of the Charter.

C. Irrelevance of registration by the United Nations

6.90 It is, perhaps, also worth adding that the fact that the texts in question were accepted by the United Nations for registration does not by itself establish or confirm their standing as international agreements. The practice of the United Nations Secretariat is to register texts which are deposited with it as agreements without passing judgment upon them. The position was clearly stated in a letter from the Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs of the United Nations dated 15 August 1991 as follows:

"...Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument.

It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement

if such treaty or international agreement does not already have that status".[178]

The above letter from the United Nations was in response to the objection raised by Bahrain in a letter of 9 August 1991 to the steps taken by Qatar to register the 1987 Agreement and the 1990 Minutes.[179] Bahrain believes that this was the first occasion on which, in the activities of the United Nations relating to registration, a State had objected to the registration of a treaty on the ground that it did not regard the text in question as amounting to an agreement in international law.

D. Even if the text of the 1990 Minutes were to be construed as a treaty, the requirements necessary for its effective operation as a treaty were not satisfied: the constitutional point

6.91 In paragraph 16 of the Annex to its letter to the Court of 18 August 1991 Bahrain referred to the requirement of Article 37 of its constitution that treaties concerning the territory of the State or its sovereign rights can only come into effect "when made by a law". The purpose of this reference was not primarily to suggest the applicability of Article 46 of the Vienna Convention on the Law of Treaties - for that would have implied that Bahrain accepted that there had, on the Bahrain side, been an intention to conclude an agreement, albeit one that had not been constitutionally sanctioned. Rather, the principal purpose of the reference was to indicate that, having regard to Bahrain's constitutional requirements, it could hardly be imagined that the Foreign Minister of Bahrain would have entered into an agreement, let alone one now said to be immediately binding upon signature,

---

[178] Annex I.22, Vol. II, at p.136.

[179] Annex I.21, Vol. II, p.125. By a letter of 23 August 1991 the Permanent Representative of Bahrain to the United Nations confirmed that Bahrain wished its letter of 9 August 1991 to be considered as a formal objection to the registration in question and to be registered as such. Annex I.23, Vol. II, p.139.

without meeting Bahraini constitutional requirements.[180] The existence of Bahrain's constitutional requirements must have been well known to Qatar because, first, the Constitution of Bahrain was published in the Official Gazette of Bahrain on 6 December 1973 and there is an established practice of the two countries of exchanging their Official Gazettes. This fact is not denied by Qatar. Secondly, Bahrain had earlier made quite plain the existence and pertinence of these constitutional requirements to the establishment of the jurisdiction of the Court by including in the draft basic agreement presented to Qatar on 19 March 1988 a clause, Article VIII, which provided that:

> "This Special Agreement shall enter into force on the date of exchange of instruments of ratification in accordance with the respective constitutional requirements of the Parties".[181]

1. The irrelevance of the concept of an agreement in simplified form

6.92 Qatar seeks to meet this point by arguing, first, that the agreement was in a simplified form and entered into force upon signature and without the need for ratification.[182] Bahrain responds to this point, first, by denying that the 1990 Minutes, even if amounting to an agreement, constituted an agreement that did not require ratification. It is not necessary for this purpose to pursue the question of whether or not the agreement was in a simplified form.[183] It is sufficient to examine the terms of the Vienna

---

[180] See also the statement to this effect by H.E. Shaikh Mohammed bin Mubarak Al-Khalifa, the Foreign Minister of Bahrain, Annex I.25, Vol. II, para. 13, at p.164.

[181] Annex I.9, Vol. II, at p.52.

[182] See Qatari Memorial, para. 5.14.

[183] It may be observed that the International Law Commission, in formulating the final Draft Articles on the Law of Treaties which were in large part eventually incorporated in the Vienna Convention on the Law of Treaties, stated in its comment on the draft that it had at one stage distinguished between "a treaty in simplified form" and "a general multilateral treaty" in connexion with the rules governing "full powers" and "ratification". However, on re-examining the position,

Convention on the Law of Treaties. The Qatari Memorial correctly identifies the controlling relevance of Article 12(1).[184] This specifies three circumstances in which consent to be bound by a treaty can be expressed by signature alone.

6.93 The first is where the treaty provides that signature shall have that effect. Qatar does not suggest that this is relevant here and Bahrain agrees; if Qatar had wished the Minutes to become effective as a treaty on signature, then Qatar would have so provided, but it did not attempt to do so; but if it had Bahrain would have rejected it.

6.94 The second is if "it is otherwise established that the negotiating States were agreed that signature should have that effect". As to this, Qatar contends [185] that if this provision applies "the text of [the 1990 Minutes] itself provides clear evidence that ratification was not envisaged by the Parties".

The Qatari Memorial continues:

> "There can be no doubt that the Agreement was to enter into force immediately. Before the Parties were allowed to seise the Court, a limited period was left to Saudi Arabia to exercise its good offices in an attempt to reach a settlement of the substance of the disputes. The fact that the Agreement was to be implemented immediately and was in fact so implemented, confirms that the Agreement came into force upon signature".

"the Commission revised the formulation of their provisions considerably and in the process found it possible to eliminate the distinctions made in them between "treaties in simplified form" and other treaties which had necessitated the definition of the term. In consequence, it no longer appears in the present article." (*See Yearbook of the International Law Commission, 1966*, vol. II, p.189.)

[184] Qatari Memorial, para. 5.16.

[185] See Qatari Memorial, para. 5.19.

This reasoning cannot support the conclusion to which it is directed. The argument turns upon the assertion that the agreement provided for immediate implementation in the shape of the continuance of the good offices of Saudi Arabia for a limited period. In truth, however, the continuance of Saudi good offices, though of course mentioned in the second operative paragraph, was not "in implementation of the Agreement" but was in implementation of the earlier agreements still operative between the Parties. The element of real "implementation" of the 1990 Minutes would have been either the settlement of the dispute or the submission of the case to the Court - a matter that could not occasion action until May 1991. That being so, the argument in support of the application of Article 12(b) collapses.

6.95 That leaves the third possibility under the Vienna Convention, namely, Article 12(c): when "the intention of the State to give [immediate effect] to the signature appears from the full powers of its representative or was expressed during negotiation". Qatar bases its argument in favour of the operation of this alternative on the terms of Article 7(2)(a) of the same Convention which provides that "Heads of State ..... and Ministers of Foreign Affairs" are considered as representing their State "for the purpose of performing all acts relating to the conclusion of a treaty". Qatar equates this provision with the intention appearing from the full powers of the representative, referred to in Article 12(1)(c). But there is nothing in the terms of Article 7(2)(a) that accords to a Foreign Minister full powers to give immediate effect to his signature to a treaty if he does not intend to do so or is prohibited by his Constitution from so doing. Even if possession of "representative power" (under Article 7(2)(a)) may be equated with "full powers" to sign a treaty, that does not by itself resolve the question of whether those full powers extend to signature with immediate effect (as contemplated in Article 12(1)(c)) or to signature subject to ratification (as contemplated in Article 14(1)(d)). Put in another way, even though the Ministers may have possessed full powers, Qatar would still have to prove that it was agreed that signature would have had the effect of binding the

parties immediately. And no such agreement is revealed anywhere in the 1990 Minutes.

6.96 In short, the legal conditions for the immediate entry into force of the 1990 Minutes (always assuming it to be a treaty) were not satisfied. The first limb of the Qatari response to Bahrain's "constitutional" point is, therefore, not established.

2. The misapplication by Qatar of Article 46 of the Vienna Convention

6.97 Qatar then raises a second argument: that, even if constitutional requirements were not satisfied, that failure did not prevent the treaty from entering into force, even though at some later stage the treaty might be invalidated on that ground. This argument misstates the principal thrust of the Bahraini argument which is directed at showing that the Bahraini Foreign Minister could not possibly have had the intention to conclude the alleged treaty, not that, having had an intention to conclude the treaty, the treaty as concluded lacked validity.

6.98 But, in any case, even if Bahrain were to concede, though only for the purpose of argument, that a valid "treaty" had entered into force, it would still be entitled, as Qatar itself suggests, to contend that, on the basis of Article 46 of the Vienna Convention, the consent given to the "treaty" must be invalidated as having been expressed in violation of a provision of its internal law regarding competence to conclude treaties that was manifest and of fundamental importance. In the light of what has already been said, and need not be repeated, that violation was manifest, since it must have been objectively evident to Qatar if the latter was conducting itself in the matter in accordance with normal practice and in good faith. Moreover, the rule was of fundamental importance since it was embodied in the Constitution of Bahrain.

3. The irrelevance of the Egyptian precedent

6.99 Some reference should be made to the attempt by Professor El Kosheri to equate the terms of Article 37 of the Constitution of Bahrain with the comparable (but not identical) provisions of Article 151 of the Egyptian Constitution.[186] Professor El Kosheri advances as "a highly significant precedent under the Arabo-Islamic Egyptian Legal Model" the fact that Egypt did not treat the Agreement of September 1986 with Israel relating to the *Taba Arbitration*[187] as requiring approval by the People's Assembly. The impression which Professor El Kosheri apparently seeks to make is that the manner in which Egypt dealt with this boundary arbitration under its own Constitution should provide guidance as to the manner in which the provisions of the Constitution of Bahrain should be interpreted.

6.100 There are two answers to this loosely conceived comparison.

6.101 The first is that the terms of the pertinent Articles of the two Constitutions differ in a material respect. The relevant part of Article 151 of the Egyptian Constitution refers to "... all treaties having as result the modification of the State's territories or affecting the sovereignty rights ...." Professor El Kosheri treats this as controlling because, he says:

> "The declaratory nature of judicial decisions as well as of arbitral awards implies necessarily that the State does not cede or give up title to any parcel of its natural territory, but simply accepts a final and binding delimitation of what initially belonged to it."

6.102 However, the Constitution of Bahrain contains a different provision. Amongst the categories of treaties which it names as coming "into effect only when made by a law" is that of "treaties concerning the territory of the

---

[186] Opinion of Professor El Kosheri, Qatari Memorial, Annex III.1, Vol. III, p.261, para. 14.

[187] See 80 *ILR*, p.226.

State, its natural resources or sovereign rights ...." The Bahraini Constitution is thus wider than is the Egyptian Constitution in its description of territory-related treaties that do not come into effect until enacted in local law. The concept of a "treaty concerning the territory" of the State in the Bahraini Constitution is manifestly wider than that of a treaty leading to a modification of the State's territory in the Egyptian Constitution. Judicial proceedings of the kind involved in the present case certainly *concern* the territory of Bahrain even if the judgment, should it turn out to be purely declaratory, may not formally involve a cession or renunciation of territory.

6.103 The second answer to Professor El Kosheri's comparison is that the Agreement leading to the *Taba Arbitration* differs in two respects from the agreement said to be constituted by the 1990 Minutes.

6.104 (i) First, the *Taba Arbitration* Agreement was made pursuant to an obligation arising between the Parties under Article VII of the Treaty of Peace of 1979 to settle by arbitration disputes not settled by other means. The principal source of obligation, the Peace Treaty, had itself been the subject of the full ratification process in Egypt and Israel involving parliamentary consideration and approval.[188]

6.104 (ii) Second, the *Taba Arbitration* Agreement expressly provided in Article XV that it would enter into force "upon the exchange of instruments of ratification". In contrast, as Professor El Kosheri is careful to point out, the 1990 Minutes contained no provision requiring ratification.

[188] Article IX of the 1979 Treaty provided that it would enter into force upon exchange of instruments of ratification. See 18 *International Legal Materials* 362, fn., and p.366.

CHAPTER VII

THE RELATIONSHIP BETWEEN THE AGREEMENT OF 1987 AND THE 1990 MINUTES

7.1 As shown in Chapter V above, the agreement reached between the Parties in 1987 was not, *per se*, a complete and unconditional agreement to accept the jurisdiction of the Court. It was not seen by either Party as a treaty or convention in force for the purpose of Article 36(1) of the Statute, but rather as a commitment to negotiate in good faith a Special Agreement. The acceptance of the jurisdiction of the Court would arise in due course from such Special Agreement.

7.2 The situation is in fact remarkably similar to that faced by the Court in the *Aegean Sea Case*.[189] There the two parties, Greece and Turkey, had, in the Brussels Communiqué of 31 May 1975, *decided* that, as regards their continental shelf problems these should be *resolved* by the International Court of Justice. The Greek argument, similar to the present argument by Qatar, saw in this joint decision an agreement directly to confer jurisdiction on the Court. Whilst acknowledging that the Parties had sought to negotiate an implementing agreement, Greece saw this as a commitment arising from a pre-existing obligation, and asserted a right to seise the Court unilaterally should Turkey refuse to conclude the implementing agreement.[190]

7.3 The Court noted that prior to the Brussels Communiqué, Greece had proposed to Turkey a special agreement on the basis of which the parties would proceed *jointly* to the Court.[191] The Court noted also that the Parties

---

[189] *Aegean Sea Continental Shelf Case (Jurisdiction), ICJ Reports 1978*, p.3.

[190] The Greek Government's arguments are summarised by the Court at para. 98.

[191] *Ibid.*, para. 100. But note that, in so doing, Greece had reserved its right to proceed unilaterally.

had established a Committee of Experts to draft a *compromis*[192], and that Turkey had throughout been prepared to contemplate only this method of seisin. The Court further noted that the Greek Government had at no stage invoked the Joint Communiqué as an "existing and complete, direct title of jurisdiction".[193] And, accordingly, the Court concluded that

> " ... the Joint Communiqué ... was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers ... to accept unconditionally the unilateral submission of the present dispute to the Court."[194]

7.4 The parallel with the present case is striking. Qatar's failure to register the 1987 Agreement, as a treaty in force, until June 1991 (and the fact that Bahrain has not registered it at all); Qatar's agreement to the constitution of the Tripartite Committee; Qatar's agreement that the task of that Committee was to draw up a Special Agreement; Qatar's own submission of a draft Special Agreement in March 1988[195]: all these evidence the clear understanding by both Parties (and, indeed, the Mediator) that the 1987 Agreement was, as such, *not* an unqualified commitment to accept the jurisdiction of the Court.

7.5 In fact the record shows that, although considerable progress had been made towards finalising a Special Agreement prior to the Dohah meeting in December 1990, there were at least three issues outstanding.

---

[192] *Ibid.*, para. 103.

[193] *Ibid.*, para. 106.

[194] *Ibid.*, para. 107.

[195] Annex I.8, Vol. II, p.41.

SECTION 1. The Matters remaining outstanding after the Agreement of 1987

A. The formulation of "the Question"

7.6 The record of the negotiations within the Tripartite Committee shows how disagreement over the formulation of the question to be put to the Court dominated the discussions.

7.7 Qatar objected[196] to the first Bahraini formula in Article II of Bahrain's original draft[197], and, although Bahrain's draft of "the question" went through two re-formulations, as late as the Sixth Tripartite meeting on 6 December 1988 the Parties had reached no agreement. Qatar suggested at that meeting that the Special Agreement should have two Annexes, in which the two Parties should separately identify the matters of difference they wished to submit to the Court.[198]

7.8 It is evident from the record that, although the differences were not confined to the question of Zubarah, it was Zubarah which preoccupied Qatar, for Qatar opposed any formulation of the question which would allow Bahrain to claim sovereign rights in Zubarah.[199]

---

[196] Qatari Memorial, Annex II.24, Vol. III, p.157.

[197] Annex I.9, Vol. II, at p.49.

[198] Annex I.18, Vol. II, at p.112.

[199] See the Tripartite Meeting of 15 November 1988 (Annex I.16, Vol. II, at p.102), where Dr Hassan Kamel thought the proposed lawyers' meeting had no right to discuss Zubarah. And the signed Minutes of 7 December 1988. (Annex I.18 , Vol. II, at pp.112-113.

B. Article V of Bahrain's draft: the obligation of non-disclosure of the proposals for settlement prior to the Special Agreement

7.9 Although this provision was contained in Bahrain's draft from the outset,[200] it was overshadowed by the controversy over the formulation of "the question". Nevertheless, in Qatar's Memorandum of 27 March 1988,[201] commenting on the Bahrain draft, a detailed opposition to this provision was expressed - the words used were "totally unacceptable" - and nothing in the subsequent record suggests any change in this position. It remained a substantive matter of dispute between the Parties.

C. Entry into Force and the Method of "seisin"

7.10 For Bahrain there had always been two quite separate steps necessary to make any Special Agreement effective once the Parties were agreed on its essential terms. The first was to ensure that Bahrain became bound by the Special Agreement in accordance with Bahrain's internal constitutional requirements. The second was to notify the Special Agreement to the Court once Bahrain was bound. Necessarily, the steps had to be taken in that order.

7.11 As to the first step, Bahrain's draft of 19 March 1988 provided as follows:

> "Article VIII
>
> This Special Agreement shall enter into force on the date of exchange of instruments of ratification in accordance with the respective constitutional requirements of the Parties."[202]

7.12 Thus, Bahrain never had in mind an informal agreement in simplified form - its Constitution precluded it[203] - and, Qatar was thus put on notice,

---

[200] Annex I.9, Vol. II, at p.51.

[201] Qatari Memorial, Annex II.24, Vol. III, p.157.

[202] Annex I.9, Vol. II, at p.52.

[203] See above, Chapter VI, Section 2.D.

from the outset, that internal constitutional requirements in Bahrain had to be met, and that this would precede formal exchange of instruments of ratification.

7.13 Qatar's draft Special Agreement of 15 March 1988 provided differently:

> "Article V
>
> 1. The present Agreement shall enter into force on the date of its signature."[204]

7.14 There was, therefore, a difference to be resolved over this question of entry into force, although the Qatari observations submitted on 27 March 1988 on Bahrain's draft, did not refer to it and, in the further negotiations, this difference was overshadowed by the more substantial difference over "the question".

7.15 As to the second step, notification of the Agreement, Bahrain's draft of 19 March 1988 contained nothing. Bahrain did not doubt the need for notification, since Article 40 of the Statute required it, and Article 39(1) of the Rules left open the possibility that the notification might be effected by the Parties jointly or by either of them. Thus, Bahrain believed the Special Agreement required no special provision since the matter was governed by both the Statute and the Rules.

7.16 Qatar took a different view. Its own draft provided:

> "Article V
>
> 1. ...
>
> 2. The present Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.

---

[204] Annex I.8, Vol. II, at p.45.

3. If such notification is not effected in accordance with the preceding paragraph of this article within one month after the entry into force of the present Agreement, it may be notified to the Registrar by either Party."[205]

7.17 This did not become a matter of controversy during the negotiations, since Bahrain saw no reason why joint notification should not be effected, once ratifications were exchanged.

SECTION 2. The degree of resolution of these outstanding matters achieved at Dohah in December 1990

7.18 It is clear that progress was made at Dohah as regards the definition of "the question". As noted in the Qatari Memorial,[206] the Amir of Qatar stated that he was prepared to accept "the Bahraini general formula". This referred to Bahrain's draft of Article II of the Special Agreement,[207] and Qatar's acceptance of Article II was recorded in the Minutes of the Meeting of 25 December 1990 prepared by Saudi Arabia.[208]

7.19 But this was the limit of the agreement on the outstanding issues. There was no agreement as regards Article V in Bahrain's draft - to which Qatar presumably remained "totally opposed". There was no agreement on whether the Special Agreement should enter into force following the exchange of ratifications, as Bahrain proposed, or upon signature, as Qatar proposed. There was certainly no agreement that the Parties should abandon their attempts to proceed to the Court via a Special Agreement; indeed on that point, the most fundamental of all, there was no discussion whatever.

---

[205] *Ibid.*

[206] Qatari Memorial, para. 3.55.

[207] See Statements of the Foreign Minister of Bahrain, Shaikh Mohammed bin Mubarak Al-Khalifa and of Dr. Al-Baharna, Annexes I.25, Vol. II, at p.165 and I.26, Vol. II, at p.181.

[208] Annex I.19, Vol. II, p.115.

7.20 Given the clear requirement that the jurisdiction must be based on consent,[209] and given further these points on which no agreement had been reached, it is extraordinary that Qatar should see in the meeting at Dohah a complete agreement to proceed to the Court on the basis of a unilateral application. Whilst there may be, as Qatar contends, a distinction between jurisdiction and seisin, it is clear that the requirement of consent extends to both. In essence, Qatar seeks to find a total agreement where no such agreement existed, to read into the Dohah meeting an implied abandonment of the search for a Special Agreement, and to derive from the words *al-ṭarafān* a meaning contrary to their normal meaning and not at all intended by Bahrain.

7.21 There is one element in the situation which Qatar has chosen to ignore, and yet it is an element which, *prima facie*, has an objective character which neither Party can claim for its own interpretation of events: this is the position of the Mediator, King Fahd of Saudi Arabia.

7.22 In September 1991 - that is, *after* Qatar had filed its Application to the Court - the Mediator submitted to both Parties a suggested "compromise" Special Agreement.[210] It had been drawn up in the Foreign Ministry of Saudi Arabia, utilising the Bahraini formula for "the question" and combining features of both the Bahraini draft Special Agreement of 19 March 1988 and the Qatari draft Special Agreement of 15 March 1988. Bahrain was prepared to resume discussions on the basis of this Saudi draft (and on the assumption that Qatar would discontinue its unilateral application), but Qatar was not.

7.23 The importance of the Saudi initiative lies in its clear perception that there had been no agreement between the Parties at Dohah to abandon the search for a Special Agreement. The Saudi initiative is simply incompatible with the Qatari thesis that, at Dohah, the earlier, common, understanding that the Court was to be seised by way of a Special Agreement had been

---

[209] See above, Chapter IV, Section 1, especially para. 4.3.

[210] Annex I.24, Vol. II, p.143.

abandoned. And it is incompatible with Qatar's notion that, at Dohah, Qatar had acquired a right to proceed by way of unilateral application.

PART THREE

CLOSING CONSIDERATIONS

CHAPTER VIII

DISADVANTAGES FOR BAHRAIN OF BEING MADE DEFENDANT

8.1 The Court may perhaps wonder why it is that Bahrain should object so strenuously to the unilateral commencement by Qatar of the present proceedings. After all, it may be asked, if Bahrain is in principle willing to accept the jurisdiction of the Court in respect of the matters in issue between Qatar and Bahrain, will not its interests, and the prospects for the satisfactory disposition of those issues, be equally well served by the process which Qatar has initiated on the basis of its interpretation of the 1990 Minutes? What is the difference between a joint submission and two unilateral submissions, subsequently joined together, which between them bring before the Court the same issues? The answer lies in large part in the considerations set out below.

SECTION 1. Evasion of Bahrain's constitutional requirements

8.2 As explained in Chapter VI,[211] the constitution of Bahrain requires that an international agreement vesting the Court with jurisdiction to determine issues such as those raised by Qatar in the present proceedings requires legislative approval in Bahrain. Qatar has long been aware of this. The terms of the Bahrain Constitution are known to Qatar. Even more to the point, when Bahrain presented a draft Special Agreement for the joint submission of the dispute to the Court,[212] it made its position plain by including in the draft a provision that it would enter into effect only after it

[211] See above, Chapter VI, Section 2, paras. 6.91 and 6.102.

[212] See above, para. 6.91.

had been constitutionally ratified. Yet, notwithstanding both the clarity of this requirement and Qatar's awareness of its relevance in the present class of situation, Qatar is claiming that an effective agreement has entered into force. It goes without saying that this is prejudicial to Bahrain.

SECTION 2. Disregard of Bahrain's wish to secure the protection of a non-disclosure undertaking (the "Article V" point)

8.3 Bahrain's insistence on the inclusion in the joint submission of a specific provision to ensure non-disclosure of settlement proposals that may have been put forward by either Party in the course of negotiations has been a significant feature of the negotiations. It was reflected, from the first, in Bahrain's draft Special Agreement of 1988.[213] Qatar, by commencing proceedings unilaterally, quite overrides Bahrain's wishes in this regard and Bahrain is thereby prejudiced. It does not matter for this purpose whether Bahrain is right or wrong in pressing this point. The fact is that Qatar has taken it into its own hands to resolve this issue, still outstanding between the Parties, by the simple expedient of deciding it in its own favour. Again, that is obviously prejudicial to Bahrain.

SECTION 3. Consideration of the question of Zubarah is foreclosed

8.4 Bahrain has emphasised the importance that it attaches to the inclusion of its claims to Zubarah within any judicial proceedings for the settlement of outstanding issues between the Parties. Zubarah was amongst the issues covered by the terms of the Bahraini Formula and specifically discussed between the Parties as an element in the litigation. Yet, by unilaterally commencing proceedings by means of an Application, Qatar has limited the scope of the proceedings to the issues covered by that Application. Zubarah is, self-evidently, not among those issues.

8.5 Qatar has made two suggestions to meet this situation. One is for Bahrain to introduce the Zubarah claims by way of a counter-claim in the

[213] See above, paras. 5.40 and 7.9.

present proceedings.[214] The other is for Bahrain itself to start proceedings in respect of Zubarah by the filing of its own separate application against Qatar.[215] Bahrain does not see either of these ideas as the equivalent of the inclusion of the Zubarah issue within an agreed question jointly submitted to the Court.

8.6 Before examining each of these ideas separately, there is an important point to be made which is equally applicable to them both. It is that the basis on which Qatar now seeks to invoke the jurisdiction of the Court is, as Qatar claims, an agreement which involves its acceptance of the Bahraini Formula. As already stated,[216] that formula covers the question of Zubarah. That being so, it is not for Qatar to pick and choose as it pleases from within that formula and thereby to exclude that question. If Qatar fails to frame its Application in a manner that expressly covers the Zubarah issue, so that there can be as little doubt that it is included within the proceedings as, say, there is regarding the Hawar Islands, Qatar has not brought its Application within the terms of the compromissory clause even as interpreted by itself.

8.7 Nor is it for Qatar then to say that in this situation Bahrain can remedy the imperfections of the Qatari Application by the devices of counter-claim or separate application. As will presently be shown, even this proposal is open to serious doubt. But there is a more fundamental objection to it. The validity of the Qatari Application has to be judged on that document as it stands at the time of its filing and within its four corners. If, to be effective in relation to the matters covered by it, the application has to be completed by some other act or document, whether a counter-claim or a separate application, it is not a satisfactory application and must fall. That said, Bahrain will now explain why each of Qatar's two suggestions is in itself unsound.

---

[214] Qatari Memorial, para. 5.81.

[215] *Ibid.*, para. 5.78. See paras. 9.6-9.7 below.

[216] See above, para. 6.58.

8.8 Consideration of the idea of a counter-claim must begin with Article 80 of the Rules of the Court: a counter-claim must be directly connected with the subject matter of the claim and must come within the jurisdiction of the Court. While it is no doubt arguable that the Zubarah claims are "directly connected" with the matters covered by the Qatari Application, it is also arguable that they are not. Bahrain entirely reserves its position on that question. Qatar is not entitled to determine conclusively that there is a "direct connection". If there is any doubt, then under Article 80(3) of the Rules of the Court, it is for the Court to decide and the Court's decision may not be pre-empted by one Party.

8.9 Reference is made in the Qatari Memorial to the *Asylum* case as a possible parallel.[217] But Bahrain fails to see its utility in the present context. Even if the elaboration of the issues in that case was left to the action of the Parties subsequent to the Application in the form of submission and counter-claim, that could only take place because of the underlying and demonstrable willingness of the Parties to go to the Court in the first place. This is made plain by the relevant terms of the declaration made by the Parties in Lima:

> "1. [The Parties] have examined in a spirit of understanding the existing dispute which they agree to refer for decision to the International Court of Justice in accordance with the agreement concluded by the two Governments
> 2. The Plenipotentiaries of Peru and Colombia having been unable to reach an agreement on the terms in which they might refer the dispute jointly to the International Court of Justice, agree that proceedings before the recognised jurisdiction of the Court may be instituted on the application of either of the Parties...."[218]

The difference between the position reflected in the Act of Lima and the present situation could hardly be clearer.

---

[217] Qatari Memorial, para. 5.71.

[218] *ICJ Reports 1950*, p.268.

8.10 Nor should it be assumed that Qatar would not object to a counter-claim brought in respect of the Zubarah claim. In paras. 3.40, 3.42 and 3.48 of the Memorial Qatar describes the Zubarah claim as introducing "an entirely new issue" which "could not be included within the subject matter of the dispute" because "the only disputes that could be referred to the court were already well defined" in the Mediation. This constitutes a clear indication by Qatar of its unwillingness to concede any "direct connection" between a Zubarah counter-claim and the matters covered in Qatar's application. In short, the possibility, such as it is, of a counter-claim does not serve to remedy the defects in the Qatari Application.

8.11 Qatar's other idea to enable Bahrain to introduce the issue of Zubarah is that Bahrain should file a separate and parallel application to cover Zubarah, thus initiating a case that the Court could subsequently join to the present proceedings to form a single case. Qatar mentions as a precedent in this connection the *South-Eastern Greenland* case.[219]

8.12 However, the *South-Eastern Greenland* case is completely inapposite. It was based on two existing Optional Clause declarations each wide enough to embrace all the issues raised by the Parties.[220] There was no question of either State having to change its legal position in order to perfect jurisdiction. There would have been jurisdiction in any event, whether or not the other party had filed its own concurrent case, simply because of the fact that each separate application was based on the optional clause declaration of the other party. Denmark could have proceeded against Norway, and vice versa, with no question arising as to jurisdiction. Moreover, the respective applications in *South-Eastern Greenland* were addressed to substantially the same subject

---

[219] Qatari Memorial, para. 5.70.

[220] See the Danish Application of 18 July 1932: "...having regard to the declarations whereby Denmark and Norway have acceded to the optional clause of Article 36, paragraph 2, of the Statute of the Court" (*Series C, No.69*,pp.10-11); and the Norwegian Application of 18 July 1932: "...having regard to the declarations whereby Denmark and Norway have acceded to the optional clause concerning the acceptance of the compulsory jurisdiction of the Court" (*Series C,No.69*,p.7). *Legal Status of the South-Eastern Territory of Greenland*, Orders of 2 and 3 August 1932, *PCIJ, Series A/B, No.48*, pp.268 and 277 respectively; Order of 11 May 1933, *PCIJ, Series A/B*, No.55, p.157.

matter, and thus joinder presented no problem for the Permanent Court. In the Order (Joinder) of 2 August 1932 the Court stated that:"...it follows that both the Norwegian and Danish applications are directed to the same object", and "...the situation with which the Court has to deal closely approximates, so far as concerns the procedure, to that which would arise if a special agreement had been submitted to it by the two Governments, parties to the dispute, indicating the subject of the dispute and the differing claims of the Parties."[221]

8.13 The present case is quite different. The strength of opposition by Qatar to the inclusion of the Zubarah issue in the Bahraini draft special agreement of March 1988 is fully exposed in paras. 3.37-3.40 of the Qatari Memorial.[222] Qatar stated explicitly that in 1988 it "continued to hold the view that any claim such as the one relating to Zubarah could not be raised and that the only disputes that could be referred to the court were already well-defined in the course of Saudi Arabia's Mediation."[223] The very words of the Qatari Memorial show that Qatar is likely still to raise difficulties (eg. in the form of an objection to admissibility) if Bahrain raises the Zubarah claim. This being so, it can hardly be predicted with confidence that the two cases would be joined by the Court or that, if joined, all difficulties would disappear.

8.14 To conclude on this aspect of the matter, Bahrain cannot be expected to lend its assistance to Qatar to fill the gaps which the latter, in its haste to pursue a unilateral initiative contrary to Bahrain's wishes, has left in the subject-matter submitted to the Court. If Qatar wants to go to the Court (as, in principle, Bahrain does), then Qatar should adhere to the agreed route of

---

[221] *Series A/B, No.48*, pp.268-72.

[222] As stated in the last paragraph referred to: "Qatar obviously could not accept the wording of the Bahraini draft proposal as to the nature of the dispute to be referred to the Court. Qatar also rejected any suggestion that no reference could be made before the Court to any negotiations during Saudi Arabia's Mediation or earlier efforts to settle the disputes. Furthermore, Qatar strongly objected to the introduction of an entirely new issue relating to Bahrain's so-called rights in and around Zubarah."

[223] Qatari Memorial, para. 3.48.

a joint submission on agreed terms. This is a matter to which Bahrain reverts in constructive terms in paragraphs 9.2-9.5 below.

SECTION 4. Bahrain is disadvantaged by being made Defendant

8.15 Generally, it had been Bahrain's expectation that by reason of the approach being pursued by the Parties towards a joint submission there would be genuine substantive and procedural equality between the Parties. Bahrain had assumed that the Parties would approach the Court on an identical basis of a common interest in a harmoniously conducted litigation. Instead, it finds Qatar trying to secure advantage by adopting the posture of a plaintiff in contentious proceedings. Bahrain had supposed that it was negotiating towards an agreed question that would reflect the concerns of both Parties. Instead, it is faced with issues that represent only the points that interest Qatar. Bahrain had expected that the nature, order and timing of the written pleadings would be agreed between the Parties prior to the commencement of the proceedings. Instead, it is confronted by a situation in which the usual procedures of the Court enable Qatar to present the case within a framework of its construction and, no doubt, in a manner best suited to the advancement of its interests. Bahrain had foreseen that the world at large would first hear of the litigation between itself and Qatar in a form that would demonstrate that this is a friendly action brought jointly by two fraternally cooperative States. Instead, it finds itself impliedly pilloried as a State being dragged reluctantly before the Court by a virtuous plaintiff.

SECTION 5. Conclusion

8.16 The disadvantages accruing to Bahrain in a case brought by application are therefore obvious: its constitutional requirements are circumvented; Article V of its draft Special Agreement is lost; the possibility of raising the issue of Zubarah is imperilled; it is forced into the position of Respondent; it can no longer insist on simultaneous filing of written pleadings; it cannot agree the time limits and other procedural elements; and Qatar has the advantage of having publicized the dispute in terms which suit its own interests.

8.17 The procedural and substantive differences just described, in the context of the present case, underscore the unacceptability of proceedings instituted by application. These differences suggest that it is simply not credible that the parties could have intended to equate the two types of procedure. There are too many important differences between cases brought by special agreement and cases brought by application to suggest that one title of jurisdiction can arbitrarily be substituted for the other.

CHAPTER IX

CONCLUDING POINTS

9.1 The Qatari Memorial contains many references to the "Arabo-Islamic tradition" as something that bears upon the content of Qatar's international obligations.[224] As Bahrain hopes it has shown, whatever else there may be in this tradition, it does not have the effect for which Qatar contends in modifying fundamental rules of universal international law. But there is one respect in which tradition in the Arab and Islamic world is relevant and should be understood. It is that one Arab State cannot dishonour another. By acting in the manner that it has in launching, suddenly and without warning to Bahrain, proceedings of a kind quite different to those that had been under discussion for some years, Qatar has affronted the honour of Bahrain and that is a matter which, in Arab and Islamic tradition, cannot be accepted.

9.2 However, in making the submission that there is no basis on which Qatar may *unilaterally* initiate proceedings against Bahrain in the International Court of Justice, Bahrain wishes to emphasize that it has not turned against the original intention of the process initiated by the mediation of Saudi Arabia. Bahrain fully accepts that it is an element in that process that the Parties should submit their differences to the Court. What Bahrain does not, and cannot, accept is the claim of Qatar to replace a bilateral joint submission by a unilateral application.

9.3 Bahrain's opposition to the Qatari action is not merely formal. It rests, as already explained, on Bahrain's belief that the Qatari action has certain implications which, to the extent that they can be foreseen, are unacceptable and, to the extent that they cannot be foreseen, should not be risked. The issue is, in part, one of good faith touching the relations of the Parties not only in the context of the mediation process but also generally in the future. The Court should not feel that a proper striving to ensure the application of the judicial process to the present dispute can only be satisfied by permitting Qatar to proceed with the present case in its present form. An approach that

[224] See the Qatari Memorial, e.g., paras. 5.09 and 5.57.

is much more likely to be conducive to a properly conducted case is one in which the Parties come to the Court jointly and willingly - as was and remains the intention of the Mediator and of Bahrain.

9.4 Bahrain therefore wishes to take the present opportunity of declaring its continuing willingness to conclude with Qatar a Special Agreement for the submission to the Court of all the disputes outstanding between them. The conclusion of such an agreement would necessarily entail the discontinuance by Qatar of the present proceedings. Bahrain must, however, emphasize that this declaration is not an invitation to the Court to use its high authority to construct for the Parties some new basis of jurisdiction that might more closely resemble a consensual submission. Any continuation of proceedings within the framework of the present unilateral application by Qatar is not acceptable to Bahrain.

9.5 To the end, therefore, that a suitable joint submission should be made to the Court, Bahrain will within the very near future forward to Qatar a fresh draft joint agreement coupled with an invitation that the two Parties should meet under the auspices of the Mediator with a view to discussing and resolving any remaining points of difficulty.

9.6 In conclusion, Bahrain turns to an entirely different and somewhat technical point regarding admissibility which arises not out of Bahrain's specific examination of that subject in paragraph 1.16 above, but instead out of paragraph 5.75 of the Qatari Memorial. In that paragraph Qatar refers to Bahrain's complaint in its letter to the Court of 18 August 1991 that Qatar, by unilaterally starting proceedings and framing them in terms of its own claims, had prevented Bahrain from introducing the issue of Zubarah. In a somewhat indirect and obscure manner Qatar appears to be arguing that it could not object to the presentation by Bahrain of a claim if it comes within the terms of "the Bahraini formula"; and, by implication, Qatar appears also to be suggesting that on this basis Bahrain could introduce the question of Zubarah even into the present proceedings as framed by Qatar. Bahrain has dealt in Chapter VIII, Section 3, above with the difficulties inherent in this suggestion. But the point that requires mention now is the manner in which Qatar, at the same time as it seems to suggest that the Court has jurisdiction

over the Zubarah question, appears to reserve to itself the right to challenge the admissibility of the introduction of this matter by Bahrain. Qatar states:

> "Of course, if a claim is put forward which one Party alleges is an admissible claim coming within the formula, and if the other maintains that it is not, it is then for the Court to decide, after having considered the arguments of the Parties, whether it is an admissible claim"[225]

9.7 Bahrain finds it impossible to put any other interpretation upon these rather Delphic words than that Qatar is reserving the right to challenge the admissibility of any claim that Bahrain may make in respect of Zubarah, if this matter is subsequently brought before the Court even by a joint submission of the two Parties. The same considerations apply to questions relating to archipelagic baselines and the fishing areas and pearl banks, matters which were agreed to be included in the Bahraini Formula at the Sixth Meeting of the Tripartite Committee but not referred to in the Qatari Application as matters upon which the Court is asked to adjudge.[226]

9.8 Bahrain is accordingly bound to protect its position in any future case by noting that, though not objecting to the admissibility of Qatar's present Application (as opposed, of course, to the present objection to jurisdiction), Bahrain is acting only within the framework of the present case as set by Qatar. Such acceptance of admissibility cannot extend to any other proceedings, even ones involving the same issues as those now raised by Qatar. Thus, for example, if in such later proceedings Qatar were to question the admissibility of any Bahraini claim to Zubarah by reference to considerations which, in its turn, Bahrain might perceive at that time and in that context as also being applicable to Qatar's claims, Bahrain would feel free to invoke such considerations - to the extent of their relevance - against the admissibility of any claims that Qatar might assert, e.g. in relation to the Hawar Islands.

---

[225] Qatari Memorial, para. 5.78.

[226] See above, footnote 159, p.78.

CHAPTER X

FORMAL SUBMISSIONS

The State of Bahrain respectfully requests the Court to adjudge and declare, rejecting all contrary claims and submissions, that the Court is without jurisdiction over the dispute brought before it by the Application filed by Qatar on 8 July 1991.

(Signed)
Husain M. Al Baharna
Minister of State for Legal Affairs
and Agent of the State of Bahrain

LIST OF DOCUMENTARY ANNEXES

Volume II

Part 1

GENERAL

Annexes I.1 - I.26

Page

Part II

EXPERT OPINIONS

Annexes II.1 - II.4

Volume III

THE HISTORICAL PERSPECTIVE CORRECTED

Annexes III.1-III.26

LIST OF ILLUSTRATIVE MAPS

ABBREVIATIONS

The following is a list of the main abbreviations used:

1987 Agreement	The Agreement described in paragraph 1.6 hereof.
1990 Minutes	The Minutes of a meeting drawn up on 25 December 1990
FO	Foreign Office documents (Public Records Office, London)
ILR	International Law Reports
IOR	India Office Records
L/P&S	Letters Political and Secret (India Office Library, London)
P	Proceedings of the Government of India (India Office Library, London)
PA	Political Agent
PR	Political Resident
R/15/1	Residency Files (India Office Library, London)
R/15/2	Political Agency, Bahrain Files (India Office Library, London)