CR 94/5

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1994

Public sitting

held on Monday 7 March 1994, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

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

(Qatar v. Bahrain)

VERBATIM RECORD

ANNEE 1994

Audience publique

tenue le lundi 7 mars 1994, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

(Qatar c. Bahreïn)

COMPTE RENDU

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

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

MM. Valticos,
Ruda, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

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

as Agent and Counsel;

Mr. Adel Sherbini, Legal Expert,

as Legal Adviser;

Mr. Sami Abushaikha, Legal Expert,

as Legal Adviser;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

The Government of Bahrain is represented by:

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

as Agent and Counsel;

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

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

Le Gouvernement du Qatar est représenté par :

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

comme *agent et conseil;*

M. Adel Sherbini, expert juridique,

comme *conseiller juridique;*

M. Sami Abushaikha, expert juridique,

comme *conseiller juridique;*

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

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

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

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

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

comme *conseils et avocats;*

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

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

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

Le Gouvernement de Bahreïn est représenté par :

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

comme agent et conseil;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel.

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

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

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

comme conseils et avocats;

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

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

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

comme conseils.

THE PRESIDENT: Je vous prie de vous asseoir. La Cour reprend ce matin ses audiences pour entendre les représentants de Bahreïn dans la suite de leurs plaidoiries en l'affaire de la *Délimitation maritime et des questions territoriales entre Qatar et Bahreïn, compétence et recevabilité.* J'appelle à la barre le professeur Lauterpacht.

PROFESSOR LAUTERPACHT:

SECTION 1 - THE LEGAL STATUS OF THE 1990 MINUTES

Thank you Mr. President. Mr. President and Members of the Court. You will recall that I concluded my argument on Friday by suggesting that, although Qatar might attempt to distort the significance of the Bahrain Foreign Minister's statement by pointing out that it was made long after the relevant events, the fact remained that Qatar has put in no evidence to contradict it. In such circumstances, I submitted, the Court is entitled to pay regard to what the Minister said as regards his intentions or more pertinently, the intentions of Bahrain during the Doha discussions.

Evidential value of statements by Foreign Ministers

I have been unable to find any case in which this Court or any other international tribunal has rejected the evidence submitted by a Foreign Minister as excluding his intention to enter into a commitment binding his State. There is certainly no *a priori* reason for excluding such relevant and uncontradicted evidence. At one point (CR 94/2, p. 66) Professor Quéneudec appeared to be arguing that such evidence was irrelevant because reliance upon it, as he said,

> "amounts to forgetting that an agreement between States is not necessarily made on the basis of the intentions of this or that party but only on the basis of a written formulation of what appears to be the expression of the common intention of the authors of the text".

That is what Professor Quéneudec said. However that may be, the real point in this case is that the statement of the Minister stands as the clearest evidence of the *absence* of a common intention. Here we are concerned not with *stating* a common intention regarding the meaning of certain words used in a text. We are concerned with the very opposite. Where the sole representative of one of the Parties says in relation to a particular episode: "I had no intention of binding my country to the possibility of unilateral submission to the Court", that entirely excludes the existence of the requisite common intention to bring such a commitment into existence.

In this same connection, it is also necessary to respond to the proposition advanced on behalf of Qatar that the Foreign Minister's statement cannot be taken into account as an item of *travaux préparatoires* in determining the meaning of the Minutes. That argument mistakes the use that Bahrain makes of the Foreign Minister's statement. It is not introduced as itself being part of the *travaux préparatoires*. For one thing, since Bahrain argues that the Minutes are not a treaty, the concept of *travaux préparatoires* as an aid to treaty interpretation, as such is not relevant. But in so far as *travaux préparatoires* are relevant as a common sense aid to identifying the nature of the situation, the statement is introduced as *evidence* of the *travaux préparatoires* - a very different thing. The replacement in the Minutes of the words "either of the two parties" by the words "the parties" is an

objective fact. The Foreign Minister's statement is merely the means by which that point is proved and a meaning is put upon the alteration.

The legal status of the 1990 Minutes

I now turn, Mr. President, to the considerations which support Bahrain's submission that the 1990 Minutes do not amount to a binding treaty or other agreement. The relevant part of Qatar's argument in the contrary sense was presented by my learned friend, Sir Ian Sinclair. I shall, therefore, begin by inviting the Court to scrutinize closely the relevant pages of the Court's record, CR 94/2. The material pages are those between pages 24 and 38. It is there, if anywhere, that one must expect to find the most vital part of Qatar's case - the proof of the assertion that the 1990 Minutes constitute a treaty. If the Court is not persuaded by this section of Qatar's argument, the whole of the rest of Qatar's case fails. Everyone who has spoken on behalf of Qatar has proceeded on the assumption that the 1990 Minutes are an international agreement. Only Sir Ian Sinclair sets about trying to prove it.

Leaving aside Sir Ian's examination of *doctrine* on the subject, the real question is, how does he treat the facts of this case so as to reach the conclusion that he seeks? Where is the evidence that Bahrain intended to create a binding legal relationship with Qatar operating between them within the sphere of international law?

Designation of 1990 Minutes in same terms as the Minutes of 1988

Permit me to go rapidly through the pages of the relevant section of Sir Ian's argument. First, at page 27, he observes that "the fact that the Doha Minutes are designated as 'minutes' is, of course, far from being evidence that they do not constitute an international agreement".

As a purely theoretical point, I would not quarrel with that. But we are not in a purely theoretical sphere. Here we are in the realm of hard facts. And the relevant facts are that in Arabic the 1990 Minutes carry the same titles as the Minutes of the Tripartite Committee meetings held on 17 January and 7 December 1988 - the title was "Minutes of a Meeting". If, therefore, the title given to the 1990 Minutes is to be given the same weight as an indicator of intention as is given to the same title in the earlier Minutes of 1988, signed by the two sides, the title "Minutes of Meeting" by itself is emphatically not an indication that the minutes are intended to be legally binding - in the sense of a final agreement. Like other "Minutes" they record provisionally agreed steps en route to a final agreement.

Failure of Qatar to establish treaty character of the 1990 Minutes

So what does counsel for Qatar next introduce as proof that the Doha Minutes were intended to be legally binding? Four elements are listed in the middle of page 30 of the CR.

The first is an examination of the terms used to express the intentions of the Parties. This immediately becomes not a demonstration of "intention" but an indication of some operative provisions of the minutes - the reaffirmation of what had previously been agreed; the statement that the Parties would be at liberty to submit the matter to the Court after 15 May 1991; and the acceptance by Qatar of the Bahraini formula. Those items are described by Qatar as "self-evidently a commitment of a legal character" and "self-evidently the written expression of a legal commitment undertaken by Qatar". But to speak in this way of something being "self-evidently" a "legal commitment"

involves assuming precisely the conclusion that Qatar must prove. One must bear in mind that the mere fact that something is written down in a document, even with the use of the verb "agreed", does not create a legally binding agreement. This, so I am told, is particularly so in Arabic.

Background and circumstances of 1990 Minutes do not establish their treaty character

Next, counsel for Qatar presents the "background against which the text was negotiated" as confirming the legal character of the commitment of the two Parties (p. 31). But when carefully read it will be seen that the subject-matter of the passage in which this point is pursued has no bearing on the alleged legal character of the commitment. The paragraph contains the following four items said to be "of particular significance in ascertaining the object and purpose of the Treaty": the failure of Saudi Arabia to secure a solution to the dispute: Saudi Arabia's initiative leading to the conclusion of the 1987 Agreement; the setback to the process of referring the disputed matters to the Court; and the subsequent lack of progress by Saudi Arabia in 1989 and 1990. My learned friend's conclusion on this "background" - which we must remember was introduced by him as a contribution towards "confirming the legal character of the commitments of the Parties" was as follows:

> "our notional observer would no doubt have anticipated in these circumstances that a major effort would be made at the Gulf Co-operation Council summit meeting in Doha in 1990 to breathe new life into the agreed proposal that the matters in dispute between Bahrain and Qatar should be referred to this Court; and our notional observer would not have been mistaken".

But how do words such as these secure the conversion of these background matters into proof that the Minutes were intended to be a

legally-binding treaty? And who is our "notional observer"? For the purposes of this discussion there cannot be a "notional" observer. He has to be an actual participant and that can only be Shaikh Mohammed, the Bahraini Foreign Minister. And he would not have anticipated any such development at the Doha meeting because he would have known that in the course of the meeting held in early December 1990 to fix the summit agenda a decision had been taken to exclude the dispute from discussion.

So, what comes next in the Qatari chronicle of matters said to demonstrate the legal character of the Minutes? On page 32 there begins a section with the words: "This brings me to a consideration of the circumstances in which the text of the Doha Minutes was adopted." But the fact that this section is presented as part of an argument that the Doha Minutes are legally binding seems then to have been overlooked, in my learned friend's speech. First, there are paragraphs about "the strange episode of the appearance of Dr. Al-Baharna at Doha" - to which the Agent has already replied. Then the suggestion is put forward (p. 33) that it is astonishing that Bahrain made no attempt to secure the inclusion in the Minutes of a reference to the continuing need for a Special Agreement. Astonishing or not, it is difficult to see how the absence of such an attempt constitutes proof that the Minutes are a legally-binding agreement. In any case, given that the Parties had previously agreed to proceed *via* a special agreement, the reaffirmation of that agreement in paragraph 1 of the Minutes was a sufficient statement of their intention.

The next point (at p. 35) is described by Sir Ian as "more general". There he stresses the "importance of the history of the negotiation of a compromissory clause in the context of a challenge by a State to the

jurisdiction of the Court based on that compromissory clause". Once again, it is impossible to discern in this point any contribution to the proof of the proposition that the 1990 Minutes were a legally binding agreement.

Subsequent conduct does not establish treaty status of the 1990 Minutes

Finally, Sir Ian commences (at p. 35) a paragraph on the subsequent behaviour of the parties. This, he says, "confirms the Qatari analysis of the significance of the Doha Minutes". What is the subsequent conduct thus invoked? Sir Ian cites the conduct of Qatar in giving the King of Saudi Arabia in May and June 1991 notice of Qatar's intention to institute proceedings unilaterally against Bahrain in July. The paragraph concludes "that Saudi Arabia did not seek to dissuade Qatar from giving effect to its stated intention after 26 June 1991". For reasons that I shall give later, towards the end of my argument, it is scarcely possible to regard this episode as evidence that Saudi Arabia regarded the 1990 Minutes as binding. But even if it were, it would still do nothing to show that *Bahrain* must have understood six months earlier that the Minutes were intended to be legally binding.

With that item Qatar concludes its proof, so-called, that the 1990 Minutes were intended to be legally binding. No reference is made by Qatar to the Saudi Arabian draft joint agreement of September 1991 - a text which can hardly be reconciled with any suggestion that Saudi Arabia regarded the 1990 Minutes as binding in the sense asserted by Qatar.

I realize, Mr. President and Members of the Court, that, at the speed I am obliged to proceed, it may not have been easy for the Court to follow me through this process of showing just how Qatar's counsel's

demonstration of the legal quality of the 1990 Minutes is, in truth, no demonstration at all. But I would earnestly invite the Court, when it has the time to do so, to retrace in a more deliberate way the ground that I have just covered. My submission is that it will not find in this central section of Sir Ian's argument the proof upon which Qatar has rested its case.

Other Qatari arguments not conceded

This, of course, is not the end of the points made by Qatar in support of its position on the treaty status of the 1990 Minutes. But limitations of time oblige me to leave aside such interesting matters as the treatment of international agreements in the Bahraini Constitution, the law relating to the entry into force of treaties and the significance of Qatar's failure to register the 1987 Agreement and the 1990 Minutes until the last possible moment. But in leaving those matters untouched, I should not be taken as admitting the correctness of what Qatar has said. I respectfully refer the Court to the Bahraini written pleadings on these points.

The importance attached by Qatar to the treaty status of the 1990 Minutes

I conclude my arguments relating to the legal status of the 1990 Minutes by venturing to emphasize the cardinal importance that attaches to Sir Ian's attempt to establish that the 1990 Minutes have the quality of a treaty or international agreement. In its written pleadings, Qatar's treatment of the subject was, to say the least, slender. No effort was made positively to show that the 1990 Minutes possessed the legal quality attributed to them by Qatar. It is to the credit of Sir Ian that he has recognized the need to say something more on the

subject. But in so doing, he has, of course, admitted the *need* for the discussion. He must show that the 1990 Minutes have the legal quality that he says they have. He has, moreover, indirectly invited the kind of detailed scrutiny of his arguments on which I have embarked this morning. The threshold question which, I suggest, the Court should ask is this: How could any negotiator on behalf of Bahrain have known between 23 and 25 December 1990 that the document he was discussing was to be regarded as in any way legally different from earlier documents bearing exactly the same title, introduced by virtually the same words and signed by the same people in exactly the same way? A specific answer must be given to this question if Qatar is even to begin to move forward with its case.

In my submission, Mr. President, Qatar has not provided a sufficient answer to the question. As a close reading of the arguments of all those who have spoken on behalf of Qatar shows, the process of reasoning required to prove Qatar's assertion that the 1990 Minutes are a treaty has been replaced by a process of repetition. It is almost as if Qatar had taken the view that if everyone on its side simply assumed the treaty quality of the 1990 Minutes and constantly asserted that assumption as a received truth, the Court might be so hypnotized as eventually to accept it as an article of faith. That is why, Mr. President, I have felt it necessary to subject my learned friend's presentation to so close an examination and I respectfully submit that the Court should find that the 1990 Minutes do not have the legal quality of a treaty and cannot form the basis for any recourse to the jurisdiction of the Court under Article 36, paragraph 1, of the Statute.

The 1990 Minutes as a step in an evolving diplomatic process

The reality is that the 1990 Minutes are not a treaty. They are, like the earlier Minutes of the Tripartite Committee, simply steps towards the ultimate goal of a Special Agreement. They record *provisional* points of agreement which should eventually find a place in a final comprehensive, legally binding, Special Agreement. Clearly, Qatar provisionally agreed to accept the Bahraini formula. Both sides pledged themselves, if circumstances so dictated, to resume good faith negotiations towards a Special Agreement. Both sides reaffirmed their adhesion to their earlier provisional agreements reached in the 1987 Agreement and during the work of the Tripartite Committee. Moreover, it is certain that, in specifically amending the Omani draft, Bahrain excluded any possibility of it being understood that Bahrain was consenting, even provisionally, to unilateral seisin of the Court by either Party.

All of this is clear from the very *nature* of the Minutes. It is equally clear from the actual words used, and it is to these that I now turn.

SECTION 2 - THE WORDING OF THE 1990 MINUTES

Mr. President and Members of the Court, I will now examine the final matter on which I wish to address you - the wording of the central provision of paragraph 2 of the 1990 Minutes.

The present dispute

The Court hardly needs to be reminded that the core of the disagreement between Bahrain and Qatar in the present proceedings is that Qatar maintains that the proceedings may be commenced unilaterally by an

application and Bahrain contends that the proceedings can be begun only by the notification to the Court of a joint submission by the two Parties together.

Paragraph 2 of the 1990 Minutes

At the centre of this disagreement is the wording of paragraph 2 of the 1990 Minutes. For the moment it is sufficient to use the English translation appended by Qatar to its Application. This is the middle column in No. 8 of your Hearing Book. There you will see the vital words in the second sentence of paragraph 2.

> "After the end of this period [that is the period till 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, and the proceedings arising therefrom ..."

The issue, in its barest terms, is whether the words "the parties" means "either of the parties" or "both the parties together".

The need to give a meaning to words in the Arabic language

The Minutes were, of course, prepared in Arabic and the relevant words in Arabic are *"al-tarafan"*. Now, I realize that it is a rare task for the Court to have to attribute a meaning to words in a language which is not one of the official languages of the Court, but I shall try to keep the matter as uncomplicated as possible. The fact that this exercise is undertaken by one who does not speak Arabic will demonstrate that we are not faced here with an impenetrable and incomprehensible mystery - or, at least, I hope it will.

Approaches to the problem

In theory, the problem can be approached in two ways.

One is to try and establish a correct translation into English of the vital words. The other is to worry less about an exact translation and more about the real sense of the words as they appear in their context, both locally within the body of the Minutes and more remotely as they have been used in the prior and subsequent practice of the Parties and of others concerned in the matter, including Saudi Arabia and Oman.

In Bahrain's submission, both approaches lead to the same conclusion, namely, that the only way in which the case can be brought to the Court is by the joint action of both the Parties together.

Again, in theory, there are two ways in which the problem of identifying the real sense of the word may be approached. One is analytical. The other is historical. And, I believe that it will be easier for the Court to follow my argument if I begin by recalling the manner in which the relevant words had been used prior to 1990, that is, by putting them in an historical context. I do so because, as Professor Bowett has shown, the 1990 Minutes were not the first occasion on which the need had arisen to describe the Parties in the context of a submission to the jurisdiction of the Court.

The historical context: the emergence of a pattern of usage

- Qatari draft, March 1988

The first occasion was at the very beginning of the discussions in the Tripartite Committee in 1988. When the Committee began its work each side prepared a draft agreement to reflect their shared idea that the proceedings would be commenced by a joint submission. The Qatari draft dated 15 March 1988 appears as Item 2 in your Hearing Book. In Article 1, as may be seen from the English version, there appear the

words "the Parties" to describe the actors in relation to the verb "submit": "The parties submit the questions ..." It is not disputed between the two sides that the intention was to provide for a joint submission. The words used in the Arabic text are "*al-tarafan*", equivalent to "the parties" or "the two parties". The word for "together" - "*ma'an*" - does not appear in the text.

- Bahraini draft, March 1988

The same is true of the Bahraini draft of 19 March 1988, Item 3 in your Hearing Book. There we find the words "The Parties" appearing at the beginning both of Article I - "The Parties shall submit the question ..." and also of Article II - "The Parties request the Court ...". In both situations the Arabic words are "*al-tarafan*". The word "*ma'an*" - "together" - does not appear.

- Qatari draft, June 1988

I pass to the next relevant item in chronological order, the Draft Agreement presented by Qatar on 28 June 1988 (Item 14 in your Hearing Book) (this is to be found in a volume filed by Qatar with its Memorial and relating to the meetings of the Tripartite Committee, p. 187). In this proposal Qatar provides in Article II, paragraph 2, that "the Parties request the Court to decide ... the following questions ...". In the Arabic original, the words "the Parties" is represented by again "*al-tarafan*" without the use of the word "*ma'an*".

- The Bahraini formula, October 1988

And now we can now move to the Bahraini formula itself, presented on 26 October 1988 (Hearing Book, Item 4). The formula begins with the words "The Parties request the Court to decide ...". In the Arabic

original the corresponding words are "*al-tarafan*" without the word "*ma'an*" altogether.

These are the principal items of record which demonstrate the use of "*al-tarafan*" to describe "the Parties" in a context where action by both of them jointly was contemplated. I say this in reliance upon the content of each document and the evident understanding of the two sides on each occasion. The pattern of usage, if I may put it that way, the pattern of usage of the words "*al-tarafan*" in the context of drafts relating to the submission of this case to the Court had become fixed or crystallized, as *al-tarafan*" meaning the "two Parties together" not emphatically not "either of the two Parties".

Evolution of the 1990 Minutes

We can now pass, Mr. President, to the process by which the 1990 Minutes evolved between 23 and 25 December 1990 in the corridors or side rooms of the Doha Summit Meeting. In approaching this matter, I suggest that we should bear in mind the pattern of usage that I have just mentioned.

Now for what actually happened at Doha we have, in terms of firsthand, personal evidence, only the statement of the Bahraini Foreign Minister, Shaikh Mohammed. Qatar has done nothing more in its Memorial and Reply than put forward a brief narrative of what happened. Where there is any discrepancy between the versions of the two sides, elementary principles of evidence require that the statement of Shaikh Mohammed should be preferred to those in the Qatari written pleadings. And for an account of what actually happened at the opening plenary meeting of the Heads of States on 23 December we must again rely

on Shaikh Mohammed. Please recall that at this point in the story of the relationship between the Parties what we are looking for is some indication that the established pattern of the usage of "*al-tarafan*" as meaning the Parties together was, as Qatar would have us believe, about to be radically altered, looking for a sign of change.

Shaikh Mohammed's account of the Summit Meeting appears in paragraphs 3 and 4 of his statement. After describing the opening stages of the discussion in rather general terms, the Foreign Minister recalls that King Fahd of Saudi Arabia "stated that it was the duty of the Tripartite Committee to meet and finalize the procedure for the parties to go to the International Court of Justice". Professor Bowett will presently be considering the other implication of this reference to the Tripartite Committee. For our present purposes, it would seem unlikely that King Fahd would have referred to the work of the Committee in these terms if by that moment in the course of the Summit discussions the Amir of Qatar had said anything to suggest that Qatar was proposing to abandon the Tripartite Committee and proceed unilaterally. So, at that stage no sign of a change in the meaning of the words.

- Qatar's acceptance of the Bahraini Formula relating to a joint submission

Even more to the point, however, is the fact that the Amir of Qatar stated that he was prepared to accept the Bahraini formula. At the risk of over-repetition, I must of course remind the Court that, as matters then stood, the Bahraini formula was understood only as a contribution to a special agreement providing for a joint submission to the Court.

The words "*al-tarafan*" as there used could *only* mean "the Parties together". That is all that can be gathered from Shaikh Mohammed's

statement and from the written pleadings of Qatar as to what little was said at the Summit Meeting bearing on the meaning of "*al-tarafan*". So up to this point there was no indication of any proposed change in the meaning of those words.

- Saudi draft Minutes

Yet there must have been something said which led Saudi Arabia in its first draft proposal (Item 5 in the Hearing Book) to include the words "the question which will be presented to the Court by *each of them*", i.e., each of the Parties. In the Arabic original these words were "*min kullin minhuma*". As the Court has already been told, Shaikh Mohammed rejected the Saudi draft by reason of the presence of those words.

- Omani draft Minutes

The next step in the evolution of the text is the arrival of the Omani draft (Item 6 in the Hearing Book). The Omani draft used the words "Either of the two Parties".

We have it on the authority of Sir Ian Sinclair (CR 94/2, pp. 32-33)

> "that the text was put first to the Qatari delegation, since there is clear evidence that the phrase 'in accordance with the Bahraini formula, which has been accepted by Qatar' was inserted into the original Omani draft on the initiative of Mr. Sherbini, Legal Adviser to the Qatari delegation".

And this leads us to a particularly important point. Qatar, having seen, as we are told, the Omani draft before it was presented to Bahrain later on the same evening, permitted it to go forward containing the words "either of the two Parties" - in Arabic, "*ayyun min al-tarafayn*".

- Amendment of the Omani draft

Why is this so important? Let us remember that one of the most important propositions in Bahrain's case is that Bahrain rejected the

words "either of the two Parties" and insisted on "the two Parties" so as to exclude the possibility that either of the two Parties could commence proceedings on its own. What is Qatar's answer to this "categorical rejection" (to use once again the helpful words of Mr. Shankardass) his categorical rejection of the Omani proposal? The way I put it on Friday, in commenting on the relevant passage in the Bahraini Foreign Minister's speech, was "what did Qatar think it was doing in accepting the changes without making its position clear"?

The Agent of Qatar gave a direct answer to the question (CR9 4/3, pp. 28-29):

> "In Qatar's view the answer to this question is clear. In procedural terms the Omani draft might have been interpreted as giving one State, effectively whichever was the first to act, the obligation to submit the *whole* case to the Court in accordance with the Bahraini formula. The change to "*al-tarafan*" reflected the fact that both Parties had their own distinct claims to make under the Bahraini formula and that it was inappropriate to allow one Party to submit the claims of both States to the Court. That change [I interpret that change from either of the two Parties to the two Parties] made clear that both Bahrain *and* Qatar had the right to submit their own case on claims to the Court in accordance with the Bahraini formula. Qatar has exercised that right."

I have read you that paragraph, Mr. President, because it represents the whole of Qatar's explanation (apart from some technical linguistic argument developed subsequently) of why it accepted in silence the change insisted upon by Bahrain and by which Bahrain restored the consistent pattern of language that had marked the jurisdictional texts previously discussed between the Parties.

Well, some may say, what is wrong with that explanation? The answer is both simple and intriguing. Qatar is saying that, having read the Omani draft and having made one change in it - namely the insertion of the reference to the Bahraini formula - it then allowed the draft to be

conveyed to Bahrain containing words which Qatar did not want, words which Qatar *now* says might have been interpreted as giving the first state to act the obligation to submit the whole case to the Court. If that was the interpretation that Qatar was putting on the words "*al-tarafan*" it must have known that it was an interpretation quite different from any interpretation put upon those words in the earlier jurisdictional texts and, self-evidently, was not an interpretation which could have occurred to Bahrain. If there was ever a case for a State to have made its understanding plain - whether before or after the Omani draft had been passed to Bahrain - that was undoubtedly it. The fact that no clarification was offered is perhaps the most cogent indication that the explanation now given by the Qatari Agent never occurred to Qatar at the time, but is an idea generated at the last moment in the framework of the present proceedings to meet what is, of course, perhaps the most telling argument in the Bahraini armoury. It will not be lost on the Court that this Qatari explanation was not presented in its Memorial and was accorded no more than a footnote in its Reply (RQ, p. 76, n. 222).

- Other pertinent elements in the 1990 Minutes

If confirmation is needed of the conclusion to be drawn from what I have just said then it is to be found in at least two other contextual elements in the same paragraph of the 1990 Minutes.

- "*Matter*" in the singular

The first of these is the reference to "the matter" in the phrase "the parties may submit the matter to the Court". Both in its Counter-Memorial and in its Rejoinder Bahrain pointed out that the use of the word "matter" in the singular ("*al-mawdu*" in the Arabic) is

inconsistent with the Qatari contention that the 1990 Minutes foresaw the possibility of two separate applications. Two separate applications necessarily imply two separate cases. The reason for Qatar's insistence on its right to make a unilateral application is that it does not wish to bring Zubarah into its case. So if the question of sovereignty over Hawar, Jaradah and Dibal, as well as the determination of the maritime boundary can be seen as one case, the question of Zubarah is, for Qatar, a distinct case.

Yet nowhere in the 1990 Minutes is there a suggestion that the word "matter" in the singular can be converted from a singular dispute or matter into plural disputes or matters and can be dealt with in or as separate cases. Both in the Qatari and the Bahraini translations of the preamble to the 1990 Minutes there is a reference to "the existing dispute" in the singular. Likewise in both translations of paragraph 2, the word "matter" appears in the singular.

In Bahrain's submission the use of these words in the singular is quite inconsistent with Qatar's idea that there can be two separate applications or cases about one dispute or matter.

What does Qatar have to say in reply to this argument, which I venture to submit, is a cogent one? The answer is nothing. Absolutely nothing - neither in its Memorial or its Reply or in the Agent's speech. Qatar had plenty of time for recondite linguistic analysis and the Qatari Agent cannot perhaps be blamed for having followed Prince Charles and Prince Edward on their journeys to and from Cambridge. But one of the major contributions of the experts on both sides has been in establishing that what divides us is not a matter of mere translation, but of understanding words in their context. Bahrain is particularly grateful

to its experts, to Professor Badawi, Dr. Holes, Professor Aboulmagd and Mr. Amkhan, in this connection. The use of the word "matter" in the singular is identified by Bahrain as a major reflection of the idea of a singular proceeding, that is to say, a proceeding brought by the two parties together, not proceedings brought by the parties individually. Yet Qatar has at no stage been able to find time to respond to this argument.

- Reference to the Bahraini formula

The second contextual matter within the body of paragraph 2 of the 1990 Minutes is the maintenance without change of the reference to the Bahraini formula. I can be quite brief about this. Enough has already been said to establish that the Bahraini formula was proposed within the framework of proposals for a joint submission and that its words reflect that idea: "the Parties", not "either of the Parties".

- "In accordance with the procedures consequent on it"

A third contextual matter is, of course, the phrase "in accordance with the procedures consequent on it", that is, consequent on the Bahraini formula. Here again, I need not detain the Court. Enough has been said on the Bahraini side to show that both in expression and in intention those words reflect the idea that the implementation of the Bahraini formula would require further negotiation with a view to the submission of the case to the Court.

The negative context: the words not used

There is a further point to be made in reference to the context of *"al-tarafan"*. Until now, I have been considering what for convenience may be called the "positive" context - the effect of other words and phrases that are positively present within the Minutes. But there is

also the matter of the "negative" context - the words that *are not* there. Qatar has chided Bahrain repeatedly for failing to introduce the word "together" (*"ma'an"* in the Arabic) into the phrase "the two parties" so that it would have read "the two parties together" and thus have put Bahrain's position beyond doubt. But Bahrain is bound to ask, why did Qatar not retain the words "either of the Parties" or, for example, introduce the adverb "separately" before the verb "submit", so that the phrase would have read "may separately submit"?

An omission of this kind can be seen as being as much part of the context as would be the presence of certain words. The Court may feel it appropriate - without going into the wider issue of the burden of proof generally - to ask this question: Upon which Party rests the burden of clarifying its position by the introduction of suitable words - is it upon the Party which insists on retaining language for which there is an established pattern of usage or is it upon the Party which, having failed to secure a change in the vital words, then pretends that the retained words have some strikingly different meaning? The question, Mr. President, in my submission, answers itself.

Subsequent use of language

There remains then for relatively brief mention evidence of the use of language by the Parties which can be regarded as part of the broader contextual approach or, if one wishes, as part of their subsequent conduct.

- Saudi draft agreement, September 1991

The first such item is the draft joint agreement prepared by Saudi Arabia and received by Bahrain in September 1991. And Qatar admits to receiving the draft agreement but denies having received the accompanying

memorandum. Both these are in the Hearing Book (Item 9). Qatar does not go so far, however, as to deny that Saudi Arabia prepared and sent such a memorandum, at least to Bahrain. Anyway, the point that matters about the memorandum is not so much whether Qatar received it as that it was in fact prepared by Saudi Arabia.

I return to the draft agreement itself. Here, in Article 1, we find the expression "The Parties request the Court to decide any matter, [and so on]". In Arabic the word used for "the Parties" is *"al-tarafan"*. There is no additional wording like "together" or "jointly". The words *"al-tarafan"* are even then deemed sufficient to create an obligation for the Parties to act together. The accompanying memorandum makes it clear, in its first sentence, that the draft foresees joint, not separate, action: "with reference to the two draft agreements submitted by Qatar and Bahrain, we [that is Saudi Arabia] have prepared the accompanying draft on the basis of the provisions contained in each of the two drafts. This is an attempt to reach a compromise between their texts in so far as that is possible". So we have here not merely evidence of Saudi Arabia's view of the continuation of its mediatory role, but a document prepared by it which contains language that follows the pattern of usage previously established in the Tripartite Committee.

- Omani letter of 29 January 1994

I pass now to a further item of subsequent context or conduct which I believe it may be helpful to draw to the attention of the Court. And that is the letter from the Ministry for Foreign Affairs of Oman of 29 January 1994 that was directly solicited by the Minister for Foreign Affairs of Qatar by a letter of 23 January 1994. These letters were submitted to the Court by the Agent of Qatar on 10 February of this year.

Bahrain has not objected to them and they are now Items 15 and 16 in the Hearing Book.

The Qatari request to Oman cannot in any way be compared with the earlier exchange of correspondence between the Amir of Bahrain and the King of Saudi Arabia. On 12 September 1993 the Amir of Bahrain wrote to the King of Saudi Arabia the letter which you will find as No. 17 in the Hearing Book. As you will see, the Amir's letter unlike the letter from Qatar to Oman, did not invite the Mediator to anticipate the role of the International Court of Justice. The letter did not ask the King to answer the specific issue before the Court in the way in which Qatar invited Oman to deal with it. The Amir of Bahrain's letter said only two things: the first was that the Amir was preoccupied with the Qatari unilateral application and was inconvenienced by it; and, second, the Amir expressed the hope that Qatar would reconsider Bahrain's request to submit the case to the Court in the form of a joint application. That was back in September 1993.

The King of Saudi Arabia did not reply until December. His answer is No. 18 in the Hearing Book. The relevant sentence reads in part:

> "the sincere attempts we made called for an amicable understanding between the two sisterly States with the goal of achieving a solution for this question in a brotherly spirit, and including that the two sisterly countries submit, together, a joint application to the International Court of Justice containing all matters of difference ...".

The substantive point that I wish to make as to the correspondence between Qatar and Oman, with which I have just been comparing the Saudi Bahraini correspondence, has a direct bearing on the linguistic issue, which is the theme of the present part of my address. First of all, the Court will observe in the Qatari letter, which has clearly been framed to

elicit a suitably favourable response from Oman, an example of the kind of language that Qatar might have attempted to introduce into the 1990 Minutes if it had thought that it could do so successfully. It appears in the first and second lines of the second paragraph of the Qatari letter to Oman: "we believe that each of the States of Qatar and Bahrain has the right to make a unilateral application ...". Those words are quite clear and if Qatar had thought that it could have achieved the objective which it now says it did achieve in December 1990, those are the words that it should have tried to put into the 1990 Minutes. That specific phraseology is a very far cry from the inexactitude of the words "*al-tarafan*" on which Qatar rests the whole of its present case.

But the matter which is of particular interest is to be found in the Omani response. In order to make the point which Qatar now presents as favouring its interpretation of the 1990 Minutes, the Omani letter has to use exactly the same words as appeared in the draft which it placed before Bahrain on 24 December 1990 and which were rejected by Bahrain. The words in the recent Omani letter are "allow *either* the State of Qatar or the State of Bahrain to submit the dispute to the Court (in Arabic "*ayyun min*")". It is the words "*ayyun min*" which Bahrain insisted on taking out of the Omani draft of 24 December 1990 and replacing by the words "the two Parties" (in Arabic "*al-tarafan*").

Perhaps I should add that if Oman had really wanted to lend full and effective support to Qatar in this case, the relevant sentence of the recent Omani letter should have read something like this: "in our opinion, the words used in the Minutes, 'the two Parties' ('*al-tarafan*'), *were intended to allow*, either Qatar or Bahrain to submit the dispute to the Court". But Oman did not say that - no doubt because, as the go-

between in the Doha discussions, it knew that the words that were finally used in the 1990 Minutes were deliberately introduced to exclude this very situation.

- Qatar's 1991 letters to Saudi Arabia

There is, lastly, Mr. President, another point which is connected with and reflects upon the proper interpretation to be put upon the word *"al tarafan"*. Qatar filed with its Memorial two letters dated respectively 6 May 1991 and 18 June 1991 from the Amir of Qatar to the King of Saudi Arabia. These are items 19 and 20 in the Hearing Book and I have already had occasion to mention them. In the first letter, of 6 May, Qatar referred to the 1990 Minutes, mentioned the period which had been laid down for the exercise of the Mediator's good offices and concluded its description of the Minutes with the following sentence: "Otherwise, the two Parties may, after this period, refer the dispute to the International Court of Justice in accordance with Bahrain's general formula ..." The English words "the two" reflect the Arabic words *"al-tarafan"*. The letter concludes by saying that "In pursuance of the above agreement, we intend to take the necessary measures to submit the matter to the Court at the end of the above-mentioned period."

Qatar refers to this letter as an indication that it proposed to start proceedings at the end of the extension of the period of the Mediator's mandate, and expresses surprise and disbelief that Saudi Arabia had not conveyed that message to Bahrain. What Qatar quite overlooks is that Saudi Arabia would have read the words *"al-tarafan"* in this context in accordance with the established pattern of usage in the established sense of the two parties together and would, therefore, not have understood the letter to be a threat of unilateral action. The

concluding sentence of the letter, "In pursuance of the above agreement, we intend to take the necessary measures to submit the matter to the Court at the end of the above-mentioned period" would also have been read by Saudi Arabia as no more than an intimation that Qatar would be taking the necessary steps jointly with Bahrain. The second letter, of 18 June, is open to the same interpretation. In other words, one has to read those letters standing in the shoes of Saudi Arabia, seeing the expression *"al-tarafan"*, understanding it in accordance with the established usage.

This is no doubt an explanation of why Saudi Arabia did not convey any warning to Bahrain. It read the letters as saying only that Qatar would be resuming the necessary steps for "the Parties", both of them, to resume the arrangements for submitting the matter to the Court.

The continuing relevance of the technical linguistic arguments

Mr. President, as the Court will have observed, I have not attempted to follow the distinguished Agent of Qatar into the technicalities of the linguistic arguments. This is not because I think that he is right in what he has said. But the highly technical arguments about the Arabic language and grammar - important and interesting as they are - do not form the first line of Bahrain's position and time is too short to pursue them now. Bahrain adheres to the views expressed by its experts, Professor Badawi, Professor Aboulmagd, Dr. Holes and Mr. Amkhan as set out in their opinions annexed to the Bahraini Counter-Memorial and Rejoinder.

Mr. President, this brings me to the end of my consideration of the 1990 Minutes, both as to their status and their content. There is no

need for me to venture a grandiloquent conclusion. I can only express the hope that the points that I have made may be of some assistance to you in reaching the right view of these Minutes. In my submission, whatever the legal status of the Minutes may be, their language is quite inconsistent with the idea that Bahrain could have given its consent to the unilateral institution of proceedings by Qatar.

Mr. President, if it pleases you, would you either call upon Professor Bowett now or, if the Court so wishes, take a coffee break. Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Lauterpacht. I give the floor to Professor Bowett.

Mr. BOWETT: Thank you, Sir.

Mr. President, Members of the Court, what I would like to do with your permission - and it can be done quite briefly - is to piece together the three phases in the negotiations, that is the 1987 Agreement, the Tripartite Committee, and Doha, to see what was really agreed between the Parties.

We have to see the whole picture as a series of negotiations designed to bring this dispute before the Court. We cannot, in my submission, isolate Doha as a fresh start, with the Parties starting with a "clean slate" and, at Doha, establishing an independent basis for jurisdiction.

The reason for this lies partly in commonsense - the Parties were inherently unlikely to jettison what they had achieved in over three years of negotiation - but also in the plain words of the Agreed Minutes

of 25 December 1990. The Parties agreed "1. to reaffirm what was agreed previously between the two Parties".

Now there cannot be any doubt what that meant! The Parties were *not* starting from scratch; on the contrary they endorsed and reaffirmed what they had agreed to date. Whatever else was agreed at Doha, it was additional, just one further agreed step in the long sequence of negotiations; and, we must assume, in no way inconsistent with the agreements reached previously.

Obviously, Qatar does not wish to see matters in this light. Qatar sees the reaffirmation of what had been agreed previously as confined to the 1987 undertaking to go to the Court. Thus, for Qatar, the whole of the progress of the Tripartite Committee was to be jettisoned. And Qatar supports this view of the matter by saying that the Tripartite Committee was at an end.

But, Mr. President - and it is a rather large But - that is not what the Doha Minutes say. They do *not* say that the Parties reaffirm their 1987 commitment in principle to go to the Court. They "reaffirm what was agreed previously", without restriction, so that they evidently intended to preserve everything they had agreed thus far.

Nor is there any basis for saying that the Tripartite Committee was at an end. Certainly, during the Fifth Meeting on 15 November 1988 Prince Saud reported that King Fahd "considers" the date of the next Summit meeting - in December 1988 - as the date for terminating the work of the Committee. It was presumably a heavy hint that they should get a move on. But Bahrain's Foreign Minister, Shaikh Mohammed, expressed the hope that he would be patient (CMB, Vol II, p. 102). And at the Sixth Meeting on 6 December 1988 there is not a word in the signed Minutes of

that Meeting about terminating the Tripartite Committee. On the contrary, the signed Minutes disclose that Bahrain would be given time to study Qatar's proposal for proceeding with the Bahraini formula and the two Annexes. So the Tripartite Committee was not dead, and the agreements it had reached thus far were not abandoned.

Indeed, it could scarcely be otherwise. If, as Qatar says, the 1987 Agreement was a treaty binding on Qatar and Bahrain, how could Saudi Arabia terminate paragraph 3 of that Treaty establishing the Tripartite Committee without their consent? And, Mr. President, I cannot find anywhere in the records anything to suggest that they did so consent. Indeed, there was no actual proposal to terminate the Committee, so there was nothing to which their consent was required.

In fact the records show that, on the contrary, Saudi Arabia itself believed the Tripartite Committee was still in existence, and still with work to do, at the time of the Doha meeting. The Foreign Minister of Bahrain, Shaikh Mohammed, recounts a meeting with King Fahd on Sunday 23 December 1990 at Doha. This is what he says:

> "During the discussion, the Custodian of the Two Holy Mosques, King Fahd bin Abdulaziz Al-Saud of Saudi Arabia, who continued in his role of Mediator between Bahrain and Qatar, stated that it was the duty of the Tripartite Committee to meet and finalize the procedure for the parties to go to the International Court of Justice." (CMB, Vol. II, p. 160.)

And Bahrain took the same view. The Foreign Minister of Bahrain is on record as saying that, at Doha, "I reiterated Bahrain's position that we must continue with the existing procedure through the Tripartite Committee ..." (CMB, Vol. II, p. 162).

So the story of the Tripartite Committee having been terminated, and its work abandoned, is pure invention on the part of Qatar.

It is important to keep all these previous agreements in mind, therefore. For if there is to be any doubt as to what, additionally, was agreed at Doha, the elements previously agreed must afford crucial evidence as to what exactly was agreed at Doha. We must assume consistency, and coherence, between the elements of the agreement.

In short, the Parties could not conceivably have reaffirmed their previous commitments, and in the same breath agreed something additional at Doha which was quite contrary to what had been previously agreed. We must assume they were acting consistently.

Now what had been previously agreed?

First, that the Parties would go before the full Court.

Second, that the Parties would go before the Court pursuant to a Special Agreement: that was to be the basis of the Court's jurisdiction. Now there cannot be any doubt about this. Bahrain always assumed this to be so, and I have earlier taken the Court carefully through the records of the Tripartite Committee so that the Court can see that this was also Qatar's intention.

If that is so, how can Qatar suggest that at Doha the Parties suddenly agreed that either Party could proceed by unilateral application, without a Special Agreement? It is simply not possible. You cannot, in one and the same breath, reaffirm the agreement to proceed under a Special Agreement *and* authorize either Party to proceed unilaterally without such an agreement: it would not make any sense!

So, whatever the words "*al-tarafan*" may mean, and whatever Qatar may or may not have thought, it is simply not possible to read the Doha Minutes as authorizing a unilateral application. That would be quite contrary to the clear reaffirmation of the earlier agreements.

I do not say that, at Doha, the Parties were not free to change their minds. They could have reaffirmed their previous agreements with an express proviso. They could have said "except that, rather than proceeding by Special Agreement, either Party may make a unilateral application to the Court after the end of May 1991".

But they did not do so, and, absent clear words to indicate a departure from their common intention to proceed by Special Agreement, we must assume that the original agreement was maintained. And this must have been the view of Saudi Arabia. Otherwise why should Saudi Arabia have offered to both Parties a Saudi version of a Special Agreement in September 1991? And that was certainly Dr. Al Baharna's intention in adding the phrase "and the procedures arising therefrom". So two out of the three Members of the Tripartite Committee believed the agreement to seek a special agreement had been maintained.

Third, the Parties had previously *not* entertained the idea of a unilateral application even as an alternative: it was never discussed in the Tripartite Committee. So we are entitled to assume that the Parties agreed previously that seisin of the Court would not take place by that route. It would have taken express words to overturn that understanding.

Fourth, the Bahraini formula was a possible solution to the disagreement over Article II - subject to further discussion of whether it needed to be amplified in one, or two, Annexes, and in what terms.

Qatar's acceptance of the Bahraini formula at Doha seemed a significant step forward. It seemed as though Qatar was prepared to accept it for Article II, without any annex and leaving it to each Party to formulate its claims within the broad ambit of that formula, as Bahrain had originally intended.

But, as Professor Weil will demonstrate in detail, the mere acceptance of the Bahraini formula could not, of itself, provide a new and sufficient basis for jurisdiction. It was never intended as such, and could not operate as such. Nor - as Professor Jiménez de Aréchaga will show - could the Bahraini formula be utilized within the framework of a purely unilateral application. It was designed to be used within the framework of a special agreement, the essential idea being that, under such a general and "neutral" formula, each Party would be free to formulate its own claims.

Fifth, the Parties had agreed to include Zubarah in the disputed matters: that is quite clear from the Tripartite Committee meeting of 6 December 1988.

Certainly Qatar had reserved its position over whether Qatar would agree to allow Bahrain to contest sovereignty - or only "private rights". But in one form or another it had been agreed Zubarah was to be included.

Qatar's argument, lucidly put by Professor Salmon on Wednesday (CR 94/3, pp. 43-48), is that Zubarah can be included. All that is necessary is for Bahrain to file a new Application in relation to Zubarah, in effect file a new case which the Court can then join.

But the Court has only to note the careful choice of words by Qatar to see that, for Bahrain, this is a trap. Qatar concedes only that the Court has competence over Zubarah "prima facie". And Qatar reserves the right to question its admissibility *("recevabilité")*. You can be certain it will do so!

Well, Mr President, there you have precisely the reason why Bahrain was adamant that a joint submission under a special agreement was needed. With the Bahraini formula as Article 2 of a special agreement, Bahrain's

risk of having Zubarah excluded would have been minimized. Now, on the basis of two, successive, unilateral applications, Bahrain is at risk. There is, in fact, still no genuine agreement between the Parties as to the subject-matter of this dispute, and Qatar will most certainly object to Bahrain's claim over Zubarah.

There are, of course, other things which Bahrain loses by not having a special agreement - for example, Article V and the right to examine the agreement as a whole prior to ratification - my colleague Mr. Highet will deal with these.

But, as a sovereign State, Bahrain is entitled to decide that its preferred way of implementing the 1987 commitment in principle to go to the Court was by way of special agreement. There are sound reasons for that decision in fact, but, irrespective of whether one agrees or disagrees with those reasons, if that was Bahrain's decision it must be respected. Mr President, that concludes my argument. I regret having trespassed into the coffee break slightly. May I ask you, after coffee, to call on Professor Jiménez de Aréchaga.

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

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I give the floor to Professor Jiménez de Aréchaga.

Mr. JIMENEZ de ARÉCHAGA: Mr. President, Members of the Court, the Qatari Memorial, at paragraph 4.12, makes an important admission on the

question of consent, an admission which has not been mentioned by our friends on the other side.

Under the title "The essential aspects of consent", Qatar refers to the need for consent to the existence of jurisdiction of the Court and examines this question from three points of view, distinguishing what it calls "three essential aspects".

The Qatari Memorial states:

> "Three essential aspects of the consent given under the 1987 and the Doha Agreements need to be considered: *first*, the consent of both States to refer the disputes to the Court; *second*, their consent to the subject and scope of the disputes; and, *third*, their consent to the seisin of the Court."

This significant admission by Qatar as to the need for a triple consent is important because Bahrain contends that not a single one of the three required consents is present in this case. Professors Bowett and Lauterpacht have demonstrated that there is not in the present case the first form or aspect of consent. After me, Professor Weil will show that there is no consent by Bahrain to the unilateral seising of the Court.

Consequently it is my task to concentrate on the absence in this case of the second form or aspect of consent, namely, that concerning the alleged consent by Bahrain to the "subject and scope" of the dispute, as it has been brought unilaterally by Qatar before the Court.

I intend to demonstrate, Mr. President, that there was not, and there is no consent by Bahrain regarding "the subject and scope of the dispute" as it has been defined unilaterally by Qatar in its Application to the Court.

The fundamental consideration in support of my submission is that in indicating to the Court the subject of the dispute, as is required by

Article 40 of the Statute, Qatar unilaterally altered that subject by restricting the scope of the dispute as it had been previously defined during the mediation process in the 1988 Minutes, when "the two Parties agreed" on five subjects as constituting what the original Arabic texts describe, in singular, as "*the existing dispute*" (I refer to the 1990 Minutes, and the signed Minutes of 7 December 1988).

It follows from that infringement of what had been agreed, that the Application filed by Qatar is defective and consequently invalid and, as such, incapable of embodying Bahrain's consent and thus incapable of conferring jurisdiction to the Court.

In order to develop my argument, Mr. President, I have to refer again, but very briefly, to certain understandings and agreements which were reached in the negotiations between the Parties under the aegis of the Mediator.

Because the process of Mediation and negotiation conducted by the Parties, under the aegis of the Mediator, with a view to concluding a special agreement, was not entirely unfruitful, as Qatar has suggested.

On the contrary, in that process certain concrete steps were taken, certain understandings were reached and even some agreements were concluded opening the way for a joint submission of the case to the Court.

The first of these concrete steps was the establishment of the "Principles for the Framework for reaching a settlement", proposed in 1978 by the Mediator, and adopted by the Parties in 1983. The first of these Principles reads:

> "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."

It is true that, at the time of adoption of this principle, it only applied to issues of sovereignty over islands and not in respect of "terra firma". However, we will see that this First Principle later embraced other territorial issues, in particular that of Zubarah.

In the process of mediation a second, and important step towards the conclusion of a special agreement was the understanding reached by the Parties, under the auspices of the Mediator, at the sixth Meeting of the Tripartite Committee. There the Parties agreed on an enumeration of the five items or issues which defined "the subject and scope of the dispute" to be submitted to the Court. While our opponents have been entirely silent with respect to that document, the text of the relevant part of the 7 December 1988 Minutes has been already referred to by Professor Bowett. It has been presented to the Court by both Parties with their respective English translations, which only differ in insignificant and irrelevant details (see page 112, volume II of the Bahrain Counter-Memorial, and page 139 of the Rejoinder). I will read again the Qatari translation of this document:

"1. *There followed a discussion aimed at defining the subjects to be submitted to the Court, which shall be confined to the following subjects*:

1. Hawar Islands, including Janan Island
2. Dibal shoal and Qit'at Jaradah
3. Archipelago baselines
4. Zubarah
5. Fishing and Pearling areas and any other matters related to maritime boundaries."

And then, in paragraph 2 the Minutes stated that:

"2. *The two parties agreed on these subjects.*"

This is an "agreed minute" if there ever was one.

The introductory phrase and the final statement to the effect that "the two parties agreed on these subjects" are underlined in the Qatari English text. Also, in the Qatari text the two paragraphs recording the understanding are numbered as paragraphs 1 and 2, thus adding to the formal character of this agreed minute.

Towards the end of that meeting, Qatar questioned the nature of the claim and the grounds to be invoked by Bahrain concerning Zubarah. The late Dr. Hassen Kamel, for Qatar, stated that

> "if the nature of the difference concerning Zubarah was connected with sovereignty over it, it would not be acceptable that this should be listed within the matters raised to the International Court of Justice. If, however, the content was connected with private (or "special") rights in Zubarah, then the State of Qatar would have no objection to this".

On his part, the representative of Bahrain replied that "their claim connected with Zubarah which would be referred to the International Court of Justice would be the strongest possible claim without any limitation".

In the light of this exchange, it may be concluded, that Qatar raised a reservation with respect to Zubarah with reference to the grounds to be invoked by Bahrain in support of this claim.

When in 1990, at Doha, Qatar accepted the Bahraini formula, one of the consequences of that acceptance was that Qatar withdrew its reservation with respect to the Bahraini claims concerning Zubarah. This is so because by its acceptance of the Bahraini formula, Qatar agreed that the Court could, and I quote from the formula, "decide any matter of territorial right or other title or interest that may be a matter of difference between them". This wide formulation in the Bahraini formula was clearly designed to embrace Bahrain's territorial claim to Zubarah in its full scope.

Thus, the inclusion of Zubarah as one of the five items or issues constituting the "subject and scope" of the dispute, as defined on 7 December 1988, was no longer questioned by Qatar, whatever the object of the claim that Bahrain could advance.

This means that the understanding that had been reached on 7 December 1988, as an agreed enumeration of the subject and scope of the dispute, was completed and perfected by the withdrawal of Qatar's reservation. It was confirmed and maintained as an indivisible whole, a "package deal", in accordance with the First Principle of the Framework of the Mediation.

The convergence of these three elements, the First Principle of the Framework of Mediation, the 7 December 1988 agreed enumeration of the five items in dispute and the 1990 full acceptance of the question of Zubarah at Doha through Qatar's acceptance of the Bahraini formula, must be considered together, since they influence and support each other. They are interdependent and interrelated elements that concur in defining the subject and scope of the dispute that had to be submitted to the Court, in a comprehensive, single case and by means of some form of a special agreement.

This is so because it is only through the method of a joint submission based on some form of special agreement, that the three instruments I have referred to could be implemented and complied with.

And the existence of these three agreements was not ignored or forgotten in 1990, at the Doha summit conference. On the contrary, these agreements were reaffirmed at the very beginning of the 1990 Doha summit conference.

The first paragraph of the Doha Minutes provides that the Parties and the Mediator "reaffirm what was agreed previously between the two Parties". Thus, such a reaffirmation, as just indicated by Professor Bowett, embraced all that had been agreed previously, not just the 1987 Minutes, as contended here by Professor Quéneudec (CR 94/2 p. 76).

The indivisibility of the five issues in dispute, resulting from the First Principle of the Framework of Mediation, is confirmed by the 1987 Agreement which refers to "*all the disputed* matters". It is also confirmed by the initial phrase of the 7 December 1988 Minutes, containing the list of issues, which provides that the reference of issues to the Court "*shall be confined* to the following subjects...".

This phrase means that the "subject and scope" of the dispute comprised only those five issues, but at the same time it required the simultaneous submission of all five issues.

Otherwise, one of the Parties would be allowed to modify what had been agreed by both; one of the Parties would become entitled to redefine by itself the subject of the dispute by restricting unilaterally its agreed scope. So, the obligation was to submit to the Court only those five questions, but at the same time to submit all five questions. It would be an equal violation of the agreed Minutes of 1988 to add to the list or to subtract from it.

Now, if we take the reaffirmed agreed Minutes of 1988, concerning the five items or issues in dispute and we compare them with the Application filed by Qatar in these proceedings we can see clearly that the Applicant State has engaged in a deliberate infringement of the agreement previously reached concerning the "subject and scope" of the dispute.

Besides the question of maritime boundaries, Qatar indicates in its submissions, in part I of its paragraph 41 of the Application, the questions of "The Hawar islands" and the "Dibal and Qit'at Jaradah shoals", as the only "subject of the dispute".

Qatar omits all reference to archipelagic baselines, to fishing and pearling areas, to Zubarah and to the island of Janan. None of the five items enumerated in 1988 is respected. Thus, for instance, the agreed list of 1988 did not characterize Jaradah as a shoal. Qatar, by categorizing it as a shoal, seeks to prejudice its status. It will be for the Court eventually to decide whether it is a shoal or an island, as Bahrain contends. The four other items are either ignored or mutilated, as is the case with the omission of the specific mention of the island of Janan, which of course is part of the Hawar islands. Again, this omission prejudices Bahrain's position, because in the list of issues of 1988 Qatar had accepted that the island of Janan should be included within the Hawar islands, although it is not covered by the British award of 1947.

Of course, the explanation for these infringements of the 7 December 1988 Minutes, particularly in respect to Zubarah, is that Qatar, as a *de facto* occupant of this territory, does not want to see this situation subjected to judicial scrutiny, while, on the other hand, the legitimate and long-standing sovereignty of Bahrain over the Hawar islands, including Janan, is challenged by Qatar before the Court. But this self-serving attitude cannot justify the breach of what had been previously agreed, nor the detriment to Bahrain's position at the stage of the merits resulting from the alterations I have indicated in the agreed list.

I do not need to recall to the Court that both Article 40 of the Statute and Article 38, paragraph 1, of the Rules require the Applicant State to indicate in its Application "the subject of the dispute" which is brought before the Court.

One of the reasons underlying this repeated requirement is the need for the Court to verify whether the necessary consent of both parties specifically and expressly extends or applies to the dispute submitted to the Court.

This statutory requirement of the indication of the subject of the dispute, given the existence of the previous agreement of 1988, created an insoluble problem for Qatar in its attempt to present itself as a unilateral applicant, capable of setting in motion, on its own, the present proceedings. Qatar tried to overcome this problem by an involved and illegitimate procedure.

In paragraph 40 of the Application, under the title Jurisdiction, where one would normally expect to find the indication of the subject of the dispute, Qatar does not mention the two geographical items of dispute it tries to bring before the Court. Qatar only refers to the Hawar islands and to Dibal and Qit'at Jaradah, in Part I of its Application, at paragraph 41. It refers to these two questions in the submissions, at the very end of its Application, where it asks the Court to adjudge and declare in its favour.

One may then ask the following question: what is the basis upon which Qatar relies in order to indicate the subject of the dispute, so as to allow the Court to determine the necessary consent by Bahrain to have that particular dispute decided by the Court? That was the problem Qatar had to solve.

Obviously, Qatar could not rely on the enumeration in the 7 December 1988 agreed Minutes because it was not complying with it.

The answer that Qatar found to its predicament was to rely on the Bahraini formula, a formula which was designed to play, within the framework of a special agreement, an entirely different role.

Qatar states in paragraph 40 of the Application under the title "Jurisdiction" the following:

> "By virtue of Qatar's acceptance of the Bahraini formula (see Annex 5), the parties are now also agreed upon the subject and scope of the disputes to be referred to the Court."

This is a mere assertion, unsupported by the facts and the law. By invoking the Bahraini formula, Qatar tries to take advantage of its general and abstract character, since the formula refers to "any matter of dispute" without the concrete indication of particular divergences. Qatar then attempts to combine this feature of the Bahraini formula with the selection of only two of the five items of dispute which were defined by the 7 December 1988 agreed Minutes.

What is Qatar's foundation for this alleged expression of consent by Bahrain? I repeat; incapable of invoking the 7 December 1988 Minutes, Qatar had recourse to the Bahraini formula, as if it contained the consent of Bahrain in having its undisputable sovereignty over the Hawar Islands and Dibal and Qit'at Jaradah challenged and put in issue before the Court.

But Bahrain has never consented, through the Bahraini formula or otherwise, to submit to the Court its sovereign rights over these essential parts of its territory which are the Hawar islands, and Dibal and Qit'at Jaradah. By its formula, and relying on the 7 December 1988 Minutes, Bahrain was prepared to come to Court only if and when its own

claims with respect to Zubarah, the Janan island as part of the Hawar group of islands, the archipelagic baselines and the pearling and fishing areas, were equally considered and decided by the Court, at the same time, within the same set of judicial proceedings and in a position of equality before the Court. Bahrain is entitled to that singular set of judicial proceedings not only on the basis of the 7 December 1988 Minutes and the Bahraini formula, but also under the already mentioned First Principle of the Framework of the Mediation, which demanded that "all issues of dispute" were "to be solved comprehensively together".

The abusive way in which Qatar utilizes the Bahraini formula, combined with the selection of only two of the five items of the 1988 Minutes, cannot be accepted as containing or as expressing Bahrain's consent to have the particular disputes selected by the Applicant submitted to the Court.

Otherwise, the Applicant would be able to pick and choose those subjects of dispute it wants to submit to the Court, while avoiding the judicial determination of those recognized subjects of dispute it does not want to submit to the Court.

It is no answer to say that the defendant may submit an application of its own or make a separate claim in the present proceedings. The fact is that the unilateral method chosen by Qatar results in the practical impossibility of complying with the First Principle of the Framework of Mediation, which provides that "all issues of dispute ... are to be considered as complementary, indivisible issues, to be solved comprehensively together".

Moreover, Qatar's answer that, in its discretion, Bahrain may file an application and raise its claims shows that there is no compulsory

jurisdiction in the present case. If the submission of the entire issues in dispute, as required by Article 40 of the Statute, depends on a subsequent, voluntary and discretionary act by Bahrain, this by itself demonstrates that at this moment there is no compulsory jurisdiction in this case, as based on the Qatari Application submitted to the Court.

It was never contemplated by the Bahraini formula that Qatar, acting unilaterally, would be entitled to "pick and choose" those particular items or issues in dispute which it preferred to submit to the Court, while remaining entitled to oppose the admissibility of Bahrain's claims and counter-claims. We all heard, on the third day, Professor Salmon enumerate the various objections Qatar would raise against the admissibility of the Zubarah claim. This would constitute another infringement of the 7 December 1988 agreed enumeration of the five items constituting the dispute. The main purpose and "*raison d'être*" of such an agreed enumeration is the obligation of each Party not to oppose the admissibility of any of the enumerated questions. That would be an unfair infringement of the *quid pro quo* inherent in the Bahraini formula together with the 1988 Minutes.

The proper utilization of the Bahraini formula would have been to insert it in a special agreement, followed by the agreed enumeration of the five subjects of dispute, as Bahrain did in Article 2 of the draft special agreement which was offered to Qatar on 20 June 1992 as a basis for a joint submission to the Court.

This shows that the Bahraini formula had to be completed, had to be "filled in", either by adding the indication of the specific issues both Parties had agreed to submit to the Court or by previously authorizing jointly each Party to formulate its own claims, on a basis of absolute

equality, in their respective and parallel Memorials. It is obvious that such a process of completion of the Bahraini formula could not be effected by a unilateral application, by only one of the Parties, since the list of subjects of dispute had been established by both.

A link had to be established between the Bahraini formula and the five issues enumerated in the 1988 December Minutes and that link could only be established by some form of previous joint or agreed action, such as the *Act of Lima* or the agreement that was concluded in the *Beagle Channel* case.

Divergent interpretations have been advanced by the Parties as to the meaning of a phrase that Bahrain succeeded in introducing, as one of its two crucial amendments, to the two drafts presented to it at the Doha Summit Conference. That phrase referred to the need to comply with "the procedures arising therefrom".

The distinguished Agent for Qatar, acting as counsel, has asserted that this phrase means that "the Parties will rely on the Court's rules to govern the proceedings" (CR 94/3 p. 39). This assertion actually supports our case because these procedural steps would consist precisely in the establishment of a link, so as to complete the formula with the enumeration of the issues in dispute in order to comply with Articles 40 of the Statute and 38, paragraph 1, of the Rules of Court. The absence of that link, that results from Qatar's infringement of the 7 December 1988 agreed Minutes, determines the invalidity of the Qatari Application, the absence of Bahraini consent concerning the "subject and scope" of the dispute and, consequently, the inexistence of jurisdiction in this case.

Thank you, Mr.President, for your patience and attention. I will appreciate it if you can call now my colleague Professor Weil.

Le PRESIDENT : Merci beaucoup Professeur Jiménez de Aréchaga, je donne la parole maintenant au Professeur Prosper Weil.

M. WEIL :

LA REQUÊTE DU QATAR AU REGARD DU «PRINCIPE GÉNÉRAL DE LA JURIDICTION CONSENSUELLE»

Monsieur le Président, Messieurs les Juges. Le Gouvernement de l'Etat de Bahreïn, et son agent, S. Exc. M. Al-Baharna, m'ont confié la mission d'examiner la requête du Qatar au regard de ce que la Chambre de la Cour a appelé récemment le "principe général de la juridiction consensuelle" (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), C.I.J. Recueil 1991*, p. 33, par. 94). Je suis très sensible à la confiance qu'ils m'ont témoignée, et je les remercie de m'avoir donné ainsi le privilège de prendre la parole devant la Cour aujourd'hui.

Sous le titre : "Les trois aspects essentiels du consentement" (*The Three Essential Aspects of Consent*) le mémoire du Qatar énumérait - mon éminent ami le professeur Jiménez de Aréchaga vient de le rappeler :

> "*premièrement*, le consentement des deux Etats en ce qui concerne la soumission des différends à la Cour (*the consent of both States to refer the disputes to the Court*); *deuxièmement*, leur consentement en ce qui concerne l'objet et la portée des différends (*their consent to the subject and scope of the disputes*); et, *troisièmement*, leur consentement à la saisine de la Cour (*their consent to the seisin of the Court*)" (mémoire du Qatar, par. 4.12).

Cette analyse, Monsieur le Président, était tout à fait exacte. Pour que la Cour soit compétente pour statuer sur la requête du Qatar il

faudrait que soit établi un triple accord : un accord, en premier lieu, sur le règlement des différends par la Cour; un accord, ensuite, sur l'objet et la portée des différends à lui soumettre; un accord, enfin, sur la possibilité pour chacune des deux Parties de saisir la Cour unilatéralement par le dépôt d'une requête. Ces trois composantes du consentement sont indissociables et doivent être réunies toutes trois; si l'une d'elles fait défaut, la Cour n'a pas compétence pour statuer sur la requête.

Il apparaît, pourtant, que c'est du bout des lèvres seulement que le Qatar acceptait ainsi, dans son premier écrit, de voir dans le consentement à la saisine une condition aussi essentielle à la compétence de la Cour que le consentement au règlement judiciaire, d'une part, et le consentement à l'objet et à la portée des différends, d'autre part. Après tout, nous expliquera plus tard le Qatar, le choix de la méthode de saisine n'est qu'une question procédurale, d'importance mineure. Dès lors que les Parties sont d'accord sur ce qui est, selon lui, vraiment l'essentiel - à savoir le principe du recours à la Cour et la détermination des différends à lui soumettre -, est-il raisonnable d'empêcher la Cour d'exercer sa compétence au nom de considérations procédurales sans importance (cf. requête introductive d'instance, par. 40; mémoire du Qatar, par. 5.74; réplique du Qatar, par. 4.10) ? Est-il nécessaire que la Cour vérifie, de manière distincte et spécifique, que les Parties ont consenti *aussi* à la saisine unilatérale ?

Du même coup, le Qatar en viendra à minimiser toujours davantage le consentement à la saisine et à faire reposer toujours davantage tout le poids de son argumentation sur la prétendue réunion des deux autres composantes du consentement : le consentement au règlement judiciaire et

le consentement à l'objet et à la portée des différends. La formule bahreïnite, dans laquelle le Qatar voudrait voir un accord des Parties sur l'objet et la portée des différends à soumettre à la Cour, occupera dès lors une place centrale dans son dispositif tactique, et c'est dans cette formule qu'il prétendra trouver un titre de juridiction.

Je me propose, Monsieur le Président, d'articuler mon exposé en deux parties.

Dans la première, j'analyserai les trois composantes du consentement à la compétence identifiées par le Qatar lui-même, en recherchant dans quelle mesure chacune de ces conditions se trouve ou non remplie. Je serai très bref sur les deux premières, déjà évoquées par mes collègues, et c'est à la troisième, c'est-à-dire au consentement à la saisine, que je m'attacherai plus en détail.

Je me tournerai ensuite, dans une seconde partie, vers le titre de juridiction sur lequel le Qatar prétend fonder sa requête, à savoir une formule bahreïnite analysée à la fois comme quelque chose qui ressemble à un compromis et comme quelque chose qui ressemble à une clause compromissoire.

I. LES TROIS ASPECTS ESSENTIELS DU CONSENTEMENT A LA COMPETENCE

Je commencerai donc par les trois éléments constitutifs du consentement; et d'abord le consentement au règlement judiciaire.

A. Le consentement au règlement judiciaire

La soumission d'un différend à la Cour est l'*un* des moyens de règlement pacifique à la disposition des Etats; il n'est pas le seul moyen, et le principe fondamental demeure celui du libre choix, énoncé à l'article 33 de la Charte des Nations Unies et dans d'innombrables autres instruments. La décision des deux Parties de choisir *ce* mode de règlement, de préférence à tout autre, constitue donc la condition nécessaire, *sine qua non*, de la compétence de la Cour.

Condition nécessaire ne veut toutefois pas dire condition suffisante. Un accord de principe de deux gouvernements pour recourir à la voie judiciaire reste désincarné et insusceptible d'être mis en oeuvre aussi longtemps que les Parties ne se sont pas mises d'accord sur l'objet du différend à soumettre à la Cour et sur la question de savoir si elles le lui soumettront conjointement par voie de compromis ou bien unilatéralement par voie de requête. Tout au plus est-on en présence de ce que l'on pourrait appeler, en empruntant ce concept à un autre domaine du droit international, un *inchoate title*, un titre de juridiction imparfait. Dans le dernier état de sa pensée, le Qatar paraît d'ailleurs accepter cette analyse (CR 94/1, p. 49).

Je ne m'attarderai pas davantage sur ce permier aspect du consentement, sur lequel mon ami le professeur Bowett s'est expliqué.

B. Le consentement à l'objet et à la portée des différends à soumettre à la Cour

En ce qui concerne le second aspect essentiel du consentement - le consentement à l'objet et à la portée des différends à soumettre à la Cour -, le Qatar soutient que l'assentiment qu'il a donné à la formule bahreinite a «incorporé» celle-ci dans le soi-disant accord de Doha et

que de cette «incorporation», sur laquelle il insiste inlassablement (voir par exemple : mémoire du Qatar, par. 1.03, 4.51, 4.55, 5.69; réplique du Qatar, par. 4.07; CR 94/1, p. 26 et 27), il résulte «qu'aussi bien lui-même que Bahreïn ont donné leur consentement, dans l'accord de Doha, en ce qui concerne l'objet et la portée des différends à soumettre à la Cour» (mémoire du Qatar, par. 4.56).

Monsieur le Président, comme le professeur Jiménez de Aréchaga vient de le montrer, l'analyse de la formule bahreïnite comme un accord des Parties sur l'objet et la portée des différends à soumettre à la Cour constitue un contresens, qui dénature complètement cette formule.

Non, la formule proposée par Bahreïn n'a pas eu pour objet, et l'assentiment donné à cette formule par le Qatar n'a pas eu pour effet, de déterminer d'une manière générale, *in abstracto*, les différends que les Parties étaient convenues de soumettre à la Cour. Ce que Bahreïn a proposé en 1988, et ce que le Qatar a accepté en 1990, c'est une rédaction pour l'article II du compromis en cours de discussion, article destiné à définir les questions sur lesquelles le compromis inviterait la Cour à se prononcer. Il s'agissait, comme l'ont montré mes collègues, d'une formulation ingénieuse et «neutre» qui exprimait en quelque sorte un accord sur le désaccord quant aux questions à soumettre à la Cour. Si un compromis incorporant la formule bahreïnite avait été conclu, la situation aurait été similaire à celle de l'affaire du *Canal de Beagle*, à une nuance près cependant : au lieu d'énoncer lui-même les questions différentes des deux Parties comme cela a été le cas dans l'affaire du *Beagle*, le compromis aurait autorisé Bahreïn et le Qatar à poser chacun les siennes au cours de la procédure.

Cette vérité, on le comprend, gêne nos adversaires. Aussi ont-ils tenté de l'occulter en soutenant que le texte de la formule bahreïnite «n'a jamais été inclus dans l'une quelconque des propositions de compromis présentées par Bahreïn à la commission tripartite» (mémoire du Qatar, par. 4, par. 54). Si la Cour veut bien se reporter au récit que le Qatar donne lui-même, dans ses écritures, de l'historique du différend, elle constatera que la formule proposée par Bahreïn pour sortir la négociation de l'impasse a été discutée par la commission tripartite au cours de ses cinquième et sixième réunions, en novembre et décembre 1988, dans le cadre des négociations en vue de l'élaboration d'un compromis (mémoire du Qatar, par. 3.48 et 3.50; réplique du Qatar, par. 3.33 et 3.38). Le professeur Bowett a fait la lumière sur ce point. Prétendre que la formule bahréïnite n'a pas de rapport direct avec la négociation du compromis est une contre-vérité flagrante.

Aussi devons-nous nous féliciter que dans d'autres passages de leurs écritures nos adversaires aient admis que la formule bahréïnite était destinée à être insérée dans un instrument plus vaste, comme l'une des dispositions d'un compromis qui devait en comporter bien d'autres :

> "the Bahraini Formula was first devised to be inserted in a special agreement", a reconnu le Qatar (mémoire du Qatar, par. 5.68; cf. réplique du Qatar, par. 3.50).

A vrai dire, c'est là le seul et le véritable objet de la formule bahréïnite. Prétendre, comme le font nos adversaires, que du fait de l'assentiment donné à Doha par le Qatar à la formule bahréïnite les Parties sont aujourd'hui d'accord sur l'objet et la portée des différends à soumettre à la Cour est à tout le moins un raccourci simplificateur qui trahit la réalité. Encore moins, nous le verrons plus loin, le Qatar n'est-il justifié à ériger la formule bahréïnite en un accord se

suffisant à lui-même (*which stands on its own*) et qui pourrait constituer un titre de juridiction.

J'en arrive ainsi, Monsieur le Président, au troisième élément du consentement, le consentement à la saisine, et plus précisément à la saisine unilatérale.

C. Le consentement à la saisine unilaterale

1. Les thèses fluctuantes du Qatar : du consentement implicite au consentement présumé, et du consentement présumé au consentement inutile

Avec ce troisième aspect du consentement à la compétence le Qatar se sent visiblement mal à l'aise.

D'un côté il soutient que les Parties se sont mises *implicitement* d'accord à Doha sur la faculté pour chacune d'elles, à l'expiration d'un moratoire de cinq mois destiné à donner une ultime chance à la médiation du roi d'Arabie saoudite, de saisir la Cour par voie de requête de ceux des aspects du différend qui l'intéressent plus particulièrement :

> "the Doha Agreement, écrit le Qatar, records the Parties' *implicit consent* to seisin of the Court in any manner allowed by the Statute and Rules of the Court..." (réplique du Qatar, par. 4.101).

De cette thèse du consentement implicite mais réel mes collègues ont fait justice. Le Qatar souligne lui-même le fait que tout au long des négociations postérieures à 1987 Bahreïn n'a cessé d'insister sur la nécessité de conclure un compromis afin de pouvoir aller conjointement à la Cour (CR 94/2, p. 34; cf. p. 17). Comment, Monsieur le Président, l'échec complet, le "*complete breakdown*" (CR 94/1, p. 51) de la négociation décrit par nos adversaires, de cette négociation visant à la conclusion d'un compromis, a-t-il pu miraculeusement se transformer à

Doha en un accord, fût-il implicite, sur le droit de chacune des Parties d'aller à la Cour séparément ? Comment imaginer un seul instant qu'une novation aussi révolutionnaire par rapport au processus de négociation suivi depuis la fin de 1987 ait pu être effectuée implicitement, par un texte aussi discret et dépourvu de toute mention spécifique ? Comment imaginer un seul instant que le Qatar aurait accepté qu'une concession aussi formidable de la part de Bahreïn se traduise dans une formule d'une pareille ambiguïté ?

Comment d'ailleurs parler de consentement implicite à la saisine unilatérale alors qu'à deux reprises, comme mon ami le professeur Lauterpacht l'a rappelé, Bahreïn s'est explicitement opposé à Doha à une proposition prévoyant que la Cour pourrait être saisie par l'une ou l'autre Partie ? L'opposition de Bahreïn à cette proposition, que le Qatar ne conteste pas (réplique du Qatar, par. 3.66 et 4.75) même si ses plaidoiries ont cherché à en minimiser la portée (cf. CR 94/3, p. 20), revêt à coup sûr une importance décisive. Chacun sait en effet que les clauses juridictionnelles de ce genre ne sont jamais adoptées par aucun gouvernement de manière légère et inconsidérée : l'affaire de la *Compétence en matière de pêcheries* en fournit une illustration.

Non, vraiment, Monsieur le Président, rien ne plaide en faveur d'une volte-face implicite de Bahreïn à Doha et d'un consentement commun à la saisine unilatérale. Paraphrasant l'arrêt sur le *Plateau continental de la mer Egée* (*C.I.J. Recueil 1978*, p. 43, par. 105), je dirais volontiers que rien dans les termes du procès-verbal de Doha ne traduit un changement de position du Gouvernement de Bahreïn quant aux conditions dans lesquelles ce gouvernement était prêt à accepter que le différend soit porté devant la Cour.

Tout en soutenant que le procès-verbal de Doha traduit le consentement *implicite* mais réel des Parties à la saisine unilatérale, mais conscient sans doute de la faiblesse de cette thèse, le Qatar a formulé parallèlement, à titre de positions de repli en quelque sorte, deux autres thèses complètement différentes : celle d'un consentement à la saisine unilatérale qui serait simplement *présumé*, et celle d'un consentement à la saisine unilatérale qui ne serait pas exigé par le droit, qui deviendrait juridiquement *inutile*. C'est à ces dernières versions de la thèse adverse - celle du consentement présumé et celle du consentement juridiquement inutile - que je voudrais m'attacher à présent.

La théorie de la soi-disant liberté de choix du mode de saisine

Ces deux versions ont un point de départ commun : la théorie du silence valant liberté de choix. Les Parties peuvent certes, nous explique le Qatar, prévoir le règlement d'un différend par la Cour et en même temps convenir du mode procédural de saisine. Mais, ajoute-t-il, si elles se limitent à prévoir le règlement d'un différend par la Cour sans ajouter de "disposition spéciale" (*special provision*) (mémoire du Qatar, par. 4.64) prévoyant le mode de saisine, le choix de la procédure de saisine est laissé aux Parties : compromis et requête peuvent alors être utilisés l'un aussi bien que l'autre. Telle est, soutient le Qatar, la situation dans notre affaire. Puisque l'accord de 1987 et le procès-verbal de Doha n'ont pas spécifié par quelle procédure la Cour devait être saisie, le choix du mode de saisine est, prétendent nos adversaires, resté "entièrement ouvert" (*entirely open*), il a été "laissé aux Parties" (*left to the Parties*), et le Qatar était, en conséquence, en droit de

choisir la voie de la requête unilatérale aussi bien que celle du compromis (voir par ex. mémoire du Qatar, par. 4.64; 5.42; réplique du Qatar, par. 3.02; 3.72; 4.43; 4.101; 6.07; 6.16; CR 94/2, pp. 62-63).

Pourquoi donc, Monsieur le Président, le silence des Parties quant au mode de saisine leur laisserait-il le choix entre la voie conjointe et la voie unilatérale ? Le Qatar n'apporte pas de réponse claire à cette question et paraît hésiter entre deux voies.

Dans une première variante, il laisse entendre qu'en l'absence de disposition spéciale prévoyant la conclusion d'un compromis, les Parties sont présumées avoir accepté la possibilité d'une saisine unilatérale. Il s'agirait en somme de l'application de l'adage du droit civil : "Qui ne dit mot consent."

Mais le Qatar ne s'en tient pas là. Dans une seconde version, plus radicale, les amarres avec le principe du consentement sont entièrement rompues : le consentement n'est plus présumé, il devient juridiquement inutile. A tel point que lorsqu'il a évoqué à nouveau, dans sa réplique écrite, le problème des aspects essentiels du consentement qu'il avait déjà étudié dans son mémoire, le Qatar a purement et simplement passé sous silence le consentement à la saisine (réplique du Qatar par. 4.86). Et c'est la même attitude de silence que sir Ian Sinclair a adoptée il y a quelques jours puisque, s'il a traité en détail du consentement des Parties au règlement judiciaire et de leur consentement à l'objet et à la portée des différends (CR 94/1, p. 47 et 50), il n'a pas dit un mot - pas un mot, je le répète - du consentement à la saisine.

Quant au professeur Quéneudec, il a, quant à lui, explicitement affirmé que, je le cite, si «la compétence de la Cour dépend de la

volonté des Parties», le mode de saisine «n'a pas nécessairement la même base volontariste» (CR 94/2, p. 63).

La compétence, soutient le Qatar, est régie par le principe de la juridiction consensuelle de l'article 36 du Statut, alors que la saisine est gouvernée exclusivement par l'article 40, lequel ne subordonne pas le choix entre le compromis et la requête au consentement des Parties. Ce choix, soutient le Qatar, est de caractère purement «procédural» et «formel» (*procedural way, formal step*), et puisque les Parties n'ont pas expressément prévu dans notre affaire à quel mode de saisine il convenait de recourir, les deux voies prévues à l'article 40 ont pu être utilisées indifféremment l'une aussi bien que l'autre (mémoire du Qatar, par. 4.57-4.64; réplique du Qatar, par. 4.96-4.103). Cette théorie de la question de la saisine, simple «question de procédure», a été poussée par mon ami M. Quéneudec jusqu'à un point extrême, puisqu'il a soutenu qu'il suffit que la saisine unilatérale ne soit pas «exclue», c'est le mot qu'il a employé, pour qu'elle soit possible (CR 94/2, p. 62-64).

Bahreïn, ai-je besoin de le répéter, n'accepte aucune des prémisses de ce raisonnement. Mais suivons un instant, à titre d'hypothèse, le Qatar dans son cheminement intellectuel. Même s'il y avait eu accord inconditionnel des Parties sur le règlement par la Cour, ce que Bahreïn nie, même s'il y avait eu accord des Parties sur la détermination des différends, ce que Bahreïn conteste, même si les Parties n'avaient rien envisagé au sujet du mode de saisine, ce que Bahreïn n'accepte pas, même alors, Monsieur le Président, on ne pourrait pas admettre la thèse du Qatar selon laquelle le choix du mode de saisine serait resté ouvert, et moins encore que la saisine unilatérale aurait été possible du simple fait qu'elle n'a pas été «exclue».

Une remarque s'impose à cet égard. Lorsque le Qatar évoque la liberté de choix du mode de saisine, il présente le problème d'une manière abstraite et irréaliste. Il donne l'impression que les deux modes de saisine - compromis et requête - sont sur le même plan et que choisir l'un est équivalent à choisir l'autre. Comment ne pas voir pourtant qu'il n'en est rien et que l'équivalence que le Qatar voudrait accréditer entre la saisine conjointe et la saisine unilatérale constitue une fausse symétrie ?

Que signifie en effet concrètement cette liberté de choix dont nous parle le Qatar ? Qu'après avoir décidé d'un commun accord de soumettre un différend au Règlement de la Cour, deux parties puissent se mettre d'accord sur les termes d'un compromis et saisir la Cour par la notification de ce compromis, cela est évident et ne fait pas difficulté. Concrètement, le problème est uniquement de savoir si, en l'absence de disposition spéciale précisant le mode de saisine, l'une des parties peut prendre le devant et porter le différend à la Cour unilatéralement. Ce n'est pas le consentement à la saisine, de manière indifférenciée, qui est en cause, c'est le consentement à la saisine par voie unilatérale. Sous les apparences de la liberté de choix, la thèse du Qatar revient en réalité à soutenir que le silence des Parties quant au mode de saisine implique, ou entraîne, la possibilité pour chacune des Parties de saisir la Cour par voie unilatérale.

2. L'erreur de la thèse du Qatar : le principe général de la juridiction consensuelle exige un consentement «non équivoque» et «indiscutable» à la saisine unilatérale

Pour mettre le doigt sur l'erreur fondamentale qui vicie la théorie du Qatar, je commencerai par sa variante la plus extrême, celle d'après laquelle le choix de la méthode procédurale de saisine serait indifférent au regard du principe général de la juridiction consensuelle et c'est après cela seulement que j'aborderai la variante du consentement présumé.

Il est incontestable, je n'ai pas besoin d'insister là-dessus, que juridiction et saisine sont deux concepts différents, comme le montre l'affaire *Nottebohm* (*C.I.J. Recueil 1953*, p. 111). C'est sur cette distinction que repose en particulier la doctrine du *forum prorogatum*, selon laquelle la Cour peut avoir été saisie valablement d'une requête alors même que sa compétence pour se prononcer sur cette requête n'aurait été acquise qu'ultérieurement, par l'assentiment du défendeur. Mais de là à soutenir, comme le fait la Partie adverse, que le mode de saisine est une simple «question de procédure» et que, en tant que telle, elle ne repose pas sur «la même base volontariste» que la compétence (CR 94/2, p. 62-63), il y a un pas que rien n'autorise à franchir. Comme l'observe sir Gerald Fitzmaurice, un tribunal qui a été saisi dans des conditions irrégulières n'a pas compétence pour statuer sur l'affaire («*if a tribunal has not been duly seised*, écrit-il, *it is incompetent to hear the case*»; *The Law and Procedure of the International Court of Justice*, Cambridge, Grotius, 1986, vol. II, p. 440). C'est aussi simple que cela : le consentement à la saisine est une condition de la compétence.

Le choix du mode de saisine, décision politique et discrétionnaire

La thèse du Qatar, me semble-t-il, repose sur une méconnaissance profonde de la philosophie du règlement judiciaire dans le système international. La Cour me pardonnera peut-être une digression de caractère quelque peu académique, mais qui me semble toucher à l'essentiel de notre affaire. Comme le disait le juriste français Maurice Hauriou, il y a de la philosophie derrière le plus petit procès de mur mitoyen.

En soutenant que le consentement à la saisine n'est pas exigé avec autant de rigueur que le consentement au règlement judiciaire et le consentement à l'objet et à la portée des différends, le Qatar méconnaît le fondement et la raison d'être du principe de la juridiction consensuelle. Même si les juristes ont une inclinaison naturelle à privilégier sur tous autres le règlement judiciaire, une vue réaliste des choses conduit à se défaire de tout fétichisme judiciaire et à accepter que d'autres modes de règlement pacifique coexistent avec le règlement judiciaire. Selon la formule bien connue, le règlement judiciaire est «un succédané au règlement direct et amiable» des conflits entre les parties (*Zones franches, C.P.J.I. série A/B n° 42*, p. 116), une «voie de substitution, mais ayant toujours une base consensuelle« (*Délimitation de la frontière maritime dans la région du golfe du Maine, C.I.J. Recueil 1984*, p. 292, par. 89; cf. *Différend frontalier (Burkina Faso c. République du Mali), C.I.J. Recueil 1986*, p. 577, par. 46). Aussi le règlement judiciaire est-il entre les mains des parties : il intervient lorsque les Etats le veulent, il intervient avec l'ampleur que les Etats lui assignent, il intervient sous la forme que les Etats lui donnent.

Le choix par un Etat du règlement judiciaire relève en conséquence de son pouvoir discrétionnaire. C'est un choix politique. La Cour a rappelé récemment que les déclarations optionnelles de l'article 36, paragraphe 2, de son Statut «sont des engagements facultatifs, de caractère unilatéral, que les Etats ont toute liberté de souscrire ou de ne pas souscrire» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis), C.I.J. Recueil 1984*, p. 418, par. 59). Cette remarque est valable pour tout consentement à la juridiction de la Cour, que ce soit sur la base de l'article 36, paragraphe 2, ou sur celle de l'article 36, paragraphe 1.

Décision discrétionnaire, relevant d'une option politique, ai-je dit à l'instant en parlant de la décision de recourir au règlement par la Cour de préférence à tout autre mode de règlement. Mais - et nous arrivons là au centre du débat - ce caractère politique et discrétionnaire n'est pas moins certain lorsqu'il s'agit pour un gouvernement de choisir entre la saisine conjointe et la saisine unilatérale. La souveraineté des Parties est en jeu ici comme là et des considérations d'intérêt national peuvent dicter la décision de chacun ici comme là. Même s'il est de principe, comme l'a rappelé la déclaration de Manille (résolution 37/10 du 15 novembre 1982), que le recours au règlement judiciaire ne devrait pas être considéré comme un acte d'inimitié, même si, comme l'a dit à juste titre l'agent du Qatar, être exposé à la requête d'un autre Etat ne peut en aucune manière être regardé comme un «déshonneur» (CR 94/1, p. 15; cf. 94/3, p. 42), il n'en reste pas moins qu'un gouvernement peut avoir des raisons politiques impérieuses pour préférer la saisine conjointe à la saisine unilatérale. Tout Etat est libre de rechercher la solution d'un différend selon le procédé qui lui paraît approprié.

Le professeur Salmon a tenté de convaincre la Cour que Bahreïn n'a rien à craindre d'une saisine unilatérale et n'a aucune raison d'être aussi irréductiblement attaché à la soumission conjointe (CR 94/3, p. 41 et suiv.). Le problème n'est pas là. Le choix de Bahreïn relève de ses prérogatives d'Etat souverain et ne se discute pas.

Monsieur le Président, les deux procédures, au demeurant, ne sont pas équivalentes - mon ami M. Highet y reviendra. La saisine par compromis implique un accord des parties sur les questions à soumettre à la Cour. Et même lorsque les aspects du différend que les deux parties souhaitent porter devant la Cour ne coïncident pas entièrement, comme c'est le cas dans notre affaire, la saisine par compromis offre toute une gamme de solutions permettant d'assurer chacune d'elles que ceux des aspects du différend qui l'intéressent plus particulièrement seront effectivement portés devant la Cour. Le compromis peut, par exemple, énumérer un à un dans le détail tous les aspects du différend et les inclure tous, de manière explicite, dans la question posée. Le compromis peut aussi, comme cela a été le cas dans l'arbitrage du *Canal de Beagle*, mentionner deux questions distinctes, posées l'une par l'une des parties, l'autre par l'autre partie. Le compromis peut enfin, comme cela serait le cas si un compromis incorporant la formule bahreïnite était signé dans notre affaire, comporter une clause ouverte et flexible permettant à chaque Partie de soumettre ceux des aspects du différend qui lui tiennent particulièrement à coeur. Les formules de ce genre, plus inventives les unes que les autres, permettent toutes d'englober dans une procédure contentieuse *unique* les divers aspects d'un même différend.

La requête unilatérale, tout au contraire, conduit à laisser essentiellement au demandeur le soin de dessiner, par ses conclusions,

les contours du différend sur lequel la Cour va avoir à se prononcer. Le Qatar soutient certes que la formule bahreïnite est assez large pour englober les revendications figurant dans sa requête et que liberté est laissée à Bahreïn de soumettre à la Cour d'autres aspects du différend, en particulier le problème de Zubarah, en déposant lui aussi une requête (mémoire du Qatar, par. 1.04; 1.08; 4.42; 5.66; 5.78 - 5.82; requête du Qatar, par. 4.115; CR 94/1, p. 26, 28; CR 94/3, p. 43 et suiv.). Ces affirmations sont toutefois, le professeur Bowett l'a relevé, accompagnées de prudentes réserves quant à l'admissibilité de telles demandes (mémoire du Qatar, par. 5.78; requête du Qatar, par. 5.04; CR 94/3, p. 50).

De toutes manières, si Bahreïn avait déposé sa propre requête, ce serait sur deux affaires distinctes, fussent-elles procéduralement jointes, que la Cour aurait eu à se prononcer, alors pourtant que l'âme de la formule bahreïnite était précisément de permettre à chaque Partie de soumettre à la Cour certains aspects du différend *dans le cadre d'une seule et même procédure*.

Monsieur le Président, le Qatar ne cesse de jouer sur les mots, entretenant systématiquement l'équivoque entre les questions distinctes que les deux Parties auraient pu soulever sur la base d'un compromis incluant la formule bahreïnite et les conclusions séparées qu'elles auraient pu soumettre dans deux requêtes distinctes. Puisque les Parties étaient tombées d'accord à Doha pour envisager des *questions distinctes*, laisse entendre le Qatar, pourquoi s'opposerait-on à ce que ces questions fassent l'objet de *requêtes distinctes* ?

Mais, Monsieur le Président, "deux questions" n'est pas synonyme de "deux requêtes". Formuler deux questions distinctes à l'intérieur et dans

le cadre d'une procédure unique ouverte par la notification d'un instrument unique, ce n'est pas la même chose que formuler deux demandes distinctes dans le cadre de deux procédures séparées, ouvertes par deux requêtes introductives d'instances autonomes - à moins, bien entendu, qu'un tel scénario ait été mis au point d'un commun accord des Parties, comme dans l'affaire du *Droit d'asile* et dans quelques autres affaires dont j'aurai l'occasion de parler ultérieurement.

L'allégation inlassablement répétée par le Qatar que les demandes formulées dans sa requête restent dans les limites de la formule bahreïnite, que Bahreïn est libre d'ajouter ses propres demandes, en particulier celle relative à Zubarah, à celles du Qatar en déposant sa propre requête et que Bahreïn a bien tort de "jouer les martyrs" (CR 94/3, p. 43), cette allégation relève d'une fausse simplicité. Le problème n'est pas seulement quantitatif, ajouter une demande à une autre, il est aussi qualitatif. L'idée d'adjonction perd tout sens lorsqu'on envisage les demandes du Qatar relatives à Dibal et Qit'at Jaradah et à la délimitation maritime. En qualifiant Dibal et Qit'at Jaradah de "hauts-fonds" et en demandant à la Cour de tracer la frontière maritime "compte dûment tenu (*with due regard*) de la ligne de partage des fonds marins des deux Etats décrite dans la décision britannique du 23 décembre 1947", la requête du Qatar préjuge et oriente le débat en posant la question en des termes auxquels Bahreïn n'a jamais consenti et dont on ne peut pas dire qu'ils sont "*within the formula*" (mémoire du Qatar, par. 5.78).

Le consentement à la saisine par voie de requête, composante à part entière du principe général de la juridiction consensuelle

Des observations que je viens de faire découle une conséquence capitale : le choix de la méthode de saisine n'est pas une simple "question de procédure". C'est une question de compétence qui relève des exigences du principe de la juridiction consensuelle. La saisine unilatérale n'est possible que si les parties y ont consenti. Ce n'est pas la saisine unilatérale qui est la solution "par défaut", comme diraient les informaticiens dans leur jargon, c'est la saisine conjointe; et il faut une volonté claire et commune des deux parties pour autoriser la saisine unilatérale.

On comprend dès lors que la Cour ait toujours traité la faculté de recourir ou non à la saisine par voie de requête comme une question de compétence de la Cour plutôt que comme une question de recevabilité de la requête. C'est ce qu'elle a fait, par exemple, dans l'affaire *Nottebohm* (*C.I.J. Recueil 1953*, p. 122). Et lorsque, dans l'affaire du *Plateau continental de la mer Egée*, elle a eu à déterminer si la décision de la Grèce et de la Turquie de faire régler leur différend par la Cour permettait à chacune des Parties de saisir la Cour par voie de requête, elle ne s'est pas demandé si la requête déposée par la Grèce était recevable; c'est sur le terrain de la compétence qu'elle s'est placée. Et le dispositif de l'arrêt ne déclare pas que la requête de la Grèce est irrecevable, mais que la Cour "n'a pas compétence pour [en] connaître" (*C.I.J. Recueil 1978*, p. 45, par. 109). Mieux encore : dans l'arrêt interprétatif en l'affaire *Tunisie/Lybie* la Cour a déclaré que

> "les parties à des traités ou à des compromis sont libres d'assortir leur consentement *à la saisine de la Cour, et donc à sa juridiction*, de toutes conditions préalables compatibles avec

> le Statut dont elles peuvent être convenues" (*C.I.J. Recueil 1985* p. 216, par. 43) (les italiques sont de nous).

On ne saurait être plus clair. Le traitement constant par la Cour du consentement à la saisine unilatérale comme une question de compétence méritait, me semble-t-il, d'être relevé.

Si vous le jugez utile, Monsieur le Président, je peux m'arrêter, sinon je peux continuer. C'est comme vous le souhaitez.

Le PRESIDENT : Bien, je crois en effet que c'est l'heure de lever la séance. Monsieur le Professeur, je vous remercie et la Cour reprendra ses audiences demain matin à 10 heures, pour continuer à vous entendre. Merci beaucoup.

M. WEIL : Je vous remercie Monsieur le Président.

L'audience est levée à 13 heures.
