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International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1994

Public sitting

held on Monday 28 February 1994, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

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

(Qatar v. Bahrain)

VERBATIM RECORD

ANNEE 1994

Audience publique

tenue le lundi 28 février 1994, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

(Qatar c. Bahreïn)

COMPTE RENDU

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

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

MM. Valticos,
Ruda, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

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

as Agent and Counsel;

Mr. Adel Sherbini, Legal Expert,

as Legal Adviser;

Mr. Sami Abushaikha, Legal Expert,

as Legal Adviser;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

The Government of Bahrain is represented by:

H.E. Dr. Husain Mohammed Al Baharna, Minister of State for Legal Affairs, Barrister at Law,

as Agent and Counsel;

H.E. Mr. Karim Ebrahim Al Shakar, Ambassador of the State of Bahrain to the Netherlands;

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

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

Le Gouvernement du Qatar est représenté par :

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

comme *agent et conseil;*

M. Adel Sherbini, expert juridique,

comme *conseiller juridique;*

M. Sami Abushaikha, expert juridique,

comme *conseiller juridique;*

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

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

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

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

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

comme *conseils et avocats;*

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

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

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

Le Gouvernement de Bahreïn est représenté par :

S. Exc. M. Husain Mohammed Al Baharna, ministre d'Etat chargé des affaires juridiques, Barrister at Law,

comme agent et conseil;

S. Exc. M. Karim Ebrahim Al Shakar, ambassadeur de l'Etat de Bahreïn aux Pays-Bas;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

comme conseils.

Le PRESIDENT : L'audience est ouverte.

La Cour se réunit aujourd'hui, en application des dispositions des articles 43 à 46 de son Statut, pour entendre les Parties en leurs plaidoiries dans l'affaire de la *Délimitation maritime et des questions territoriales entre le Qatar et Bahrein*, sur les questions de compétence et de recevabilité soulevées en l'espèce.

Avant d'ouvrir l'audience en cette affaire, il échet d'abord de parachever la composition de la Cour. A compter du 6 février 1994, trois nouveaux juges sont devenus membres de la Cour, après avoir été élus par l'Assemblée générale et le Conseil de sécurité des Nations Unies. A la même époque, deux de nos collègues, M. Oda et M. Herczegh, ont été réélus pour un nouveau mandat; nous en les félicitons et sommes très heureux de pouvoir continuer à bénéficier de leur participation aux tâches de la Cour. De surcroît, chacune des Parties en la présente affaire, le Qatar et Bahrein, ont usé de la faculté que leur confère l'article 31 du Statut de la Cour, de désigner un juge *ad hoc* pour siéger en l'affaire. L'article 20 du Statut de la Cour dispose que "Tout membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en pleine conscience." Au cas présent cette disposition comprend les juges *ad hoc*. Je vais donc dire quelques mots de la carrière et des qualifications de chacun de ces juges, puis je les inviterai, suivant l'ordre de préséance et d'ancienneté, à faire leur déclaration solennelle.

M. le juge Shi Jiuyong, de nationalité chinoise, a été le conseiller juridique du ministère des affaires étrangères de la République populaire

de Chine, et membre de la Commission du droit international, dont il a été le président lors de sa quarante-deuxième session en 1990. Il a fait ses études à l'Université St. John de Shanghai, et à l'Université de Columbia de New York. Il a accompli une carrière éminente dans le domaine de la recherche juridique et de l'enseignement, comme professeur, comme représentant de son pays et comme conseiller juridique.

M. le juge Carl-August Fleischhauer, de nationalité allemande, est certes bien connu de la Cour, et plus encore de l'Organisation des Nations Unies, puisque depuis dix ans, il est le conseiller juridique de l'Organisation. C'est en cette qualité qu'il a eu à participer à trois affaires consultatives portées devant la Cour; plus tôt dans sa carrière, il a participé, au nom de la République fédérale allemande, à deux affaires auxquelles cet Etat était partie. Il a fait ses études à Heidelberg, à Grenoble, à Paris et à Chicago, et il est entré dans la carrière diplomatique, puis a accédé au poste de conseiller juridique du ministère fédéral des affaires étrangères.

M. le juge Abdul G. Koroma, de nationalité sierra-léonienne, vient aussi à La Haye en provenance de New York, où il était le représentant permanent de son pays auprès de l'Organisation des Nations Unies, avec rang et qualité d'ambassadeur extraordinaire et plénipotentiaire. Il a fait ses études en Sierra Leone et à l'Université d'Etat de Kiev, ainsi qu'à l'Université de Londres. Il a accompli une longue carrière au service de son gouvernement, comme conseiller juridique, comme haut-commissaire, et comme ambassadeur; il a représenté son pays en de nombreuses conférences et, pendant seize ans, il a été membre de la Sixième Commission de l'Assemblée générale des Nations Unies.

Quant aux juges *ad hoc* désignés pour la présente affaire, il est heureux pour la Cour que le choix des Parties se soit porté sur deux juges particulièrement expérimentés. Bahrein a désigné en qualité de juge *ad hoc* M. Nicolas Valticos, juge à la Cour européenne des droits de l'homme, et récemment membre d'une Chambre de cette Cour internationale de Justice, en qualité de juge *ad hoc*, dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* entre El Salvador et le Honduras. M. Valticos est membre de la Cour permanente d'arbitrage, et ancien professeur de l'Université de Genève.

M. le juge José-María Ruda a été désigné par le Qatar. Il suffit de rappeler à son égard qu'il a été un membre particulièrement éminent de la Cour de 1973 à 1991 et en a été le Président de 1988 à 1991.

J'invite maintenant chacun de ces juges à prendre l'engagement solennel prescrit par le Statut et je demande à toutes les personnes présentes à l'audience de se lever.

M. SHI :

"I solemnly declare that I will perform my duties and exercise my powers as Judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : M. Fleischhauer.

M. FLEISCHHAUER :

"Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement en pleine et parfaite impartialité et en toute conscience."

Le PRESIDENT : M. Koroma.

Judge KOROMA :

"I solemnly declare that I will perform my duties and exercise my powers as Judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : M. Valticos.

M. VALTICOS :

"Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience."

Le PRESIDENT : M. Ruda.

Judge RUDA :

"I solemnly declare that I will perform my duties and exercise my powers as Judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. les juges Shi, Fleischhauer et Koroma, et les déclare dûment installés comme membres de la Cour.

Je prends acte également des déclarations solennelles faites par M. le juge Valticos et M. le juge Ruda, et les déclare dûment installés en qualité de juges *ad hoc* en l'affaire de la *Délimitation maritime et des questions territoriales entre le Qatar et Bahreïn*.

The proceedings in the case were begun on 8 July 1991 by an Application filed by the State of Qatar, instituting proceedings against the State of Bahrain in respect of certain disputes defined by Qatar as disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

In that Application Qatar founded the jurisdiction of the Court upon certain agreements between the Parties stated to have been concluded in December 1987 and December 1990, the subject and scope of the commitment to jurisdiction being determined, according to Qatar, by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990. By letters addressed to the Registrar of the Court on 14 July 1991 and 18 August 1991 Bahrain contested the basis of jurisdiction invoked by Qatar. At a meeting between the President of the Court and the representatives of the Parties held on 2 October 1991 it was agreed that questions of jurisdiction and admissibility in this case should be separately determined before any proceedings on the merits.

Time-limits were accordingly fixed for a Memorial of Qatar and a Counter-Memorial of Bahrain on questions of jurisdiction and admissibility, and those pleadings were duly filed. By an Order of 26 June 1992, the Court found that the filing of further pleadings by the Parties was necessary, and filed time-limits for a Reply of Qatar and Rejoinder of Bahrain, which were duly filed. The case has therefore been ready for hearing, for purposes of Article 54 of the Rules of Court, since the filing of the Rejoinder on 29 December 1992; but as a result of the number of cases on the Court's list, it has not been possible to open the oral proceedings until today.

Having ascertained the views of the Parties on the matter, the Court has decided, pursuant to Article 53, paragraph 2, of the Rules of Court, that the pleadings which have been filed, and the annexed documents, shall be made accessible to the public with effect from the opening of the oral proceedings.

I note the presence in the Court of the Agents, counsel and advocates of the two Parties. It was Qatar, which, in accordance with the Court's Order of 11 October 1991, filed the first pleading on jurisdiction and admissibility, and Qatar will thus address the Court first, and I give the floor to the Agent of Qatar.

Mr. AL-NAUIMI:

1. Mr. President, Members of the Court, it is not without emotion that a lawyer appears before the International Court of Justice, and I would like to add that it is an honour and a privilege for me to represent the Government of the State of Qatar before the Court in this case between the State of Qatar and the State of Bahrain. My Government has asked me to communicate to you its sincere respects upon this occasion when, for the first time, two Arab Gulf States are appearing here. Mr. President, I would also like to take this opportunity, on behalf of all the members of the delegation of Qatar to congratulate you, Sir, on your recent election as President of this distinguished institution. Our congratulations equally go out to Vice-President Schwebel and to the newly-elected judges whom we are delighted to welcome on the bench today.

2. I am also pleased this morning to convey through Dr. Al-Baharna, to the Government and the people of the State of Bahrain, the most sincere regards of my Government and of the brotherly people of Qatar, upon the occasion of Bahrain's presence today in this courtroom. This Court is, *par excellence*, a place where disputes are solved by the peaceful means of judicial settlement, as mentioned by Article 33 of the Charter of the United Nations. The case brought by Qatar's Application

is important for both States. It involves questions of maritime delimitation and territorial sovereignty which are of vital importance for Qatar, for its relations with its neighbours and for other States in the Gulf region.

3. Mr. President, Members of the Court, on 8 July 1991 Qatar filed its Application instituting proceedings against Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States. As explained in Qatar's Application, in 1987 and 1990, as a result of many years of mediation, the two States entered into international agreements conferring jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute. Qatar has seised the Court by means of an Application in accordance with Article 40, paragraph 1, of the Statute of the Court, read with Article 38 of the Rules of Court. Counsel for Qatar will develop these points later.

4. Nearly three years have now passed since the filing of the Application. In these introductory remarks, Mr. President, I wish briefly to recall Bahrain's attitude since that filing.

First, by letter of 14 July 1991, Bahrain requested that the Application filed by Qatar should not be entered in the General List, and that no action should be taken in the proceedings. Of course, Bahrain was told that Article 38, paragraph 5, of the Rules of Court was not applicable in the present circumstances. The case was then duly entered in the General List and given a title, as recorded in the Order made by the President of the Court on 11 October 1991.

Second, by another irregular communication of 18 August 1991, Bahrain purported to contest the basis of jurisdiction of the Court invoked by Qatar. However, Bahrain, despite being a party to the Statute of the Court, failed to comply with the Rules of Court, refusing to appoint an Agent or to file a preliminary objection. This problem was only solved as a result of an agreement subsequently reached between the two States that "questions of jurisdiction and admissibility in this case should be separately determined before any proceedings on the merits". This agreement is noted in the Order of the Court dated 11 October 1991. It was only on 26 October 1991 that Bahrain appointed its Agent.

Third, Bahrain has alleged in its pleadings that it is an insult and a dishonour for a State to be brought to the Court by another State and placed in the situation of a defendant. Engaging in peaceful means of settling a dispute can, of course, never be considered as a dishonour, and, in any event, the Court will note that, if Bahrain had filed a preliminary objection, it would today be in the position of a claimant and Qatar would be in the position of defendant.

5. Other aspects of the conduct of the Parties should also be recalled.

In December 1987 both Qatar and Bahrain agreed that until the final ruling by the Court on the disputed matters:

> "(a) Each party shall undertake from to date to refrain from any action that would strengthen its legal position, weaken the legal position of the other party, or change the status quo with regard to the disputed matters. Any such action shall be regarded null and void and shall have no legal effect in this respect."

This Agreement echoed the Parties' earlier undertaking under the Second Principle of the 1978 Principles for the Framework for Reaching a

Settlement, which were achieved within the context of the Saudi Mediation and have been referred to in the pleadings as the "Framework" (MQ, Vol. III, Ann. II.1, p. 3).

Qatar has done nothing to attempt to modify the legal situation existing between the Parties or to modify the status quo with regard to the disputed matters. Bahrain, however, has not exercised the same restraint. As the Court is aware, various incidents have taken place since 1991 relating to the underlying disputes. Qatar can only regard these incidents as a breach by Bahrain of its undertaking to respect the status quo principle embodied in the Framework and the December 1987 Agreement.

In addition, after the filing of the Application, Judge Jennings, who at the time was President of the Court, received an assurance from Qatar that it would refrain from any act which might endanger the peace in the region. Since then, Qatar has abided by this assurance. However, Qatar has reason to believe that Bahrain is reinforcing its military presence on the main Hawar Island, including the entry into the island of heavy artillery and various military vehicles.

In any event, what do these actions show? They show clearly that the long outstanding dispute between the two sister States, with respect to which Qatar has been constantly seeking justice for more than 50 years, is still alive and needs to be resolved peacefully on the basis of international law.

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6. Mr. President, Members of the Court, in my presentation I now propose, as briefly as possible, to recall to the Court first (I) some aspects of the geographical and historical background to the existing and long-outstanding disputes (see MQ, pp. 9-31; CMB, pp. 12-17; RQ, pp. 7-11 and RB, p. 8) and second (II) some of the most important aspects of the various attempts to solve these disputes finally through negotiation or by recourse to a third party. I hope that this will serve as a useful introduction to the presentations of learned counsel on behalf of Qatar which will follow. I bear in mind that when referring to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application, the Order made by the President of the Court on 11 October 1991 stated that "it is necessary for the Court to be informed of all the contentions and evidence of fact and law on which the Parties rely in that connection".

I also bear in mind that both States are here now before the Court at the stage of the oral pleadings. According to Article 60 of the Rules of Court, Qatar's oral statement:

> "shall be directed to the issues that still divide the Parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain".

With your permission, during these oral pleadings we will not give the references for the quotations we will use, but these

references will be communicated to the Registry, and we would be grateful if it could insert them in the text of the transcript.

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* *

7. (I) To begin, I invite you to my region, where the territories of Qatar and Bahrain are located and, as a guide, I will provide you with a short presentation of some aspects of the geographical and historical background of the existing and long-outstanding disputes. I do not intend to enter into the substance of the case relating to the maritime delimitation and territorial questions between Qatar and Bahrain but simply to give the necessary background to the present proceedings dealing with the questions of jurisdiction and admissibility.

8. Mr. President, this morning I have distributed, through the Registry, for the Court, and directly to Bahrain's delegation, an enlarged copy of the map (L/P & S/12/38066) appearing at page 36 of Qatar's Application, so as to enable the Court to follow this part of my presentation more easily.

The disputes brought before the Court by Qatar's Application of July 1991 are:

- the dispute relating to sovereignty over the Hawar islands (see Application of Qatar, paras. 11-17); and
- the dispute relating to the delimitation of the maritime boundary (*ibid.*, paras. 18-25).

9. The dispute relating to the Hawar islands, which lie along the western coast of Qatar, arose during the 1930s, against the background of exploration for oil in the region. Following protests by Qatar to the British authorities against Bahrain's incursions on Hawar, the British Government decided in 1939 that the Hawar islands belonged to Bahrain and not to Qatar (MQ, Vol. II, Ann. I.38). Qatar strongly protested against this decision at the time (see, MQ, Vol. II, Anns. I.40, I.43, I.45 and I.47), and has continued to oppose it and to maintain that it is invalid.

10. The dispute relating to the delimitation of the maritime boundary arises out of a British decision of 1947 to delimit the sea-bed boundary between the two States in accordance with equitable principles by means of a median line based generally on the configuration of the coastline of the Bahrain main island and the peninsula of Qatar (MQ, Vol. II, Ann. I.53). That decision specified two exceptions to the dividing line. The first purported to recognize that Bahrain had sovereign rights in the areas of the Dibal and Qit'at Jaradah shoals lying on the Qatari side of the line, and the second was the drawing of the line so as to give effect to the British decision of 1939 that the Hawar islands belonged to Bahrain.

11. In the immediate aftermath of the British decision of 1947, Qatar did not oppose the part of the line which the British Government stated was based on the configuration of the coastlines of the two States and was determined in accordance with equitable principles. But Qatar did protest vigorously against the two exceptions (MQ, Vol. II, Ann. I.55), and has continued to oppose those exceptions ever since. By way of contrast, Bahrain argued that Janan Island should have been included as part of the Hawar group of islands (MQ, Vol. II, Ann. I.55), and

stated that it considered Dibal and Qit'at Jaradah as shoals over which it had sovereign rights, asserting that the dividing line should be adjusted accordingly (MQ, Vol. II, Ann. I.54).

12. Now, let us leave the immediate aftermath of the British decisions and look at the situation of the disputes in the 1960s (MQ, Vol. II, Anns. I.56-I.63). The views of Qatar and Bahrain can be obtained from the British Archives and from other documents that Qatar and Bahrain have in their own archives. As the Court will be aware, documents in the British Archives are subject to a 30-year non-disclosure rule. Therefore, so far, British Archive documents only up to the end of 1963 are in the public domain.

13. In a memorandum of 1964 Bahrain put forward certain claims concerning the "undersea boundary between the two States" (Ann. I.56). In that memorandum, Bahrain alleged that Dibal and Qit'at Jaradah were islands with territorial waters and that they should be regarded as "outer coast for the purpose of determining the base line from which territorial waters and median line is to be measured". In its 1965 memorandum in reply, Qatar rejected those claims and also referred to the dispute over the Hawar islands (Ann. I.57).

14. In the same memorandum, Qatar proposed that all these disputes be settled by arbitration. At first Bahrain agreed to this, and the British Government also agreed to the process of arbitration.

Qatar had listed the question of the maritime delimitation together with the question of title to the Hawar islands in its draft arbitration Agreement which it submitted to the British Political Agent in Qatar in 1966 (Ann. I.61).

However, Bahrain frustrated that arbitral process by refusing to agree to submit to arbitration the issue of title to the Hawar islands. On 29 March 1966, Qatar was informed that Bahrain was "not prepared to submit to arbitration" the question of "the sovereignty of the Hawar group of islands which was awarded to Bahrain in 1939" (Ann. I.62). Bahrain also stated that it was not prepared to submit to arbitration the question of the "sovereignty of Bahrain over any other island or shoal".

The Court will not have failed to notice that the question of Zubarah was not mentioned by either Bahrain or Qatar during these proposals for arbitration.

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* *

15. (II) Mr. President, Members of the Court, I now wish to briefly outline the steps leading to the filing of Qatar's Application in July 1991, in particular those taken during the period of the kind Mediation of the Kingdom of Saudi Arabia. This presentation will be made in the light of the objections to jurisdiction raised by Bahrain before the Court.

16. After the British presence in Qatar and Bahrain ended in 1971, the dispute relating to the Hawar islands remained outstanding, as did the dispute relating to the maritime boundary. In addition, no agreement had been reached with respect to the delimitation of the disputed northern area between the Bahrain Light Vessel, the northernmost point on the line indicated by the British Government decision of 1947, and the

continental shelf boundaries of the two States with Iran. In 1975 and in 1976, Qatar raised with Saudi Arabia issues relating to the existing disputes with Bahrain, and as a result it was agreed that the Kingdom of Saudi Arabia would undertake mediation between Qatar and Bahrain to resolve those disputes.

17. On 13 March 1978, King Khalid of Saudi Arabia proposed a set of "Principles for the Framework for Reaching a Settlement".

The First Principle embodied in the Framework referred to the complementary nature of the disputes between the two countries relating to "sovereignty over the islands", "maritime boundaries", and "territorial waters".

The Second Principle provided for the maintenance of the status quo.

The Third Principle *inter alia* prohibited Qatar and Bahrain from presenting the disputes to any international organization.

The Fourth Principle envisaged the formation of a committee composed of representatives of the three countries "with the aim of reaching solutions acceptable to the two Parties on the basis of justice ...".

The Framework was accepted in 1983 by Bahrain and Qatar with a Fifth Principle which, in its final version, reads as follows:

> "In case that the negotiations provided for in the fourth principle fail to reach agreement on the solution of one or more of the aforesaid disputed matters, the Governments of the two countries shall undertake, in consultation with the Government of Saudi Arabia, to determine the best means *of resolving that matter or matters, on the basis of the provisions of international law. The ruling of the authority agreed upon for this purpose shall be final and binding.*" (Emphasis added.)

I stress the words "resolving that matter or matters, on the basis of the provisions of international law" and "the ruling of the authority agreed upon for this purpose shall be final and binding". As will be

shown, these words marked a significant move by Qatar and Bahrain towards the settlement of their dispute. The two States have thus been in agreement since 1983 to have their dispute finally solved by a third party on the basis of international law.

18. It will be seen that the road to the International Court of Justice has been a long and difficult one. No material progress in negotiations was made between 1983 and 1986; and in 1986 a crisis arose due to the breach by Bahrain of the Second Principle of the Framework, providing for the maintenance of the status quo. This led to an armed clash, known as "the Dibal incident", which in turn led to the conclusion of the December 1987 Agreement under which Qatar and Bahrain agreed to refer their existing disputes to the Court.

19. The terms of the 1987 Agreement are set out in two letters dated 19 December 1987 which were sent by King Fahd of Saudi Arabia, in identical terms, to the Amir of Qatar and the Amir of Bahrain. These letters contained proposals which were accepted by both Amirs and were made the subject of a public announcement by Saudi Arabia on 21 December 1987. There is no dispute between the Parties that the 1987 Agreement constitutes an international agreement.

20. In his preamble, King Fahd reminded the Amirs of the good offices he had undertaken to help to find a "just and final settlement" of the long-standing disputes between the two States, relating to sovereignty over the Hawar islands, the maritime boundaries of the two countries, and any other matters.

21. As a basis for settling the disputes, the first paragraph of the 1987 Agreement provided as follows:

"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."

22. The third paragraph of the 1987 Agreement reads as follows:

"*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 both parties, be issued."

Mr. President, Members of the Court, as will be shown by Qatar's Counsel, this paragraph does not make the basic commitment to refer the disputed matters to the Court, mentioned in the first paragraph, conditional on the Parties reaching a special agreement, nor does it preclude Qatar from seising the Court unilaterally, as Bahrain now alleges.

23. The fourth paragraph of the 1987 Agreement provides that

"*Fourthly*: The Kingdom of Saudi Arabia will continue its good offices to guarantee the implementation of these terms."

24. On 15 November 1988, during the Fifth Meeting of the Tripartite Committee, which had been set up in accordance with the third item of the 1987 Agreement, Prince Saud Al-Faisal of Saudi Arabia, who was presiding over the meeting, announced that King Fahd considered that December 1988 was the date for terminating the Tripartite Committee's work. By that date, the Tripartite Committee had been unable to reach an agreement, and it thereafter ceased to function.

25. The failure of the Tripartite Committee's approach to the Court led eventually to the conclusion of the Doha Agreement on 25 December 1990. This Agreement was reached pursuant to Saudi Arabia's commitment, mentioned in the preamble and incorporated in the fourth paragraph of the 1987 Agreement, to continue its good offices to help to

find a just and final settlement of the disputes by the Court, as agreed under the first paragraph.

26. Thus, after the Tripartite Committee ceased to function, in December 1988 it was agreed on the occasion of the GCC Summit meetings, in Bahrain and Oman in 1988 and 1989, to give Saudi Arabia further limited periods to mediate in an attempt to reach a settlement on the substance of the disputes. However, no such settlement was reached during those periods. Accordingly, at the opening session of the annual GCC Summit which was taking place in December 1990 in Doha, the Amir of Qatar reminded the other Heads of State of the Agreement reached in 1987 to put an end to the disputes between Qatar and Bahrain, by referring them to the International Court of Justice. To facilitate the reference to the Court the Amir of Qatar announced Qatar's acceptance of the Bahraini formula. This opened the door to an agreement, it being understood that the Saudi mediation would be given one further chance before the Court could be seised. A draft agreement was then prepared with the assistance of Oman, reflecting the outcome of the discussion of the Heads of State. All this took place against the background of the Iraq-Kuwait crisis, which had demonstrated the necessity of solving disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

27. The Doha Agreement is an instrument which, as from May 1991, allows the full implementation of the commitments made by the two States in the 1987 Agreement. Paragraph (1) of the Doha Agreement reads as follows:

"The following was agreed

(1) To reaffirm what was agreed previously between the two parties."

Thus, it reiterates, *inter alia*, the consent of the Court's jurisdiction incorporated in the 1987 Agreement, reaffirming the undertaking by both Parties to refer the dispute to the Court. Counsel for Qatar will further develop this point.

28. Mr. President, now I will read the relevant passage of paragraph (2) of the Doha Agreement with respect to submission of the disputes to the Court:

"The following was agreed

...

(2) ... After the end of this period (I remind the Court that this is in May 1991), the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar ..."

29. The "Bahraini formula" which is incorporated by reference in the Agreement under paragraph (2) and which was proposed by Bahrain in 1988 and finally accepted by Qatar in Doha in 1990, defines the subject and scope of the disputes which would be submitted to the Court. Under the formula,

"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."

No problem of translation can arise since Bahrain provided this formula to Qatar in both English and Arabic.

I would add two remarks:

30. *First*, the written pleadings show that all the disputes which are before the Court for adjudication fall under the Bahraini formula.

Bahrain itself has admitted that the claims Qatar has presented, leading to the requests that Qatar has made in paragraph 41 of its Application, are admissible.

31. *Second*, the Bahraini formula is before the Court. From Bahrain's pleadings it appears Bahrain is complaining that its claims with respect to Zubarah are not before the Court. However, these have not even been described by Bahrain. What does Bahrain claim about Zubarah? Qatar does not know, and neither does the Court. In its pleadings, Bahrain has introduced some complaints about Qatar's attitude vis-à-vis Zubarah, and the behaviour of the British in that connection. Are these complaints and the archival documents concerning Zubarah, annexed by Bahrain to its Counter-Memorial (CMB, Anns. III.13-III.16 and III.18-III.25) the basis of Bahrain's claims? Who knows? Neither the Court nor Qatar yet knows on what basis it could be determined whether Bahrain's claims concerning Zubarah are admissible or not, under the Bahraini formula which is incorporated by reference in the Doha Agreement. The task is made even more difficult because Bahrain's pleadings offer no evidence of any claim having been made concerning Zubarah between 1950 and 1988.

32. Mr. President, as the Court will recall, Qatar seised the Court by means of an Application, in accordance with Article 40, paragraph 1, of the Statute of the Court read with Article 38 of the Rules of Court. It is Qatar's submission that the Doha Agreement allowed each Party to seise the Court unilaterally in accordance with the Statute and Rules, and to present its own claims after the period ending in May 1991 had elapsed. This view is confirmed by a recent communication, dated 29 January 1994, from the Omani Minister for Foreign Affairs, who played

a central role in the drafting of the Doha Agreement. Bahrain's concern that, because its alleged claims are not mentioned by Qatar in its Application, they cannot be adjudicated, are easily dispelled because of the use of the word "*al-tarafan*" in the Doha Agreement, which permits Bahrain to file a separate application.

33. As will be explained later, the replacement of the words "*ayyun min al-tarafain*" ("either one of the parties") by "*al-tarafan*" ("the two parties" or "the parties") in the draft text of the Minutes in Doha was quite acceptable to Qatar, because both Parties had distinct claims to make before the Court, and because this language would enable each Party to present its own claims to the Court. The Doha Agreement gives both Qatar and Bahrain, separately, the opportunity to have all the disputes, falling under the Bahraini formula, considered by the Court. The Bahraini formula was deliberately designed to cover all the matters in dispute between Qatar and Bahrain without spelling them out in detail because of their sensitivity. Against this background and in view of the long history of the negotiation for the reference of the disputes to the Court, it is unrealistic to believe that in December 1990, in Doha, the Parties would have made seisin of the Court conditional upon the conclusion of a special agreement to be jointly submitted to the Court.

34. The disputes which Qatar considers fall within the Bahraini formula, are before the Court. If Bahrain wishes to add other disputes which it considers also fall within the Bahraini formula, all it has to do is submit an application to the Court.

35. Moreover, I recall that Bahrain has argued that it has been disadvantaged by the fact that it has been put in the position of a defendant. I would like to state publicly today, as Agent of the State

of Qatar, that I would agree to the Parties requesting the Court to authorize them to file their written pleadings simultaneously in the next phase of the proceedings, in order to avoid any such alleged disadvantage. In addition, I would remind Bahrain that, if it files an application, the Court may at any time direct that the proceedings in the two cases be joined, to which Qatar would likewise have no objection.

36. Finally, another passage of paragraph 2 of the Doha Agreement deserves mention. In furtherance of paragraph 4 of the 1987 Agreement, that passage states:

> "The following was agreed
>
> (2) ... Saudi Arabia's good offices will continue during the submission of the matter to arbitration;"

Qatar must say here that it is very grateful to the Mediator for not having departed from its role of mediator and for all his patient endeavours which have, *inter alia*, resulted in our presence here today. Mediation is, of course, also a means of solving disputes according to Article 33 of the Charter of the United Nations. Qatar is likewise very grateful to the Mediator for having accepted so readily to continue its good offices while the case is pending before the Court.

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* *

37. In conclusion, Mr. President, Members of the Court, it is significant that within a period of three years two international agreements were entered into by Qatar and Bahrain providing for the

reference of their long-standing dispute to the Court. I firmly believe that this is evidence of the willingness, intention and consent of both States that you should finally rule upon the existing disputed matters, covered by the Bahraini formula, between the State of Qatar and the State of Bahrain which have been brought before the Court by Qatar's Application.

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* *

38. I will now indicate how and in what order the counsel for Qatar are going to discuss the various issues in these proceedings.

First, Sir Ian Sinclair will examine the requirements for a basis of jurisdiction of the Court as set out in the Statute and Rules of Court.

He will be followed by Mr. Shankardass who will present the facts of the case including those relating to the mediation, the 1987 Agreement, the work of the Tripartite Committee and the 1990 Doha Agreement. In particular, he will demonstrate that Bahrain's insistence on the joint submission by a special agreement is not consistent with the facts.

Sir Ian Sinclair will then take the floor again to discuss the status of the Doha Agreement. Professor Jean Salmon will complete this analysis of the status of the Doha Agreement by showing that Bahrain cannot validly argue that its consent to be bound by that agreement has been expressed in violation of Bahrain's constitutional requirements, thereby invalidating that consent.

Professor Jean-Pierre Quéneudec will then turn to the subject of the interpretation of the Doha Agreement and, as counsel, I will deal with the linguistic issues raised by Bahrain in connection with the interpretation of the Doha Agreement.

Professor Jean Salmon will also take the floor again in order to respond to various concerns which have been expressed by Bahrain in connection with the present proceedings. He will then deal with the question of the admissibility of Qatar's Application.

Finally, Sir Francis Vallat will conclude this first round of Qatar's presentation by summarizing the case for Qatar in favour of the jurisdiction of the Court to entertain the dispute and the admissibility of Qatar's Application.

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39. Mr. President, Members of the Court, I would like to thank you for the attention that you have given to my speech. It might have been too long, but I would like to recall that I was making short a long story between the two sisterly States of Qatar and Bahrain.
As I said before, the road which has led to the Court has been a long one, and I would like to repeat my satisfaction at being present here before you with my brothers from Bahrain.

The President, could you now call upon Sir Ian Sinclair please. Thank you very much.

The PRESIDENT: Thank you, Your Excellency. I give the floor to Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court, it is, of course, a very great privilege for me to appear this morning and to address the Court on behalf of the State of Qatar. My task this morning, following the introductory statement by the Agent which you have just heard, is to analyse the requirements, as set out in the Statute and Rules of Court, for establishing a basis for the exercise of jurisdiction by the Court in the present case. I will initially discuss the conditions for the exercise of jurisdiction, and will then proceed to demonstrate that these conditions are amply fulfilled in the present case.

1. The requirement of consent

The Parties are fortunately in agreement that the *consent* of the Parties, whether given in advance of the submission of a case to the Court or in the face of the Court itself, is an essential prerequisite to the assumption of jurisdiction by the Court in contentious cases. Thus, Qatar has unequivocally stated in its Memorial:

> "The principle of consent of the Parties as the basis of the jurisdiction of the Court to decide in contentious cases is embodied in Article 36 of the Statute and has been confirmed by the Court on numerous occasions." (MQ, Vol. I, para. 4.04.)

Qatar cited in support of this proposition a lengthy series of passages from the jurisprudence of the present Court and indeed from that of its predecessor, stretching back as far as the Judgment of the Permanent Court on jurisdictional issues in the *Chorzow Factory* case in 1927.

Now, the Court will hardly need reminding that consent need not be given *ad hoc* in each individual case and may have been given generally beforehand, as where a State becomes a party to a treaty providing for the reference to a tribunal of all disputes that may arise concerning its interpretation or application, or makes an Optional Clause declaration. The Court will equally be aware of the consideration that consent to the exercise of jurisdiction is quite distinct from the consent to the general functioning and operation of the Court as an institution which is involved by being a party to the Statute of the Court. Qatar does not of course contend that the jurisdiction of the Court is or can be founded upon a treaty embodying the consent of both Bahrain and Qatar given in advance to refer all disputes concerning its interpretation or application to the Court; nor indeed does Qatar seek to rely upon parallel declarations recognizing the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

The title of jurisdiction invoked by Qatar in the present case is Article 36, paragraph 1, of the Court's Statute, which reads:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

As the Qatari Agent has already made clear, Qatar submits that the basic consent of both Parties to confer jurisdiction upon the Court in respect of defined and established disputes between Qatar and Bahrain is clearly evidenced by the Agreement entered into between the two States in December, 1987. The first element in this

Agreement (which I will henceforth refer to as the "1987 Agreement") is worded as follows:

> "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."

The 1987 Agreement is confirmed and indeed supplemented by the Doha Agreement in the form of agreed Minutes signed by the Foreign Ministers of Qatar, Bahrain and Saudi Arabia on 25 December 1990. The consent given by the Parties is thus an *ad hoc* consent evidenced by the provisions of the two agreements to which I have just made reference.

In the jurisdictional phase of the *Corfu Channel* case, the present Court stated:

> "While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form ..." (*I.C.J. Reports 1948*, p. 27.)

I cite this passage only to establish that neither the Statute nor the Rules lay down that the consent of the parties to confer jurisdiction on the Court in respect of an individual case must be evidenced by the conclusion of a special agreement.

Thus, it is accepted law that consent given *ad hoc* in an individual case need not be given in any special form. In commenting on this proposition, the late Sir Gerald Fitzmaurice adds:

> "In particular, it need not take the form of a joint special agreement or *compromis* concluded by the parties before going to the Court." (Fitzmaurice, "The Law and Procedure of the International Court of Justice", 29 *BYBIL* (1952), p. 43.)

Now, the requirement of consent by both parties to the jurisdiction of the Court may appear to weigh the scales heavily in favour of

potential or prospective defendants. However, the application of the principle of consent has been refined as a result of the development of a number of concepts within the framework of the Court's jurisprudence. I propose to refer very briefly to some of these concepts.

There is, in the first place, the distinction between the principal and the incidental jurisdiction of the Court. I need not fortunately go into this distinction, since it is not immediately relevant to the present proceedings.

A second concept which serves to refine the operation of the principle of consent is the accepted flexibility as regards the means for expressing consent, at least where that consent is given *ad hoc*. I have already drawn to the attention of the Court the passage from its Judgment in the jurisdictional phase of the *Corfu Channel* case where the Court, of course, confirmed that neither the Statute nor the Rules require that consent should be expressed in any particular form. As that eminent former Judge, Sir Hersch Lauterpacht, puts it, with reference to the *Rights of Minorities in Upper Silesia* (*Minority Schools*) case decided by the Permanent Court:

> "The Court pointed out once more that its jurisdiction in a particular case is not subordinated to the observance of certain forms such as the conclusion of a special agreement, and that the consent of a State to the submission of a dispute may not only follow from an express declaration, but may also be inferred from acts conclusively establishing it." (Sir H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 202.)

Now, Mr. President, this has particular significance in the present case since, as the Court will be aware from the written pleadings,

Bahrain appears to be insisting that it is only through the conclusion of a special agreement between Bahrain and Qatar that the jurisdiction of the Court to determine the merits of the dispute which has arisen between them will be perfected.

A third concept affecting the operation of the principle of consent is the notion of consent by subsequent conduct. This is, of course, the basis of jurisdiction by *forum prorogatum* upon which, as is already apparent, Qatar does not rely in the present case.

A fourth concept which refines the operation of the principle of consent has been developed within the framework of the Court's jurisprudence - this is the inability of a State to withdraw a consent already given, once that consent has been acted upon by another State. An example of the principle that a consent to the exercise of jurisdiction by the Court cannot be withdrawn after the Court has been validly seised of a case is the Judgment of the present Court in the preliminary objections phase of the *Rights of Passage* case. It will be recalled that, in that case between Portugal and India, Portugal had accepted the compulsory jurisdiction of the Court by an Optional Clause declaration made on 19 December 1955, India being on that date bound by a parallel Optional Clause declaration. On 22 December 1955, Portugal instituted proceedings against India by unilateral application. Portugal relied, as the basis of jurisdiction, on the parallel Optional Clause declarations. India raised a number of preliminary objections to the jurisdiction of the Court. One of those preliminary objections merits attention in the context of the present dispute. This was the objection which challenged the validity of the

Portuguese Optional Clause declaration on the ground that it incorporated a condition which, so India alleged, enabled Portugal to withdraw from the jurisdiction of the Court a dispute already referred to the Court. The Court found that, in fact, the Portuguese condition did *not* have the legal effect alleged by India. But the Court went on to say:

> "It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction." (*I.C.J. Reports 1957*, p. 142.)

The Court went on to cite approvingly a passage from its earlier Judgement on the preliminary objections raised by Guatemala in the *Nottebohm* case.

Thus, the jurisprudence of the Court firmly establishes the principle that a State is not entitled to withdraw a consent to the jurisdiction of the Court already given in such a way as to have that withdrawal of consent apply to proceedings instituted by another State before the withdrawal of consent. In other words, lapse of a title of jurisdiction, whether the lapse is the result of effluxion of time or of a valid denunciation, "only takes effect for the future and removes all foundation for the exercise of jurisdiction by the Court on the basis of the lapsed title in respect to proceedings not instituted prior to the effective lapse" (Rosenne, *The Law and Practice of the International Court*, 2nd Revised Ed. (1985), p. 502).

So much for the concepts which refine the operation of the principle of consent or at any rate circumscribe its application in particular cases. On the other side of the coin, it might be thought that

considerations relating to the burden of proof would offset whatever advantage might be thought to accrue to an applicant State from these indications based upon the jurisprudence of the Court that the principle of consent will not necessarily be applied with undue rigidity and inflexibility. Indeed - and it occasions no surprise to Qatar - Bahrain has sought to argue that Qatar must bear a particular burden of proof in establishing the consent of the Parties (by which of course is meant the consent of Bahrain) to the exercise of jurisdiction by the Court on the merits of the present case (CMB, para. 4.5).

Qatar submits that this Bahraini argument is a misconstruction of the legal position. Obviously Qatar, as an applicant State, is required to specify, as it has in fact done, the legal grounds upon which the jurisdiction of the Court is said to be based. Bahrain contests the interpretation which Qatar puts on the 1987 Agreement, as confirmed and supplemented by the Doha Agreement of 25 December 1990, and indeed, in the case of the Doha Agreement, contests whether such an agreement exists at all. These are essentially legal issues which the Court will have to determine. The determination of these issues raises no particular question as to the burden of proof on Qatar as an applicant State. Qatar of course fully accepts the force of the maxim *actori incumbit probatio* whereby each party to a dispute has to prove its own assertions, the burden of proof being in consequence shared between the parties. Qatar also accepts that it is a fundamental requirement of any judicial system that a person who desires a court to take action must establish his case to the satisfaction of the court.

But the jurisprudence of the present Court, and indeed of its predecessor, the Permanent Court, shows a marked reluctance to rely overmuch on the incidence of the burden of proof.

In a number of cases, the present Court has indicated that the burden of proof lies simultaneously and equally on both parties. Thus, in the *Temple of Preah Vihear* case, the Court made the following pronouncement:

> "As concerns the burden of proof, it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff, having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward." (*I.C.J. Reports 1962*, pp. 15-16.)

A broadly similar position was taken by the Court in the *Minquiers and Ecrehos* case (*I.C.J. Reports 1953*, p. 9).

The passage from the Court's Judgement in the *Temple* case which I have just cited has a particular relevance to the present proceedings. It is indeed true that Qatar is the Applicant State in these proceedings. But Bahrain is contesting the basis of jurisdiction of the Court invoked by Qatar and, in so doing, is positively asserting that, in the particular circumstances, the jurisdiction of the Court can only be established by means of the conclusion of a special agreement between Bahrain and Qatar. On this issue - the alleged requirement of a special agreement - it is *Bahrain* which is in the position of applicant and Qatar in the position of respondent. On Bahrain's own argument, therefore, the burden of proof of this alleged requirement rests on Bahrain. This view of the matter is, if anything, reinforced by the consideration that, in

its irregular communications of 14 July and 18 August 1991, Bahrain vigorously contested the jurisdiction of the Court to entertain the present proceedings without, however, formally lodging a preliminary objection as contemplated by Article 79 of the Rules of Court. Qatar of course acknowledges that the Order made by the then President on 11 October 1991, took account of an agreement reached between the representatives of the Parties, at a meeting which they held with the President on 2 October 1991, that questions of jurisdiction and admissibility should be separately determined before any proceedings on the merits. Qatar cannot, however, fail to remind the Court that, if Bahrain had followed the procedure indicated in Article 79 of the Rules of Court, as it should have done, it would then have been for *Bahrain* to establish, both factually and legally, the grounds on which the preliminary objection is based. The Court will of course be aware that paragraph 2 of Article 79 of the Rules of Court provides as follows:

> "The preliminary objections shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached."

This provision *can* be interpreted as suggesting that the burden of proving the facts and the law which would sustain a preliminary objection to the jurisdiction lies on the State which raises that objection - that is to say, Bahrain. Qatar does not seek to put the position any higher than that. Indeed, paragraph 6 of Article 79 of the Rules of Court may rather suggest, as indeed Qatar has always assumed, that the burden of proof falls equally upon both parties. This provision is certainly not suggestive of the idea that a special burden of proof falls on one

particular party in the context of argument on the validity of preliminary objections.

Mr. President, this may perhaps be a convenient time at which we could pause for a coffee break. It is a point at which I start to move my argument a bit further forward.

The PRESIDENT: Thank you very much, Sir Ian. This will, I understand, be a convenient moment for the customary coffee break; the Court will adjourn for 15 minutes. Thank you.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Sir Ian.

Mr. SINCLAIR: Mr. President, before the welcome coffee break, I was in the process of addressing the Court on the question of the burden of proof and it may be worth in this context recalling that the late Sir Hersch Lauterpacht, both in his judicial capacity and in his private writings, does not appear to have been much impressed by arguments based on the burden of proof. For example, in his separate opinion in the case of Certain Norwegian Loans, Judge Lauterpacht stated:

> "There is, in general, a degree of unhelpfulness in the argument concerning the burden of proof. However, some prima facie distribution of the burden of proof there must be ... the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting."
> (*I.C.J. Reports 1957*, p. 39.)

In the present case, Qatar accepts that it must establish that the Court has jurisdiction on the basis of the two agreements which it has invoked. But this, with respect, Mr. President, is *not* because of the incidence of any particular burden of proof favouring Bahrain and

penalising Qatar, or because of the existence of any special principles of evidence applicable in the matter of establishing the Court's jurisdiction. It is a simple application of the principle that it is for each party to establish its own assertions. The position has been felicitously put by Sandifer:

> "The broad basic rule of burden of proof adopted, in general, by international tribunals ... may be simply stated: that the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention. This burden may rest on the defendant, if there be a defendant, equally with the plaintiff as the former may incur the burden of substantiating any proposition he asserts in answer to the allegations of the plaintiff." (Sandifer, *Evidence before International Tribunals*, Revised Edition, 1975, p. 127.)

A broadly similar view has been expressed by the late and sadly missed Judge Manfred Lachs in one of the last of his private writings. He finds that, in the context of the burden of proof, the positions of applicant and respondent are virtually indistinguishable:

> "In the Statute, they are assimilated to each other, which makes a distinction in this respect rather difficult. However the case may be, the parties to a dispute have, as has been so rightly stated, not only the right but the duty to prove their claim and they are under an obligation to co-operate to this end with the international judge."

After citing with approval passages from an earlier article by Witenberg, Manfred Lachs himself then adds:

> "The practice of the Court indicates, in fact, that the burden was placed on the shoulders of either the Applicant or the Respondent" (Lachs, "Evidence in the procedure of the International Court of Justice: the role of the Court" in *Mélanges Diez de Velasco*, 1993, p. 428).

Now, Mr. President, if the two Parties are in disagreement as to the incidence of the burden of proof, there is less disagreement between them on the *standard* of proof. Of course, Bahrain seeks to muddy the waters by confusing the *burden* of proof with the *standard* of proof; and it goes

further by accusing Qatar of failing to draw to the attention of the Court certain passages from the writings of Sir Gerald Fitzmaurice and of Rosenne which, according to Bahrain, are incompatible with the arguments advanced by Qatar (CMB, para. 4.5). The fact is, however, that the passages cited by Bahrain in paragraph 4.5 of its Counter-Memorial are selective and are far from reflecting the balance with which both Fitzmaurice and Rosenne - these highly distinguished authorities - treat the issue of consent to the jurisdiction of the Court. For example, Fitzmaurice wisely points out that "by consent, in the legal sense of the term, is not meant *willingness*, which may or may not exist in the given case". He gives the example of the man prepared to undergo a surgical operation; he does not actually undergo it willingly. Fitzmaurice continues by making another general point:

> "Jurisdictional objections are sometimes frowned upon as being an attempt by the State concerned to escape from its legal obligations or from honouring the consents it has given, but that of course begs the very question which the jurisdictional objection raises, and which has to be decided, namely whether consent *was* given. Such a feeling may be natural, but it cannot justify imputing to a State a consent that does not exist. *Equally, if a true consent has been given, the State ought not to be allowed to escape its consequences on a technicality, or because of unwillingness when it comes to the point.*" (Fitzmaurice, *loc. cit.*, p. 86.)

I would draw the particular attention of the Court to the last sentence of this citation. Here is the necessary qualification to the general point which Fitzmaurice is making, and it is a qualification which must not be forgotten or disregarded. It is not a question of which State bears the burden of establishing consent. What the Court has to do is to review all the evidence and arguments adduced by the parties relating to the alleged consent and determine whether or not a true consent has been

given. If the Court concludes that a true consent has been given, the respondent State cannot thereafter repudiate or disavow that consent.

As I have already indicated, there would appear, on the face of things, to be less dispute between the Parties as to the *standard* of proof than there is as to the *burden* of proof. Qatar does not take issue with the general principle advanced by the Permanent Court in the *Factory at Chorzów, Jurisdiction,* case that "the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it" and that

> "consequently, 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".

This is accordingly the test to be applied so far as the *standard* of proof is concerned. But what does it require? What is the meaning of preponderant in this context? Prima facie, it would seem to require that the Court should compare the evidence adduced by the proponent of an issue with the evidence adduced by its opponent with a view to determining the relative weight to be accorded to that evidence. It would then be the relative weight which would measure the preponderance of the arguments. This would accord with the dictionary definition of preponderant. The *Oxford English Dictionary*, for example, defines the word "preponderant" as meaning, in the first place, "surpassing in weight; outweighing, heavier" and, in the second place, "surpassing in influence, power or importance; predominant". Both these definitions embody the notion of comparison, of relativity. So what is required of the Court in this case is, Qatar would submit, a weighing of the respective arguments favouring or denying the exercise of jurisdiction. These arguments will, of necessity, be a mix of factual and legal elements, proof of the factual elements being governed by the general

rules of evidence to the exclusion of any special burden of proof on Qatar beyond that which flows naturally from its position as applicant.

I should perhaps at this stage say a few words about the concept of reciprocity of consent. Qatar, in its Memorial (paras. 4.40 to 4.43), drew attention to the considerations underlying this concept. So far as Qatar can judge, Bahrain has not seen fit to comment directly on this part of the Qatar Memorial. However, Bahrain appears to be asserting that, because Qatar has invoked the jurisdiction of the Court in this case by way of unilateral application, there is no effective reciprocity of consent, particularly because Qatar has not included the question of Zubarah within the scope of its Application. The Bahraini argument on this point (CMB, paras. 8.4-8.14), it must be said, has, whether deliberately or not and Qatar is in no position to judge, distorted arguments advanced by Qatar. For example, in paragraph 8.5 of the Bahraini Counter-Memorial, it is stated that Qatar had made two suggestions to overcome the difficulty that Zubarah is not among the issues covered by the Qatar Application: the first is "for Bahrain to introduce the Zubarah claims by way of a counter-claim in the present proceedings". To this is appended a footnote reference to paragraph 5.81 of the Qatari Memorial. But if one looks at paragraph 5.81 of the Qatari Memorial, one finds only a citation from a *Bahraini* letter of 16 September 1991, in which the argument is advanced that "it is by no means clear that Bahrain would be free to raise the issue of Zubarah by way of counter-claim". But Qatar has not maintained that Bahrain would have to raise the question of Zubarah by way of a counter-claim to the claims advanced by Qatar in its Application. So all the argumentation in the Bahraini Counter-Memorial about the requirement of establishing a

link between a counter-claim and the principal claims is totally beside the point. What Qatar has been asserting, and continues to assert, is that, under the Bahraini formula, Bahrain is perfectly at liberty to raise the Zubarah question by making its own separate Application to the Court against Qatar. Qatar has not sought to deny that, for *jurisdictional* purposes, the question of Zubarah can be regarded as falling within the scope of the Bahraini formula. The *admissibility* of potential Bahraini claims with respect to Zubarah is a separate issue which will be addressed by Professor Salmon.

Now, Mr. President, I will conclude these relatively general observations on the notion of consent by drawing attention to a distinction which has been made, both in doctrine and in the jurisprudence of the Court, between the categories of treaty upon which the jurisdiction of the Court may be founded. This is the distinction between a treaty embodying a general obligation to accept the jurisdiction of the Court in relation to any dispute which may arise concerning its interpretation or application and a treaty embodying a *specific* obligation to accept the jurisdiction of the Court in relation to a concrete dispute between the Parties. The Court itself has acknowledged this distinction. In its Judgment in the jurisdictional phase of the *Fisheries Jurisdiction* case between the United Kingdom and Iceland, the Court had occasion to comment on an argument put forward by Iceland to the effect that treaties of judicial settlement or declarations of acceptance of the compulsory jurisdiction of the Court are subject to unilateral denunciation in the absence of express provisions as regards duration or termination. Referring to this argument, the Court stated:

> "It is sufficient to remark that such views have reference only to instruments in which the parties had assumed a general obligation to submit to judicial settlement all or certain categories of disputes which might arise between them in the unpredictable future. The 1961 Exchange of Notes does not embody an agreement of this type. It contains a definite compromissory clause establishing the jurisdiction of the Court to deal with a concrete kind of dispute which was foreseen and specifically anticipated by the parties." (*I.C.J. Reports 1973*, p. 16.)

I have drawn attention to this distinction because, in the present case, the Court is, Qatar would submit, confronted with a combination of two treaties which, between them, embody a *specific* undertaking by both Parties to refer to the Court identified and identifiable disputes between Qatar and Bahrain. In other words, the situation is not dissimilar to that which the Court had to deal with in the jurisdictional phase of the *Fisheries Jurisdiction* case, with the significant difference that Bahrain has at least appeared in order to argue that the Court has no jurisdiction to deal with the merits of the present case.

Now, Mr. President, I turn from what has hitherto been a fairly broad and general discussion of the legal implications of the requirement of consent to the to a more focused analysis of the essential aspects of the consent of both Qatar and Bahrain to confer jurisdiction on the Court in respect of the matters in dispute between them, as evidenced by the Agreement of 1987, confirmed and supplemented by the Doha Agreement of 1990.

2. The consent of Bahrain and Qatar to refer the disputes to the Court

The basic consent of both States to submit the matters in dispute between them to the jurisdiction of the Court is expressed in the Agreement of December 1987, whose existence even Bahrain does not dispute. The Agent has already cited paragraph 1 of that Agreement.

It is difficult to conceive of a more unequivocal expression of consent by both Parties to the jurisdiction of the Court in respect of all the disputed matters than is represented by this language. It only remains for me to remind the Court that the Agent for Qatar has already explained this morning the nature and scope of these matters in dispute between Bahrain and Qatar.

Mr. Shankardass, who will follow me, will be reviewing the long drawn out history of attempts to resolve these disputes and will, in particular, explain the circumstances of the mediation effort undertaken by the Kingdom of Saudi Arabia from 1976 onwards.

Despite the best endeavours of Saudi Arabia as mediator during the period from 1976 to 1987, it had not proved possible to secure an agreement on the substance of any of the disputes between Qatar and Bahrain. In the circumstances, King Fahd of Saudi Arabia wrote identical letters to the Rulers of Qatar and Bahrain on 19 December 1987 making a four-point proposal. Paragraph 1 of that proposal, of course, provides for reference of all the disputed matters to the International Court of Justice. Paragraph 2 of the proposal covered the maintenance of the status quo and related matters; for present purposes, I need not recite its terms. Paragraph 3, on the other hand, is significant, and its wording is important:

> "*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 both parties, be issued."

I will come back to paragraph 3 in a moment. Finally, paragraph 4 of the proposal provided for the continuance of the good offices of the Kingdom of Saudi Arabia to guarantee the implementation of these terms.

Both Qatar and Bahrain accepted this four-point proposal, so that a public announcement could be made on 21 December 1987 recording the agreement of the Parties.

Now, Bahrain has of course argued that paragraph 1 of the 1987 Agreement was expressly made conditional upon completion of the procedure outlined in paragraph 3 of the Agreement.

Thus, Bahrain contends, with reference to paragraph 1 of the 1987 Agreement:

> "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" (CMB, para. 5.12).

This argument betrays a certain misunderstanding of what is Qatar's position. Qatar has not asserted that the terms of the 1987 Agreement by themselves provided an immediate basis for enabling the Court to exercise its jurisdiction. Qatar does *not* however concede that the clear commitment of both Parties under paragraph 1 of the 1987 Agreement to accept the jurisdiction of the Court in relation to "all the disputed matters" was in any sense qualified or conditional upon the successful outcome of the activities of the committee constituted under paragraph 3.

Qatar does not underestimate the significance of paragraph 3 of the 1987 Agreement, but paragraph 3 was clearly designed to *facilitate* the reference of all the disputed matters to the Court, and not to be used as a weapon in the hands of one of the Parties to *frustrate* such a reference. Mr. Shankardass will, in the course of his presentation,

review the proceedings of the Tripartite Committee and will demonstrate that at no time was the conclusion of a "special agreement" considered to be an essential prerequisite to the establishment of the jurisdiction of the Court. Qatar was prepared to participate in the process of seeking to elaborate a "special agreement" acceptable to both Qatar and Bahrain, but most certainly did not regard the failure of the joint effort to draw up a "special agreement" within the framework of the proceedings of the Tripartite Committee as in any way invalidating the consent which both Parties had already given to the jurisdiction of the Court in relation to all matters in dispute between them by virtue of the 1987 Agreement.

3. The consent of Bahrain and Qatar to the subject-matter and scope of the disputes to be referred to the Court

It was the Doha Agreement of December 1990, which confirmed and supplemented the 1987 Agreement, and thereby finally established the jurisdiction of the Court over all the matters in dispute between Bahrain and Qatar. As I have just indicated, the 1987 Agreement had recorded the basic consent of both Parties to refer all the disputed matters to the Court for adjudication. Prima facie, the expression "all the disputed matters" would have covered the dispute relating to title over the Hawar islands, to sovereign rights over the two shoals of Dibal and Qit'at Jaradah, and to the course of the sea-bed boundary between Bahrain and Qatar. These were certainly the matters to which the mediation efforts of Saudi Arabia had been directed.

The wording of the first Principle of the Framework formally approved by both Bahrain and Qatar in 1983 clearly embraces the specific disputes between Qatar and Bahrain to which I have just made reference. On the other hand, this formulation would *not* have covered the question

of Zubarah. Bahrain indeed seems implicitly to admit that Zubarah was not included within the first Principle of the Framework, since Bahrain does *not* assert that the question of Zubarah fell within the initial scope of the Saudi Mediation. Bahrain is careful to confine itself to arguing that "The dispute over Zubarah thus forms an integral part of the *background* (I stress the word "background") to the differences between Bahrain and Qatar" (CMB, para. 2.11). Bahrain did not attempt to raise the question of Zubarah within the Framework of the Saudi Mediation until 1986, when it supposedly filed a memorandum with Saudi Arabia (CMB, para. 2.11). But Qatar never received a copy of this memorandum, nor indeed has Bahrain filed a copy of this memorandum with the Court. In addition, it is noteworthy that no reference is made to the question of Zubarah in the identical letters of 19 December, 1987 from King Fahd of Saudi Arabia to the Amirs of Bahrain and Qatar. The Court will of course be aware that it was the failure of Bahrain and Qatar to agree upon the formulation of the question or questions to be put to the Court which led to the complete breakdown in the work of the Tripartite Committee in December, 1988. As Mr. Shankardass will make clear, Qatar had made a good faith effort during the last five meetings of the Tripartite Committee between March and December, 1988, to reach agreement on the formulation of an agreed question or questions to be submitted jointly to the Court by Qatar and Bahrain. But the formulations proposed by Bahrain in their draft special agreements of March, 1988 (MQ, para. 3.37) and June, 1988 (MQ, para. 3.46) were clearly designed to prejudge, in Bahrain's favour, some of the major issues in dispute between the Parties and were therefore unacceptable to Qatar. It was not until late October, 1988, that Bahrain put forward a general formula for reference of the

disputes between Qatar and Bahrain to the Court. That general formula subsequently came to be known as "the Bahraini formula". Qatar welcomed this as a step forward but has sought some clarification of its terms. At the sixth and final meeting of the Tripartite Committee on 7 December, 1988, Qatar suggested that it could accept the inclusion of Zubarah as a subject of dispute if any Bahraini claim in respect of Zubarah was restricted to claims of private rights and not claims to sovereignty; but this suggestion was refused by Bahrain. I will not go into further detail about the final meetings of the Tripartite Committee in December 1988, as Mr. Shankardass will be covering that. All I would say is that both Qatar and Bahrain had been put on notice by Prince Saud towards the close of the fifth meeting of the Tripartite Committee on 5 November, 1988, that the King of Saudi Arabia considered that the date of the beginning of the GCC summit, in December, 1988, was the date for terminating the mission of the Tripartite Committee, whether or not it had succeeded in achieving its mission (MQ, para. 3.50). So it is quite clear that the Tripartite Committee had become *functus officio* after its sixth meeting on 7 December, 1988.

As the Court will be aware, the Saudi Arabian Mediation was continued in 1989 and 1990 as a result of decisions taken at the GCC summit meetings in Bahrain in 1988 and in Muscat in 1989, but no progress was made on the substance of the disputes between Qatar and Bahrain.

Qatar was becoming increasingly suspicious that Bahrain was intent on either withdrawing from its commitment to refer the disputed matters to the Court or on so wearying the Qatari authorities as to cause them to accept language for such a reference which would be prejudicial to Qatari interests. Qatar therefore decided to raise the subject at the opening

session of the GCC summit at Doha on 23 December, 1990. Bahrain proposed that the Saudi Arabian Mediation be further extended without any time-limit. Qatar strongly opposed this proposal. In so doing, and in order to reach a solution on the subject-matter and scope of the disputes to be referred to the Court, the Amir of Qatar stated that Qatar now accepted the "Bahraini formula". It is noteworthy that the Sultan of Oman also played a prominent role by persuading both Parties to agree to the continuance of the good offices of Saudi Arabia until May 1991, after which the Parties would be at liberty to submit the matter to the Court in accordance with the Bahraini formula. These developments opened the door to the conclusion of the Doha Agreement represented by the Agreed Minutes of 25 December, 1990. I and other of my colleagues, including Professors Salmon and Quéneudec will, in later interventions, address *inter alia* the status of the Doha Minutes as a treaty or convention in force within the meaning of Article 36(1) of the Statute, the Bahraini argument that, even if the Doha Minutes constituted a binding international agreement at the time of their conclusion, Bahrain's consent to be bound had been expressed in violation of Bahraini constitutional requirements so as to invalidate that consent, and the interpretation of the Doha Minutes, including Bahrain's false distinction between joint and unilateral seisin. For the time being, I would simply draw attention to the consideration that the Doha Minutes reaffirmed and perfected the consent of both Qatar and Bahrain to the jurisdiction of the Court over all the matters in dispute between the two States. They did so by embodying two distinct elements which had not been covered in previous exchanges, including the 1987 Agreement. These two distinct elements are:

(1) Qatari acceptance of the "Bahraini formula", that is to say, the neutral general formula which would ensure that all Qatari and Bahraini claims, including the Qatari claim to the Hawar islands and the Bahraini claim to Zubarah, would fall within the jurisdiction of the Court;

(2) An agreed date (15 May 1991), after which the Parties would be at liberty to submit the matters in dispute to the International Court of Justice in accordance with the Bahraini formula, notwithstanding the continuance of the Saudi Arabian mediation.

I should add that the Doha Minutes also served another purpose. The Tripartite Committee in 1988 had failed to fulfil the task entrusted to it under paragraph 3 of the 1987 Agreement. The Doha Minutes succeeded in elaborating alternative arrangements, including time-limits, for the reference of the matters in dispute between Bahrain and Qatar to the Court. These alternative arrangements were a substitute for the non-fulfilment by the Tripartite Committee of its mandate in 1988; they also served to ensure that legal effect could be given to the consent to the jurisdiction of the Court already given by both Bahrain and Qatar, notwithstanding efforts by one Party to frustrate reference of the disputed matters to this Court.

In sum, Mr. President, Qatar contends that the consent of both Parties to the exercise of jurisdiction by the Court over identifiable, territorial and maritime boundary disputes is evidenced by the 1987 Agreement as confirmed and supplemented by the Doha Minutes of 1990. Qatar likewise contends that, as Professor Quéneudec will demonstrate, there is a clear and acknowledged distinction between the jurisdiction of the Court to entertain a dispute or series of disputes and the method of

seisin of the Court. At the same time, Qatar denies that it ever agreed with Bahrain that the only method of seisin of the Court in relation to the disputes between the two States should be by joint submission pursuant to a special agreement. Mr. Shankardass will show that Qatar was willing to negotiate such a special agreement within the framework of the Tripartite Committee in 1988, but unfortunately it was not possible for the two States to agree upon a text before the work of the Tripartite Committee came to an end in December 1988.

Mr. President, Members of the Court, I thank you for your patience and courtesy. It would now be convenient, Mr. President, if you were to call on Mr. Shankardass. Thank you.

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

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

May I say what a very great honour and a privilege it is to address this Honourable Court and the very distinguished members of this great institution.

Sir, it is my task today to address the Court on a number of important issues on which the Parties before the Court remain divided - and, in particular, on the question whether their decision to refer their existing disputes to this Court was subject to a condition that such reference had to be by joint submission pursuant to a Special Agreement.

The Court will have seen from the opening address of the Agent for the State of Qatar, H.E. Dr. Najeeb Al-Nauimi, the presentation of Sir Ian Sinclair, and the pleadings filed by the Parties, that disputes arising out of two decisions of the British Government admittedly existed

between Qatar and Bahrain at least from 1939 onwards in respect of sovereignty over the Hawar islands; as also since December 1947 in respect of sovereign rights over the Dibal and Qit'at Jaradah shoals and the delimitation of the Qatar-Bahrain maritime boundary. An attempt was made to resolve the disputes when, in 1965, Qatar proposed a reference to arbitration, and the proposal was approved by the British Government. Bahrain at first accepted the proposal, but later frustrated the attempt at arbitration by seeking to exclude Qatar's claim to the Hawar islands.

Sir, for the purpose of addressing some of the developments relating to the subsequent efforts at resolving the disputes, with which this Court is now concerned, I will focus on four main periods: *first*, the period from the beginning of the Saudi Mediation up to the conclusion of the 1987 Agreement. I will refer to the circumstances leading to the acceptance of the proposal by both Qatar and Bahrain that their dispute had to be settled by this Court in accordance with international law; *second*, I will examine the 1987 Agreement itself and its scope as it was understood by both Bahrain and Qatar. I will seek to show the Court, from the documents and from the record of views expressed by representatives of the two Parties, that there is no substance whatever in Bahrain's contention that the commitment of the two Parties in the 1987 Agreement to refer their disputes to this Court was conditional upon the successful negotiation of a Special Agreement; *third*, I will attempt to demonstrate that although during the work of the Tripartite Committee the Parties tried to reach an agreement on the terms of a Special Agreement, this effort ultimately failed, and the Tripartite Committee ceased to function in December 1988; *fourth*, and finally, I will examine the circumstances surrounding the conclusion of the Doha Agreement, which

allowed both Qatar and Bahrain to submit their respective claims to this Court in accordance with the Bahraini formula, and the events that followed the Doha Agreement.

1. THE SAUDI MEDIATION UP UNTIL THE 1987 AGREEMENT

Following the outline I have just given, I will begin by discussing the period of the Saudi Mediation up until the 1987 Agreement.

(i) The 1976 Agreement on Saudi Mediation and the Framework

By 1976, a few years after the British presence in the Gulf had ended, it had been agreed that Saudi Arabia would act as Mediator between Qatar and Bahrain in an endeavour to resolve the outstanding disputes. The first significant stage reached in the course of the Mediation was the proposal made by King Khalid of Saudi Arabia in 1978 of a set of Five Principles which have been referred to as "the Framework" within which the Mediation was to operate. All important developments in the course of the Mediation have been affirmed to be pursuant to this Framework. The Court has already been addressed this morning about the content of the Five Principles of the Framework and I will therefore, Mr. President, only refer to those relevant to my presentation. The First Principle of the Framework, which gave an indication of the subjects of the disputes, read:

> "All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters are to be considered as complementary, indivisible issues, to be solved comprehensively together."

The Fourth Principle provided for the formation of a Committee with representatives from Qatar, Bahrain and Saudi Arabia and I quote "with the aim of reaching solutions acceptable to the two Parties". Unlike the

Committee under the 1987 Agreement, to which I will shortly refer, this Committee was charged with the task of finding solutions on the substance of the disputes. The Fifth Principle, as originally proposed, stated that if the Parties failed to reach agreement on any of the disputed matters, Saudi Arabia would be authorised to propose a compromise which would be regarded as "the solution agreed upon between the Parties". In other words, Mr. President, the compromise to be proposed by Saudi Arabia was to be the final solution.

(ii) 1981-1983: Consideration of Qatar's proposal of an amended Fifth Principle for the Framework

However, in 1981, in response to a request from Saudi Arabia for comments on the terms of the draft Framework, Qatar proposed an amended text for the Fifth Principle, suggesting, that since the dispute was a purely legal one, and so as to avoid any embarrassment in the sensitive relations between Qatar, Bahrain and Saudi Arabia, "the resolution of the dispute be left to ... the principles and rules of international law ..." and that the "decision of the authority, which will be agreed upon for this purpose, shall be final and binding on both Parties" (see, MQ, Annex II.4).

Consideration of the proposed Framework, and Qatar's amendment of the Fifth Principle, continued until May 1983, during a period of increasing tension between Qatar and Bahrain over their long-standing disputes. As explained in Qatar's Memorial (paras. 3.17-3.19), this tension was a matter of serious concern to other countries in the Gulf region - so much so that the Gulf Cooperation Council, generally referred to as the GCC, also resolved, in March 1982, to request Saudi Arabia to

use its good offices to try and resolve the disputes between Qatar and Bahrain.

Saudi Arabia subsequently convened a meeting on 22 May 1983 with representatives of Qatar and Bahrain in Riyadh and the agenda for this meeting was "to discuss the dispute on Hawar islands and the maritime boundaries" (see, MQ, para. 3.19 and Anns. II.8 and II.9). This meeting finally approved the text of the Framework including the amended text of the Fifth Principle proposed by Qatar. The acceptance by the Parties of the Fifth Principle requiring resolution of their disputes according to International Law, a fact acknowledged by Bahrain (see, CMB, para. 5.5), was, Mr. President, in a sense the first step towards referring their disputes to this Court.

During the years following the May 1983 meeting, Saudi Arabia continued to try to secure a settlement on the substance of the disputes. Despite the Saudi efforts, no significant progress was, however, made. On the other hand, there were a number of occasions when Qatar found it necessary to protest against actions by Bahrain which it considered were violations of the status quo and which led to a further increase in tension between the two countries.

(iii) The 1986 Crisis

Early in 1986 a serious crisis erupted - which the Agent for Qatar this morning referred to - when Qatar discovered that Bahrain had begun construction work on the Dibal Shoal in an attempt artificially to transform its nature from a shoal to an island and to make it a post for its coastguard. On 26 April 1986, Qatar sent a security force to put an end to this violation. Saudi Arabia immediately intervened by diplomatic

action to resolve the crisis. In his letter of 14 May 1986 (MQ, Ann. II.12, p. 79), King Fahd of Saudi Arabia called upon the parties "not to use force as long as Saudi mediation is continuing and not to execute any new works...". As a result of the Saudi intervention, the offending construction was removed. Saudi Arabia also intensified its efforts to find a solution for the long-standing disputes. Unfortunately, success continued to elude the Saudi efforts; and complaints by both Parties about infringements of the status quo continued. It was against this background, Mr. President, that Saudi Arabia eventually brought about what has been called the 1987 Agreement - to which I will now turn.

2. THE AGREEMENT OF DECEMBER 1987

Because Saudi Arabia had not succeeded in securing a resolution of the disputes through its own Mediation since 1976 - that is in a period of over 11 years - King Fahd eventually decided to invoke the Fifth Principle of the Framework - that the disputes be settled in accordance with international law by an authority whose decision would be final and binding on both Parties. In his identical letters of 19 December 1987 (see, MQ, Ann. II.15, p. 103) to the Amirs of Qatar and Bahrain, King Fahd proposed to the two Parties an effective alternative means of reaching a final and just solution - words that I will have occasion to refer to again - to what he termed "the long-standing dispute ... over the sovereignty over Hawar islands, the maritime boundaries of the two brotherly countries, and any other matters". He called upon them to agree to refer their disputes to this Court for a final and binding

ruling. Both Bahrain and Qatar accepted this proposal and "the 1987 Agreement" came into existence.

I believe, Mr. President, it is appropriate for me to recall (in this instance by using the United Nations translation which Bahrain prefers) the relevant paragraphs of the new Agreement that had been reached. These were:

> "1. 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.
>
> 2. (The second paragraph referred to maintenance of the status quo).
>
> 3. 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 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.
>
> 4. The Kingdom of Saudi Arabia shall continue to use its good offices to ensure that these conditions are fulfilled."
> (United Nations translation; see CMB, Vol. II, Ann. 1.3.)

The Court will have noticed from Qatar's pleadings that the announcement of this 1987 Agreement by Saudi Arabia in December 1987 was welcomed by member States of the GCC as is shown by a newspaper report which appeared in the Gulf Times of 29 December 1987 (see, RQ, Ann. I.2), which said:

> "Saudi Foreign Minister Prince Saud al-Faisal has said that the GCC was very happy that the two sisterly states of Qatar and Bahrain had decided to settle their territorial dispute by referring it to the International Court of Justice.
>
> Prince Saud, who was answering a question from an Egyptian journalist at Sunday night's Press conference at the close of the day's sessions of the GCC Summit, said the submission of the issue to the Court was something natural, since the GCC members were members of the United Nations.

'Therefore they were supposed to make use of that framework, specially as the case is of a legal nature and deals with borders' he added." (See, RQ, Ann. 1.2, p. 13).

The Court will see that a solution for resolving the long pending disputes had been found and agreed. All that remained was to ascertain and follow the procedure for implementing it. The Parties had at that stage apparently not applied their minds in any way as to the particular Rules of the Court which were to be invoked to implement their decision. That appears to be the reason why they opted for a procedural solution through the constitution of a Tripartite Committee.

In contrast to the Committee formed under the Framework whose task as I said was to find solutions on the substance of the disputes, the Tripartite Committee under the third paragraph of the 1987 Agreement was to be constituted merely for procedural purposes, i.e., "for the purpose of *communicating with* the International Court of Justice and *completing the requirements for referral of the dispute thereto* in accordance with the Court's regulations and instructions..." (see, CMB, Ann. 1.3, p. 18, para. 3; emphasis added). Mr. President, it is impossible to see how Bahrain can contend that this enabling provision for "communicating with" the Court and "completing the requirements" of its regulations to implement the agreement was a condition *requiring joint submission to the Court pursuant to a special agreement* and that otherwise the disputes could not be submitted to the Court. I submit, Mr. President, that Bahrain is wrong in contending (see, CMB, para. 5.13) that "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". The implementation of the decision in the first paragraph to refer the dispute to this Court was dependent upon the

applicable Rules of this Court and not upon the "activity" of the Tripartite Committee as such.

As I have already explained, prior to the 1987 Agreement the Parties had not addressed the question of the method of approach to the Court. In any event, the text of the 1987 Agreement says nothing about a Special Agreement. To the contrary, it is clear that part of the task of the Committee established under the third paragraph was to ascertain an appropriate method. As I will presently show, even Bahrain admits to having concluded sometime *after* the 1987 Agreement was reached that "contact with the Court should be through a Special Agreement".

Bahrain asserts that prior to the 1987 Agreement the Parties had always thought in terms of a "joint submission" and never in terms of a unilateral application; and that this background is a "pertinent consideration" in the interpretation of the 1987 Agreement (see, CMB, paras. 5.3-5.6 and RB, para. 4.03). To support this assertion Bahrain relies on Qatar's proposal of arbitration in 1965; on the fact that the Framework described all issues of dispute between the Parties as being of a complementary, indivisible nature to be solved comprehensively together; and on King Fahd's proposal that the 1986 Dibal crisis might have to be resolved by arbitration sanctioned by both Parties. In fact, Mr. President, as is obvious, none of Bahrain's so-called pertinent considerations has anything whatever to do with the method of approaching *this* Court. Bahrain also cites the *Dubai-Sharjah* arbitration as an acceptable precedent of a joint submission in the Gulf area (see, CMB, para. 1.7). I submit, Mr. President, *firstly* that it is obvious the *Dubai-Sharjah* case is not a valid precedent to cite for the simple reason that the parties in that case are members of a Federal State, namely the

United Arab Emirates, and could not have brought their dispute to this Court in any event; and *secondly*, it is most important to keep in view the significant fact that in December 1987 King Fahd did not propose a joint reference to arbitration by nominated arbitrators (which would have required a further elaborate agreement) as in the *Dubai-Sharjah* case, but instead proposed a reference to a permanent institution, i.e., *this* Court with its established rules of procedure which permit the invoking of its jurisdiction by a unilateral application or a reference (joint or otherwise) under a Special Agreement.

In the light of these facts, there can be no justification whatever for Bahrain's contention that the 1987 Agreement

> "though evidently contemplating the eventual submission of the dispute to the Court, was clearly conditional upon the successful negotiation of a Special Agreement ..." (see, CMB, para. 1.6),

or for the statement that the 1987 Agreement was merely "a commitment to negotiate in good faith a Special Agreement" (see, CMB, para. 7.1). As I will show from the record of proceedings of the Tripartite Committee, the 1987 Agreement was clearly understood and repeatedly referred to by all the parties as embodying *the commitment* of Bahrain and Qatar *to submit their disputes to the Court* (see, e.g., the Signed Minutes of the First Tripartite Committee Meeting-Qatar's T.C.M. Documents, p. 51).

3. PROCEEDINGS OF THE TRIPARTITE COMMITTEE

I now turn to the period after the conclusion of the 1987 Agreement and, in particular, the Meetings of the Tripartite Committee. Bahrain seeks to rely on what it calls "the conduct of the Parties in the period following the acceptance of the Agreement" and argues that this conduct shows that the Parties "immediately and continuously recognized that they

had to negotiate an agreement for a joint submission" (see, CMB, paras. 5.20 *et seq.*).

I would respectfully submit, Mr. President, that when two States agree to refer their disputes to this Court, it would be natural for them to try to see if they could also mutually agree on the terms of a special agreement and the procedure to be followed (which may, or may not, necessarily provide for a joint reference). But surely, Sir, that does not mean that another available method of approach is precluded if they do not reach a special agreement. Qatar has never denied that during the Tripartite Committee Meetings the Parties tried to reach a mutual agreement on the text of a special agreement, an effort which ended in failure when the Tripartite Committee ceased to function in December of 1988.

What Qatar does not accept, however, is Bahrain's proposition that the Parties "*immediately and continuously recognized* that they *had* to negotiate an agreement for a joint submission". Such a proposition finds no support in the facts, as I will now show.

(i) The preliminary meeting of the Tripartite Committee and the draft procedural proposals

At the time of the GCC Summit meeting in Riyadh in December 1987 at which the 1987 Agreement was announced, there was a preliminary informal meeting of representatives of Saudi Arabia, Qatar and Bahrain where both Qatar and Bahrain presented draft proposals in respect of the *procedure* to be followed for "communicating with the Court". This was an initiative by the Parties to begin implementation of the third paragraph of the 1987 Agreement. Finding no evidence in the text itself to support its argument that the 1987 Agreement was conditional upon the conclusion

of a Special Agreement, Bahrain seeks to buttress its argument by praying in aid these two procedural proposals (see, CMB, paras. 5.21-5.24).

This, I submit with respect, Mr. President, is really scraping the bottom of the barrel. The proposals referred to by Bahrain which were made just after the conclusion of the 1987 Agreement were not agreed to. It must be doubtful therefore whether they can be of any relevance. This would be bad enough if Bahrain had not, as I will shortly explain, also misdescribed its own proposal.

Qatar's proposal consisted of a draft joint letter from Qatar and Bahrain to be sent to the Registrar of this Court *immediately* informing the Registrar of three things:

First, a list of the disputes between Qatar and Bahrain; Second, that Qatar and Bahrain had agreed to submit the disputes to the Court; and Third, that the two States were now opening negotiations for a Special Agreement.

Qatar's aim in making its proposal was to get the matter before the Court as soon as possible. But according to Bahrain this shows that Qatar itself thought that the 1987 Agreement meant that a special agreement was "necessary". This cannot be true, Mr. President, because, as I shall explain, during the first Meeting of the Tripartite Committee, Qatar was careful to avoid any language which would limit the Committee's role only to that of helping the parties to reach a special agreement. In any event Bahrain rejected Qatar's proposal that I have just described which then ceased to be a factor in the negotiations.

On the other hand, Bahrain's original procedural proposal consisted of a draft agreement to be signed by both Parties, but contained no special agreement language at all. It expressed profound appreciation

for Saudi Arabia's help to the two parties in reaching what Bahrain called in the preamble to its draft "a final and just solution for the disputed matters between them by submitting these matters to the International Court of Justice". Article 1, paragraph 1, of the draft described the aim of the Committee as "*contacting* the International Court of Justice" and "fulfilling all the requirements necessary to have the dispute submitted to the Court according to its procedures and so that a final and binding judgment be rendered" (see, MQ, Ann. II.17). The Court will no doubt immediately recognize that this language reflects the language of the 1987 Agreement itself and contains no implication of conditionality and no suggestion that Bahrain thought that the work of the Tripartite Committee was to be concerned only with a special agreement.

In fact Qatar offered to accept this draft proposal during the first formal Tripartite Committee meeting on 17 January 1988; but at this stage, i.e., several weeks after the 1987 Agreement was reached, Bahrain sought to amend this first draft by changing the description of the aim of the Tripartite Committee from "contacting the International Court of Justice and fulfilling all its requirements ..." to "*reaching* a Special Agreement ..." - an amendment which Qatar rejected.

Bahrain's Counter-Memorial (in paragraph 5.1) contains a serious inaccuracy (I note in parentheses that this is a fact which Bahrain now accepts - as will be seen from footnote 31 at page 15 of Bahrain's Rejoinder). The inaccuracy is in the attempt to suggest that Bahrain's own draft procedural agreement referred to a special agreement. As I have just shown, Bahrain sought to add such a reference by an amendment which Qatar rejected. Despite this rejection, Bahrain annexed only the

amended draft agreement as Annex 1.5 to its Counter-Memorial and then proceeded to use it, together with a reference to Qatar's proposal to support its assertion that a Special Agreement was always regarded as a prerequisite to the making of a reference to this Court.

Thus, Mr. President, the amended draft that Bahrain refers to in paragraph 5.21 of the Counter-Memorial is of little help to its cause. *First*, it was not Bahrain's first reaction. *Second*, the amendment proposed by Bahrain was categorically rejected by Qatar precisely because of its reference to a special agreement, and this rejection encountered no comment or protest either from the Mediator or Bahrain. *Third*, and most importantly, the very fact that Bahrain felt it necessary to amend its first draft clearly implies that it did not think that in and of itself the language of the 1987 Agreement required a special agreement. If the language of the 1987 Agreement had already required a special agreement as Bahrain now alleges, Bahrain would not have needed to revise that language to specify the need for a special agreement. The truth Mr. President is that the 1987 Agreement contained no such requirement.

There is thus no substance in Bahrain's contention that the 1987 Agreement was "clearly conditional upon the successful negotiation of a special agreement" (see, CMB, para. 1.6). There is no evidence for this in the text of the Agreement, nor can any evidence be found in the draft procedural proposals presented by Qatar and Bahrain that I have just referred to.

Let me now turn, Mr. President, to the deliberations of the First Meeting of the Tripartite Committee.

(ii) The First Meeting of the Tripartite Committee

The discussions in this First Meeting on 17 January 1988 clearly shows that those present did not think a special agreement was the only method available for the approach to the Court. The comments of the Chairman of the Meeting, Prince Saud Al-Faisal, the Foreign Minister of Saudi Arabia, are particularly pertinent in this regard. He opened the meeting by defining its main purpose as considering "*ways and means* for referring the issue to the International Court of Justice" (see, Minutes of the First Meeting of the Tripartite Committee, Qatar's T.C.M. Documents, p. 4). Later in the meeting he stated that the only concern was "to discuss *how* to refer the subject to the International Court of Justice" (*ibid.*, p. 21).

Such statements, Mr. President, make no sense whatever if it is assumed an agreement had already been reached to pursue only the method of a special agreement.

Even more striking is the explanation of Bahrain's attempt to amend its first draft procedural proposal (that I have just referred to) - so as to include a reference to a special agreement - given by Dr. Al-Baharna, one of Bahrain's representatives in the Tripartite Committee Meetings, and now the distinguished Agent for the State of Bahrain in this case. He said:

> "The procedural agreement (i.e., Bahrain's first draft) referred to the contact, but *after referring the subject to the experts we learned that the contact with the Court should be through a special agreement* that would allow the Court to consider the subject." (Minutes of the First Tripartite Committee Meeting, CMQ, Documents, p. 9; emphasis added.)

This, Mr. President, is again clear evidence that at the time of the 1987 Agreement Bahrain did not think that the conclusion of a special

agreement was the only method of "contacting" the Court. It was only later, after consultation with "experts" that Bahrain decided the method of approach should be through a special agreement. However, this was a separate conclusion that Bahrain had reached, not something required by the 1987 Agreement.

In this context it is also significant that when Dr. Al-Baharna stressed at the First Meeting that "what is required is a special agreement specifying the disputed points and giving the Court the authority to consider the matter", Dr. Hassan Kamel for Qatar read out paragraph 1 of Article 40 of the Court's Statute and drew attention to the fact that it provides for cases to be brought before the Court either by notification of a special agreement or by a written application (see, Minutes of the First Meeting of the Tripartite Committee, Qatar's T.C.M. Documents, p. 10). He was thus drawing the Committee's attention to both the available methods of contacting or approaching the Court.

It is also important to stress that during the meeting Prince Saud of Saudi Arabia expressly referred to the *commitment* of Bahrain and Qatar to refer their disputes to the Court and to the Committee's duty to transform the commitment into a submission to the Court; and said that if it did not do so "this would mean the Committee does not honour its commitments" (Minutes of the First Tripartite Meeting, Qatar's T.C.M. Documents, p. 22). However, as I said earlier, at this First Meeting of the Tripartite Committee both Parties rejected each other's draft of the procedural proposals. Therefore, the question of how to make a reference to the Court remained unsolved. The record of the proceedings of the First Meeting clearly demonstrates that the Parties'

ideas on the question of how the disputes were to be submitted to the Court had not yet crystallized.

Finally, Mr. President, it is illuminating to note that Bahrain's own translation of the Signed Minutes of the Tripartite Committee's First Meeting annexed to Bahrain's Rejoinder records that it met, that is, the Committee met, "to consider *the procedures* by which the *commitment* of the State of Bahrain and the State of Qatar to refer the differences between them both to the International Court of Justice would be implemented" (see, Ann. I.1, p. 83; emphasis added). These Minutes demonstrate Bahrain's own clear understanding of the scope of the first and third paragraphs of the 1987 Agreement; that is that the decision to refer the dispute to the Court was *a commitment* and the work of the Tripartite Committee was merely "to consider the *procedures* to implement the commitment". This was in fact the common understanding of the two Parties and it is therefore impossible, Mr. President, to understand how Bahrain can today contend that the *commitment* or what Bahrain also describes as *"an undertaking"* (see, RejB, para. 1.04) of the Parties was "vitally qualified by the provision for the formation of a committee" (see, CMB, para. 5.12). As already explained, the role of the committee was merely to assist the Parties in determining and completing the procedural requirements of this Court's Rules. All this is in itself evidence that the 1987 Agreement did not *require* a special agreement.

It is true that in view of Bahrain's insistence at the First Meeting that a special agreement was the appropriate way to refer the dispute between the Parties to the Court, the Tripartite Committee then entered upon an exercise to see if an acceptable special agreement could in fact be finalised. As Qatar has shown in its written pleadings, this attempt

to reach a special agreement ended in failure in December 1988, when the Tripartite Committee ceased to function, but at no time was it stated or even contemplated that if no special agreement was reached the commitment of the Parties in the 1987 Agreement to refer their disputes to the Court would not be implemented.

(iii) The Draft Special Agreements

After the First meeting of the Tripartite Committee, both Bahrain and Qatar submitted in March 1988 drafts of a suggested text for a special agreement. The Court will have seen from Qatar's Memorial that in Article II of its draft the following questions were raised (see, MQ, Ann. II.21):

> "1. To which of the two States does sovereignty over Hawar islands belong?
>
> 2. What is the legal status of the Dibal and Jaradeh shoals? In particular, does either State have sovereignty, if any, over the Dibal or Jaradeh shoal or any part of either shoal?
>
> 3. By a letter dated 23 December 1947, the British Political Agent in Bahrain informed the Ruler of Qatar and the Ruler of Bahrain of the decision of the British Government establishing the existing median line which at present determines the respective continental shelves of the two States. Does that median line represent the right boundary between the said continental shelves?
>
> 4. Having regard to the answers to questions one, two and three, what should be the course of the boundary or boundaries between the maritime areas appertaining respectively to the State of Qatar and the State of Bahrain?"

Mr. President and Members of the Court, I submit to you with great respect, that this description of the issues to be referred to the Court accurately reflected the disputes which the parties sought a resolution of under the Framework and under the 1987 Agreement.

As I mentioned a short while ago, the Framework had referred to "All issues of dispute between the two countries relating to sovereignty over the islands, maritime boundaries and territorial waters"; and King Fahd of Saudi Arabia had proposed the 1987 Agreement "as a basis for settling the dispute", which he had stated (in his letter of 19 December 1987) was "with respect to sovereignty over the Hawar Islands, the marine boundary between the two brotherly countries and any other matters". This was therefore a description of the disputes which had already been accepted by both Parties and was now incorporated in the questions which I have just read that Qatar proposed should be included in a special agreement. As against this, Mr. President, let me now read out to you Bahrain's unbelievably slanted description of the disputes contained in its draft special agreement also submitted in March 1988:

"1. The Parties request the Court

(a) to draw a single maritime boundary between the respective maritime areas of Bahrain and Qatar; such boundary to pass between the easternmost features of the Bahrain archipelago including most pertinently the Hawar Islands, Fasht ad Dibal and other adjacent or neighbouring features and the coast of Qatar, and to preserve Bahrain's rights in the pearling banks which lie to the north east of the Fasht ad Dibal, and in the fisheries between the Bahrain archipelago and Qatar

(b) to determine the rights of the State of Bahrain in and around Zubarah." (see, MQ, Annex II.22.)

As the Court will see, this description of the disputes to be referred to the Court assumed there was no dispute with regard to the Hawar Islands or the Dibal and Qit'at Jaradah shoals and in effect required an advance recognition by Qatar that these belonged to Bahrain. The question posed by Bahrain only asked for a decision of the Court on a maritime boundary based upon recognition, despite the fact that the

Framework and the December 1987 Agreement clearly showed that disputes relating to these islands and shoals were outstanding. Furthermore, as has been explained by Sir Ian Sinclair, Qatar was made aware of a claim - which had at no time been the subject matter of Saudi Arabia's Mediation - for the determination by the Court of Bahrain's alleged rights "in and around Zubara" on the western coast of Qatar, without any indication of the nature or basis of such rights. Bahrain acknowledges that the claims to Zubarah were not included in the First Principle of the Saudi Framework (see, CMB, para. 5.4) but alleges that it brought the issue of Zubarah to Saudi Arabia's notice in 1986. As Sir Ian Sinclair has already explained to the Court, Bahrain has offered no evidence in these proceedings in support of this allegation, nor indeed that Qatar was informed.

Bahrain also included in its draft text a provision which would have in effect prevented Qatar from adducing evidence relevant to show the existence and nature of the disputes. This provision - Article V - will be discussed in detail by my colleague Professor Jean Salmon in a later presentation. It suffices for me to mention here that Qatar also strongly rejected this provision.

The terms of Bahrain's draft, which Qatar found outrageous, also gave grounds for a strong suspicion that Bahrain had decided either to obstruct the reference of the disputed matters to the Court in the same way as it had frustrated the 1965 decision to go to arbitration, or to use the opportunity of drafting a Special Agreement radically to transform the scope of the issues to be referred, by ignoring those issues which had been the subject matter of the Mediation under the Framework, and by adding new issues, including that of Zubarah. The Amir

of Qatar said as much in his letter of 25 March 1988 to King Fahd conveying his "total rejection" of the Bahraini draft coupled with his "strongest protest" at this development.

It is also useful to refer to the Memorandum of 27 March 1988 incorporating Qatar's detailed views on Bahrain's proposed Special Agreement circulated to the Tripartite Committee, in which Qatar submitted that the terms of the Bahraini draft, including Article V, meant:

> "the imposition on the State of Qatar of express admission of the non-existence of the dispute which actually exists between it and the State of Bahrain ... and of conceding all Bahrain's claims as well as abstaining from including in the evidence and arguments presented by it any document whose dates precede the date of the Special Agreement.
>
> In the face of all this, the Government of the State of Qatar cannot but totally reject the Bahraini draft, and couple this rejection with the strongest possible protest". (See, M.Q., Annex II.24, p. 165.)

(iv) The Second Tripartite Committee Meeting

The drafts submitted by the two Parties were taken up for discussion at the Second Meeting of the Tripartite Committee held on 3 April 1988 when the above views were conveyed to Bahrain.

It was in this Meeting after both Parties had rejected each other's description of the disputes to be referred to the Court, that the Chairman of the meeting, Prince Saud, observed:

> "There are two possible attitudes representing two different perspectives. Would it be possible, he asked, merely to inform the Court that disagreements exist between the countries as Qatar claims so and so, while Bahrain claims so and so ? Or, could we agree on points to be put before the Court ?" (See, Minutes of the Second Tripartite Committee Meeting, Qatar's T.C.M. Documents, p. 84).

In many ways, Mr. President, this question became the crucial issue and marked the beginning of the realisation that it might be difficult to agree on a list of subjects to be included in a common document for a joint submission, even if a Special Agreement was concluded and that each Party would have to place its own separate claims separately before the Court. In fact, Prince Saud summarized the position at the end of the Meeting by saying: "The question to be put to both countries is the following: could all the points evoked by the two countries be included in a common document to be put before the Court ?" (*Ibid.*, p. 87.) The Parties took time to consider their response to this question.

(v) The Third Tripartite Committee Meeting

At the commencement of the Third Meeting of the Tripartite Committee held on 17 April 1988 in Riyadh, Prince Saud reminded those present that:

> "we are not discussing the case in its entirety but investigating the format in which it is to be brought before the Court". (see, Minutes of the Third Tripartite Committee Meeting, Qatar's T.C.M. Documents, p. 111).

However, at this Third Meeting the question posed by Prince Saud was not specifically addressed and the meeting continued to discuss the drafts of the Special Agreement presented by each of the States at the previous Meeting without reaching any agreement. Bahrain continued to take the position that the subjects of the dispute were not defined, Dr. Al-Baharna, Bahrain's representative, stating:

> "The State of Bahrain considers that there has not been a legal agreement on the matters in dispute, and consequently the task of the committee is to define the subjects of dispute irrespective of any proposals or exchange occurring during the mediation period. Sadly, we have not yet reached that stage." (*Ibid.*, p. 131).

On the other hand Dr. Hassan Kamel for Qatar, took the position that:

"this committee has no brief to discuss or identify the matters differed upon, since the matters in dispute are defined within the framework of the mediation" (*ibid.*, p. 133).

The Court will observe that the emphasis in the deliberations of the Committee had shifted. Now, instead of considering ways of "communicating with" the Court and "completing the requirements for referral of the dispute" the Committee became engaged in a controversy on what the disputes were. Qatar maintained that the issues in dispute had been clearly defined during the Mediation, while Bahrain claimed that this was not so and sought the inclusion of a number of other issues. It was this controversy which, from the Second Meeting onwards, dominated the proceedings of the Tripartite Committee and not the method of "communicating with" this Court either through a Special Agreement or otherwise.

Both Parties however continued to reiterate their *commitment* to refer the disputes to the Court. Dr. Hassan Kamel stated on behalf of Qatar:

> "We are as brothers, as brothers who have made a commitment to refer their disputes to the International Court of Justice. What do we have to do to fulfil this commitment ? We have to agree on a reasonable formula acceptable to both sides." (*Ibid.*, p. 116.)

Sheikh Mohammad bin Mubarak Al Khalifa, Foreign Minister of Bahrain, stated:

> "Bahrain insists that the laudable efforts of Saudi Arabia must continue as shown in the letter of 19.12.1987 from the Custodian of the Two Holy Mosques, until such time as a judgment is given by the International Court of Justice." (*Ibid.*, p. 126).

Except for these statements reiterating the commitment to come to this Court with their disputes, The Third Meeting ended inconclusively.

(vi) The Fourth Tripartite Committee Meeting

The Fourth Meeting of the Tripartite Committee took place on 28th June 1988 in Jeddah. Prior to this Meeting both Bahrain and Qatar had submitted revised descriptions of the disputes to be included in a possible Special Agreement. The revised draft version presented by Bahrain was again found unacceptable by Qatar for substantially the same reasons as in the case of the first draft.

In his letter of 9 July 1988, sent after the Fourth Meeting, the Amir of Qatar again complained to King Fahd of Saudi Arabia that in its revised draft Bahrain had followed the very course it took in preparing its first draft, entirely ignoring the fact that the subjects of dispute for reference to this Court were defined by the First Principle of the Saudi Mediation; and that Bahrain's action appeared to be designed to block a reference to this Court (see MQ, Annex II.28).

In spite of the objectionable nature of Bahrain's description of the dispute in its second draft, Bahrain's Foreign Minister claimed that Bahrain was disappointed and dissatisfied with Qatar's new proposal and alleged that all concessions were being made only by Bahrain (see Minutes of the Fourth Tripartite Committee Meeting, Qatar's T.C.M. Documents, p. 168).

The so-called "concession" in the new Bahraini draft he was presumably referring to was, that instead of asking the Court to draw a maritime boundary east of Hawar (that is implying a recognition in advance by Qatar that the Hawar islands belonged to Bahrain), the Parties were now to ask the Court to consider the limited question of the extent to which the two States had "exercised sovereignty over

the Hawar islands". In reality this formulation was just as unsatisfactory as Bahrain's former draft. Moreover, the maritime boundary was still to be drawn so as to grant Dibal and Qit'at Jaradah shoals to Bahrain (see, MQ, Annex II.27).

The Fourth Meeting, therefore, ended with a sense of despair amongst Qatar's delegation, without any further progress.

At this stage, the search for a formula describing the issues in dispute in a manner acceptable to both Qatar and Bahrain had reached a deadlock, and no effort was made to summon another Meeting of the Committee for some months. As I have said, the issue now was: could the Parties agree on a list of subjects to be referred to the Court? And if not, was there some way (regardless of whether this would be by a joint submission or otherwise) in which each Party could place its own claims before the Court - a question which Had been posed by Prince Saud at the Second Meeting and still remained unanswered. Mr. President, perhaps this would be an appropriate moment to stop.

The PRESIDENT: Thank you, Mr. Shankardass. The Court will now rise, and the hearings will be resumed tomorrow at 10 a.m.

The Court rose at 1.10 p.m.
