CR 94/8

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1994

Public sitting

held on Friday 11 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 vendredi 11 mars 1994, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

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

(Qatar c. Bahreïn)

COMPTE RENDU

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

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

MM. Valticos,
Ruda, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Qatar is be represented by:

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

as Agent and Counsel;

Mr. Adel Sherbini, Legal Expert,

as Legal Adviser;

Mr. Sami Abushaikha, Legal Expert,

as Legal Adviser;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

The Government of Bahrain is represented by:

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

as Agent and Counsel;

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

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

Le Gouvernement du Qatar est représenté par :

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

comme *agent et conseil;*

M. Adel Sherbini, expert juridique,

comme *conseiller juridique;*

M. Sami Abushaikha, expert juridique,

comme *conseiller juridique;*

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

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

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

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

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

comme *conseils et avocats;*

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

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

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

Le Gouvernement de Bahreïn est représenté par :

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

comme agent et conseil;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel.

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

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

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

comme conseils.

The PRESIDENT: Please be seated. The Court will hold this morning its last hearing in the course of which it will hear Bahrain in its second round of oral proceedings. I give therefore the floor to the Agent, His Excellency Minister Mohammed Al Baharna.

Mr. AL BAHARNA: [Greetings] Mr. President, Members of the Court, in opening this second round of oral pleadings on behalf of the State of Bahrain I should like to outline the order in which counsel will address the Court:

- firstly, Professor Weil will return to the question of consent to the jurisdiction of the Court;
- secondly, Professor Bowett will concentrate on the 1987 Agreement and the work of the Tripartite Committee;
- Dr. Jiménez de Aréchaga will consider the question of the subject of the dispute and refute Qatar's contention that this is defined in paragraph 2 of the 1990 Minutes; and
- Professor Lauterpacht will address the status and effect of the 1990 Minutes.

Finally, I will conclude by summarizing Bahrain's perception of the principal points in this case.

Mr. President, I should be grateful if you would kindly call on Professor Weil to address this Court.

The PRESIDENT: Thank you, Your Excellency. J'appelle à la barre le professeur Prosper Weil.

M. WEIL : Monsieur le Président, Messieurs les juges, le second tour des plaidoiries orales est l'occasion de faire le point et de dresser le bilan des convergences et des divergences entre les Parties.

Premièrement : les Parties s'accordent à voir dans notre affaire une question de compétence, et non pas une question de procédure ou de recevabilité.

Deuxièmement : les Parties s'accordent à voir dans le consentement des Parties la condition de la compétence de la Cour.

Troisièmement : ce qui nous sépare de nos adversaires, c'est qu'ils soutiennent que l'engagement pris par les Parties en 1987 de soumettre leurs différends à la Cour doit recevoir effet, fût-ce au prix d'une saisine unilatérale non voulue par les Parties et, en tout cas, jamais acceptée par l'une d'elles. Nous estimons, pour notre part, que le titre de juridiction résultant de l'accord de principe des Parties de recourir au règlement de leurs différends par la Cour de préférence à tout autre mode de règlement reste imparfait, «*inchoate*» *ai-je dit*, aussi longtemps que les Parties ne se sont pas mises d'accord *aussi* sur l'objet et la portée des différends et sur la méthode par laquelle la Cour sera saisie.

Quatrièmement : tout en insistant sur le caractère complet et définitif de l'engagement pris en 1987 de recourir au règlement de leurs différends par la Cour, le Qatar continue à prétendre que de l'assentiment qu'il a donné à la formule bahreïnite est né le consentement des Parties à l'objet et à la portée des différends (CR 94/7, p. 45 et 58). Nous avons montré que ce n'était là l'objet et l'effet de la formule bahreïnite que dans la perspective du compromis en cours de négociation. Le conseil du Qatar est allé hier jusqu'à avancer l'idée, assurément inattendue, que cette formule (la formule bahreïnite)

était «plus appropriée à la saisine de la Cour par voie de requête», et «qu'elle se prêtait beaucoup mieux à servir de base à une requête unilatérale de chacune des Parties» qu'à une saisine par voie de compromis (CR 94/7, p. 59). Je pose la question, Monsieur le Président : est-ce que les gouvernements ont l'habitude de rédiger les clauses par lesquelles ils prévoient que la Cour pourra être saisie unilatéralement, par requête de l'une ou de l'autre Partie, sur le modèle du langage de la formule bahreïnite : «Les Parties prient la Cour de trancher toute question ... etc. ?»

Cinquièmement : le consentement à la compétence implique-t-il un consentement spécifique à la saisine, et plus précisément à la saisine unilatérale ? Sur cette question, qui se trouve au coeur de notre affaire, la pensée de nos adversaires paraît avoir quelque peu évolué. De la distinction radicale entre la compétence proprement dite, dont le Qatar reconnaît qu'elle relève du principe consensualiste, et la saisine, simple «question de procédure», qui, à ce titre, ne relèverait pas au même degré de l'exigence volontariste, il n'a fort heureusement plus été question.

Mais si la thèse extrême, négatrice de toute exigence du consentement à la saisine, paraît avoir été abandonnée, le Qatar ne s'est pas pour autant rallié à la conception, que j'ai eu l'honneur d'exposer devant la Cour, du consentement à la saisine, composante à part entière du principe général de la juridiction consensuelle. Sur ce point, l'ambiguïté des thèses du Qatar demeure entière, et le Qatar continue à jouer sur les deux registres du consentement réel, fût-il implicite, et du consentement simplement présumé. D'un côté, en effet, le procès-verbal de Doha a continué hier à être présenté comme exprimant l'accord des Parties sur la

possibilité d'une ou de deux requêtes unilatérales. D'un autre côté, et concomitamment, on nous a répété hier que, puisque les Parties n'ont pas pris expressément position sur le mode de saisine et n'ont pas «formellement exclu» (CR 94/7, p. 63) la saisine unilatérale, le consentement à cette dernière devait être présumé.

Je ne reviendrai pas sur l'impossibilité juridique à admettre l'idée inacceptable d'un consentement simplement présumé. La question se ramène en conséquence à celle de savoir si à Doha les Parties - les deux Parties - ont ou non donné leur consentement à la saisine unilatérale. Ce consentement, nous sommes d'accord avec la Partie adverse là-dessus, peut être implicite, à condition d'être certain compte tenu des circonstances de l'espèce. Il peut avoir été donné sous n'importe quelle forme. Mais encore faut-il qu'il ait été effectivement donné, qu'il soit «non équivoque» et «indiscutable».

Nous avons montré, dans le premier tour de nos plaidoiries, qu'il ne pouvait pas être question d'une «rencontre des volontés», d'un «meeting of minds», à Doha sur la saisine unilatérale puisque Bahreïn a obtenu à Doha l'accord du Qatar à la substitution des mots : «les Parties» aux mots «l'une ou l'autre Partie» ou «chacune des Parties» *proposés par* Oman. Ce fait, je l'ai déjà dit, n'est pas contesté par le Qatar (réplique du Qatar, par. 3.66; CR 94/3, p. 20) et a été reconnu tant dans les écritures que dans les plaidoiries du Qatar. Je me permets de le répéter : *un «non» explicite ne peut pas être compris comme un «oui» implicite*.

Embarrassé sans nul doute par le caractère dévastateur de ce fait établi et non contesté, l'agent du Qatar a tenté d'en minimiser la portée. Pour tout juriste, pour tout homme de bon sens, écarter, au

cours de la négociation d'une clause juridictionnelle, «*either of the Parties*» au profit de «*the Parties*» signifie que c'est l'action des deux Parties, et non pas celle de l'une ou l'autre d'entre elles agissant seule, qui est exigée. Pour le Qatar, au contraire, le sens naturel et ordinaire des termes doit être inversé, puisque, à en croire l'agent du Qatar, c'est dans le but de permettre la saisine unilatérale que ce changement aurait été opéré :

> « On the Omani draft [a déclaré hier l'agent du Qatar] Bahrain simply changed «either of the parties» to «the parties», thus making clear that both Qatar *and* Bahrain had the right to make a unilateral application to the Court.» (CR 94/7, p. 16.)

M. Quéneudec, quant à lui, dans sa démonstration visant à établir que les Parties avaient «laissé ouverte la possibilité d'une saisine unilatérale» (CR 94/7, p. 60), a passé sous silence ce changement hautement significatif apporté à la rédaction du procès-verbal de Doha, changement dont je dirais qu'il a fermé - plutôt que laissé ouvert - toute possibilité de saisine unilatérale.

Sir Ian Sinclair a mis en garde contre la tentation, dans l'interprétation d'un traité, de faire prévaloir l'intention subjective des négociateurs sur la volonté des Parties telle qu'elle est exprimée dans le texte (CR 94/7, p. 34 et suiv.). Laissant de côté la question de la nature juridique du procès-verbal de Doha, j'observerai simplement que c'est à une donnée objective, qui a trouvé expression dans les textes, que je me suis référé lorsque j'ai insisté sur l'importance cruciale du changement de texte opéré à Doha à l'initiative de Bahreïn et accepté par le Qatar. J'ajouterai que si les Parties avaient vraiment entendu, à Doha, vouloir autoriser désormais chacune d'elles à agir unilatéralement et séparément, ce n'est à coup sûr pas à la formule figurant dans le

procès-verbal de Doha qu'elles auraient recouru, mais à la formule classique, usuelle, claire et simple «l'une ou l'autre Partie» - or, c'est cette formule qu'elles ont précisément écartée.

Dans l'espoir d'établir contre vents et marées un semblant de consentement à la saisine unilatérale à Doha, le Qatar a avancé au second tour des plaidoiries un argument quelque peu nouveau, repris avec une insistance qui n'aura pas échappé à l'attention de la Cour : l'engagement pris en 1987 de porter le différend devant la Cour, nous a-t-on expliqué longuement hier, ne pouvait pas rester inexécuté du simple fait de l'échec des négociations pour la rédaction du compromis; la voie du compromis étant abandonnée, nous a-t-on dit en toutes lettres, il ne restait «d'autre issue que la voie de la requête» (CR 94/7, p. 63 ; cf. p. 20).

La Cour aura remarqué que ce thème du caractère inéluctable de la saisine unilatérale, à la suite de l'échec de la négociation pour la rédaction du compromis, paraît avoir remplacé, dans la pensée de nos adversaires, le thème primitif d'après lequel, les Parties étant d'accord sur l'essentiel, il n'y a plus rien aujourd'hui qui fasse obstacle à ce que la Cour exerce sa compétence. Jusqu'ici, c'était l'accord des Parties sur presque tout qui était invoqué pour justifier le dépôt de la requête; à présent, c'est l'échec complet des négociations dont on nous dit qu'il ne laissait plus d'autre issue.

C'est là, une fois de plus, nier l'exigence du consentement à la saisine. Cette thèse revient en effet à soutenir que si deux gouvernements désireux de soumettre un différend déterminé au Règlement de la Cour ne parviennent pas à s'accorder sur la rédaction d'un compromis, ils sont présumés *ipso facto* avoir consenti à la saisine

unilatérale, puisqu'il n'y avait plus d'autre issue pour porter l'affaire à la Cour. En d'autres termes, l'échec de la soumission conjointe se transforme, selon la thèse de nos adversaires, par une mystérieuse alchimie, en un accord sur la soumission unilatérale; ou, si l'on préfère, le consentement à la saisine unilatérale est inféré de l'échec des négociations pour la rédaction d'un compromis.

Ce n'est plus parce que les Parties auraient décidé d'un commun accord, fût-ce implicitement, d'autoriser la saisine unilatérale que le procès-verbal de Doha est, à l'extrême fin de cette procédure, présenté comme légitimant la requête unilatérale du Qatar, mais parce que, les Parties n'étant pas parvenues à s'accorder sur la rédaction d'un compromis, le dépôt d'une requête était devenu le seul moyen encore disponible pour mettre en oeuvre la décision de principe de 1987 de recourir au règlement judiciaire. La Cour appréciera la singulière logique de cette argumentation.

Le consentement à la saisine, élément constitutif du principe fondamental de la juridiction consensuelle ne repose pas, contrairement à ce qu'a dit le professeur Salmon, sur «un dogme présenté comme une vérité révélée : que l'action doit être introduite conjointement» (CR 94/7, p. 51). Il constitue une règle de droit qui occupe une place centrale dans le système juridique international.

Monsieur le Président, Messieurs les juges, à la suite de l'exposé que j'ai eu l'honneur de faire devant la Cour, j'attendais - pour être franc, je redoutais - une contradiction sur la nécessité du consentement à la saisine en tant que troisième aspect essentiel du consentement à la compétence et une contradiction aussi sur l'identification du titre de

compétence dont se prévaut le Qatar. Les plaidoiries que nous avons entendues hier ont déçu mon attente mais ... dissipé mes appréhensions.

La non-exigence du consentement à la saisine a été réaffirmée sans qu'il y ait été apporté le moindre commencement de preuve.

Quant au titre de juridiction - question importante dans un débat sur la compétence - on s'est contenté de nous dire que chercher à faire une place à la requête du Qatar dans un «schéma prédéterminé» - entendez par là : le «schéma» décrit dans l'arrêt *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)* - «revient à oublier que l'article 36, paragraphe 1, du Statut n'a jamais été interprété de manière littérale» (CR 94/7, p. 61). A cette dernière analyse de l'article 36, paragraphe 1, j'avais moi-même souscrit, dans les mêmes termes, en ajoutant que c'est la réalité du consentement plus que son véhicule formel qui est déterminante (CR 94/6, p. 20-21).

Sur le titre de juridiction invoqué par le Qatar nous restons donc sur notre faim.

Quant à dire que j'ai procédé à la manière des «anciens apothicaires» qui «aiment les bocaux bien rangés avec leurs étiquettes bien distinctes» (CR 94/7, p. 61), je prends ceci pour un compliment, car je me suis efforcé de suivre la ligne tracée par la Cour et par d'éminents auteurs qui ont tous procédé à une classification rigoureuse des titres de juridiction. Je voudrais en tout cas rendre hommage au talent et à l'élégance de mon ami et collègue Jean-Pierre Quéneudec, puisque c'est avec lui plus particulièrement que j'ai eu le plaisir de croiser le fer.

Monsieur le Président, Messieurs les juges, permettez-moi de redire à la Cour combien je suis heureux et combien je me sens honoré d'avoir pu, grâce à la confiance du Gouvernement de Bahreïn, prendre la parole devant

elle. Je vous remercie de votre patiente attention, et je vous prie, Monsieur le Président, de bien vouloir appeler à la barre le professeur Bowett.

Le PRESIDENT : Merci, professeur Weil. I give now the floor to Mr. Bowett.

Mr. BOWETT : Thank you Sir. Mr. President, Members of the Court, both Parties agree that, pursuant to the 1987 Agreement, they accepted no more than a commitment *in principle* to refer *all* their disputes to the Court. It is common ground that the 1987 Agreement was not *per se* a basis of jurisdiction: it required implementation to become effective.

Both Parties agree that, within the Tripartite Committee, the Parties agreed that the method of implementation should be a Special Agreement.

The question arises, therefore, of how Qatar attempts to show that this clear agreement to proceed to the Court under a Special Agreement was changed. The central Qatari argument depends upon the use in the Doha Minutes of the phrase *"al tarafan"*. Professor Lauterpacht has demonstrated that this argument is totally unpersuasive.

In addition, however, Qatar has to explain away two further phrases in the Doha Minutes which, I submit, are clearly inconsistent with Qatar's interpretation. I take the first phrase:

(i) **"That which had previously been agreed between the two Parties was re-affirmed"**

Given that the Parties had previously agreed to proceed via a Special Agreement, this phrase in the Doha Minutes must confirm that common intention. I take the second phrase:

(ii) **"the two Parties may submit the case to the International Court of Justice, in accordance with the Bahraini Formula..."**

It has to be recalled that there were three distinct elements to this formula. These were

First, a "neutral" framing of the issues,

Second, a clear understanding that it was designed by Bahrain to allow Bahrain to bring its claims concerning Zubarah, an understanding Qatar does not deny, and

Third, a common acceptance that the Bahraini formula was to be contained in Article II of a Special Agreement.

Now, insofar as Qatar wished to accept this formula at Doha, Qatar had to accept all three elements: the "definitional" element, the element of intent or purpose, and the element of context. It was not open to Qatar to accept just the first element, and reject the second and third. In fact, Qatar has not really accepted even the first element. Qatar's Application is not in the neutral terms of the Bahraini formula. The issues put to the Court by Qatar in its Application are not an accurate reflection of that formula but are rather selective and self-serving. Qatar pays no more than lip-service to the requirement - the fundamental requirement - that the Parties must be agreed on the subject-matter of the dispute which they refer to the Court. Thus, this phrase, too, runs counter to Qatar's interpretation of the Doha Minutes. Qatar cannot, at the same time, "accept" the Bahraini formula with its three elements *and* disavow the need for a Special Agreement, bringing a unilateral claim excluding Zubarah.

So, Qatar's interpretation faces these considerable obstacles - quite apart from the meaning of *"al tarafan"* - which arise from the

inconsistency between Qatar's interpretation of what was agreed at Doha and these two, clear phrases in the Agreed Minutes.

How does Qatar explain these inconsistencies? Qatar offers *two* explanations:

First, Qatar argues that the "re-affirmation" was confined to the 1987 Agreement and the commitment in paragraph 1 of that Agreement to have recourse to the Court. Thus all the agreements reached in the Tripartite Committee, including the agreement to proceed by way of Special Agreement, can be ignored.

In the argument of the Agent for Qatar yesterday we were given the reasoning behind this extraordinary interpretation of what was re-affirmed at Doha. The reasoning seems to run as follows. Qatar says that the GCC members knew of the 1987 Agreement, but did *not* know of the other agreements reached in the Tripartite Committee.

Therefore, says Qatar, at Doha the Parties' re-affirmation of their previous agreements was confined to the 1987 Agreement. Mr. President, I see no logic in that: and it is certainly not what the Doha Minutes say. Why two parties, in re-affirming points of agreement they have previously negotiated, should wish to confine that re-affirmation to points third parties may know about is not clear to me at all.

Second, Qatar argues that the Tripartite Committee was at an end and, in consequence, the understanding that the Parties would proceed via a Special Agreement had been abandoned.

Mr. Shankardass, as counsel for Qatar (CR 94/7, p. 20) suggested that this failure had occurred by the end of 1988.

In the first round I had suggested (CR 94/5, pp. 35-36) that this reasoning was unacceptable. The Minutes say nothing about terminating

the Committee, and, on the contrary, disclose that Bahrain would go away and think about the Qatari idea for two annexes. Moreover, Saudi Arabia could not unilaterally terminate a dispositive provision in a tri-party agreement without the consent of both Qatar and Bahrain. And, finally, at Doha both King Fahd and Shaikh Mohammed stated that the Tripartite Committee was still in being.

Qatar's answer to these points is that the consent of Qatar and Bahrain to the termination of the Tripartite Committee established in paragraph 3 of the 1987 Agreement by Saudi Arabia was not needed. Because Saudi Arabia was given "another role and duty" under paragraph 4; I cite Mr. Shandardass.

Mr. President, I am baffled. Paragraph 4 provided for Saudi Arabia to continue its good offices. How that can be interpreted as including a power to terminate paragraph 3, without the consent of the other Parties, escapes me.

Then as to the statements made by King Fahd and Shaikh Mohammed at Doha, suggesting the Tripartite Committee was still in being, Mr. Shankardass suggests the statement was "obviously made in the context that it was a duty the Committee had failed to discharge" (CR 94/7, p. 21).

That is *not* what King Fahd is reported as saying. I can only request the Court to read the text of the report (CMB, Vol. II, p. 160).

Mr. President, the suspension of the work of the Tripartite Committee in 1989-1990 has been satisfactorily explained by both Parties: it was due to the active resumption of Saudi mediation on the merits. There is no possible basis for assuming that this body, established by treaty, has been terminated. Indeed, Qatar overlooks a rather elementary point. The

termination of the Tripartite Committee would not in any event terminate all that had been provisionally agreed in that Committee. Why should it? To bring to an end the machinery for negotiation does not automatically bring to an end the content of agreement already reached via that machinery.

So, if the Committee remained in being this carries the clear implication that its work was unfinished. What, then, was its work? It had decided that the preferred way to implement the 1987 Agreement in principle to go to the Court was via a Special Agreement: and its work was to complete that Agreement. Qatar has not disputed that.

Of course, Mr. Shankardass keeps repeating that it was not stated in the 1987 Agreement to be the only way. I accept that. But the point is that, within the Tripartite Committee they decided this was the way to be followed. After some initial uncertainty Dr. Hassan Kamel entirely accepted that. And I see no basis in the records for suggesting that the method of seisin was still an open question at the Sixth Meeting.

It must by now be clear to the Court that Qatar wishes to rid itself of the embarrassment of having agreed, in the Tripartite Committee, to seek a Special Agreement.

Bahrain does not argue that these agreements reached in the Tripartite Committee were treaty commitments, beyond revocation.

The process of negotiations in the Tripartite Committee, like the negotiations of any agreement or treaty, is one in which, step by step, the component elements are agreed. Obviously at each stage that agreement is "provisional", in the sense that both Parties will want to look at the whole text, with all its components, before saying "we have an agreed text." And, even then, the Parties will be fully bound only

when they have given their formal acceptance - by ratification, acceptance or signature - whatever method the relevant final clauses stipulate.

Applying this to the negotiations in the Tripartite Committee, Bahrain does not argue that each agreed step was fully binding the moment it was agreed. Thus, when the Parties agreed to draw up a Special Agreement, there was no final commitment at that stage.

But in this case there are additional factors to be taken into account. At Doha the Parties *re-affirmed* that agreement. Moreover, in accepting the Bahraini formula, Qatar knew that, because of the whole history of negotiations in the Tripartite Committee, this would be understood as accepting article II *of a Special Agreement*.

Thus, what Qatar cannot say is that, at Doha, it confirmed its acceptance of the prior, albeit provisional, agreement to proceed by way of a Special Agreement and, at the same time, argue that it obtained at Doha Bahrain's consent to proceeding without a Special Agreement, by unilateral application. It is a simple question of consistency. The Qatari argument has to be rejected because it is simply inconsistent.

I would emphasize that, in showing that Qatar's arguments are inconsistent, I attach no greater legal quality to the Doha Minutes than to the Tripartite Committee Minutes. They all recorded agreed steps *en route* towards a final agreement. I reject entirely Sir Ian Sinclair's view that the Doha Minutes were binding, unlike the Tripartite Committee's, because at Doha they were intended to "pin down" the Parties. Mr. President, all agreed minutes "pin down" signatories in this provisional way, and the Doha Minutes are no different from the Minutes of the Tripartite Committee.

Mr. President, Members of the Court, this concludes my statement, and I thank you for your courtesy and patience. Could I now invite you to call on Professor Jiménez de Aréchaga?

The PRESIDENT: thank you Professor Bowett. I give the floor to Professor Jiménez de Aréchaga.

Mr. JIMENEZ DE ARECHAGA: Mr. President, Members of the Court, my learned friend Professor Salmon has contended in the second round that the "subject of the dispute", which an applicant is required to indicate in its application, is defined in paragraph 2 of the Doha Minutes in the phrase which merely says "the question".

This is a new thesis, not alleged in the Application itself which, in trying to define the subject of the dispute, refers only to the Bahraini formula. In any event, an elliptical reference to "the question" is absolutely insufficient for the Court to determine whether there is the required consent of both Parties with respect to "the subject of the dispute".

Realizing the insufficiency of this contention Professor Salmon also had recourse to the Bahraini formula, incorporated in the Doha Minutes.

But the Bahraini formula has also been drafted in a general and abstract way. It is a formula which requires to be completed and filled in with an indication of concrete issues.

Both Parties agree that the Bahraini formula was designed to include Zubarah; it constituted an answer to the late Dr. Hassan Kamel's reservation opposing the Bahraini claim of sovereignty with respect to Zubarah.

But, as a general and abstract formulation it does not assist the Court in its task of determining whether there is consent of the Parties concerning the subject of the dispute.

Professor Salmon's simple answer is to say: let Bahrain complete the subject of the dispute by filing its own claims, including Zubarah. As to Qatar's claims, concerning the Hawar Islands and what Qatar calls the shoals, they have been filed with the Court.

But there is a missing element in this view of the case by Qatar. What is missing is an all-encompassing, agreed reference to the Court, such as the Act of Lima, authorizing expressly each Party to submit its own claims. The Doha Minutes, contrary to Professor Salmon's supposition, cannot perform that role because their very terms do not contemplate nor authorize such an exceptional procedure. To support Qatar's interpretation the relevant phrase in the Doha Minutes should have provided as follows: "Once that period has elapsed *each* Party may submit *its own claims* to the ICJ". But this was not the formulation that was adopted at Doha.

In its future judgment the Court has to determine whether Bahrain has consented to "the subject of the dispute" as *that dispute has been defined in the Qatari Application*. This is so, because Qatar's final submission is to the effect that the case should go on as it stands, on the basis of the Application Qatar has filed, thus limited to its own claims.

This means that it is necessary for the Court to determine with respect to the present Application whether there is, here and now, consent by Bahrain to have its sovereignty over Hawar Islands and Dibal, and Qit'at Jaradah, submitted to judicial decision in these proceedings.

We venture to suggest, Mr. President, that, in taking its decision, the Court should recall that Bahrain is asked to do what few States have done, or are prepared to do, namely to put in issue before the Court territories over which it exercises long-standing sovereignty. This is the reason why I said in my previous intervention that:

> *"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 go 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"*
>
> ...
>
> "with all issues of dispute to be considered as complementary, indivisible issues, to be solved comprehensively together",

as it is demanded by the First Principle of Mediation, accepted by the Parties.

It follows that the present one-sided Application is not an equitable and valid basis for proceedings intended to achieve a final judicial settlement of the existing dispute. What is required under Article 40 of the Statute is to reject the present Application, in order to have a balanced case encompassing what Sir Ian Sinclair has called "the whole dispute", including the complete list of issues which were defined in the agreed Minutes adopted on 7 December 1988 at the Sixth Meeting of the Tripartite Committee.

Mr. President, that is the end of my statement. I thank you and the Members of the Court for their patience and attention. And I ask you, if you wish, to call to the bar Professor Lauterpacht.

The PRESIDENT: Thank you, Professor Jiménez de Aréchaga. I give the floor to Professor Lauterpacht.

Mr. LAUTERPACHT: Mr. President, Members of the Court, every case must have a heart. At the heart of this affair lies the text that we call the 1990 Minutes. At the heart of the 1990 Minutes lies paragraph 2. At the heart of paragraph 2 lies the sentence (in the United Nations translation)

> "Once that period has elapsed the two parties may submit the case to the International Court of Justice, in accordance with the Bahraini formula adopted by the State of Qatar and the arrangements relating thereto."

And at the heart of that sentence lie the words "the two parties". No matter how much our distinguished opponents may suggest the independent force of the 1987 Agreement; no matter how much they may decry the activity of the Tripartite Committee and attempt to consign it to a premature grave; no matter how much they may seek to exaggerate or disregard a limited consent; no matter how much they may pretend that the quality of an application rests not upon its own content but upon the possibility of subsequent conduct on the part of the Respondent State which for good reason it has declared it will not pursue, and which, in any event, anticipates a degree of compliance by the Court that no litigant has the right to assume; none of these things can affect the heart of the matter. They are all, so to speak, adipose tissue - on the identification of which I can rightly claim to be an expert. Unless the Applicants in this case can get the heart of the matter to beat firmly and steadily the corpse cannot take life.

Fated as I have hitherto been to deal with the issues relating to the 1990 Minutes, it falls to me to examine the patient in the light of the

treatment that he has received at the hands of the doctors on the other side. It is my submission, but with no regret, that his condition is mortal and that his demise is imminent.

Analogies are all very well, Mr. President, but there is one major flaw in this one. It may suggest that our patient was once alive. The premise is false. He was always dead.

In carrying out this enquiry - I am not sure whether to call it *post-mortem* or *ante-mortem* - I shall deal with only a few symptoms of the disease identified by learned counsel for Qatar. And here, Mr. President, I re-enter the vocabulary of the law.

TO REAFFIRM WHAT WAS PREVIOUSLY AGREED BETWEEN THE PARTIES

May I begin by disposing briefly of one point that arises on paragraph 1 of the Doha Minutes: "That which had previously been agreed between the two parties was reaffirmed."

Bahrain has argued that that reaffirmation must have been intended to cover more than the 1987 Agreement. This provision, it will be recalled, first appeared in the Omani draft of the 1990 Minutes. Bahrain argued that, although Oman would have known of the 1987 Agreement, it could not have known of the content of whatever might have been subsequently agreed between the Parties in the Tripartite Committee. Oman would, therefore - so Bahrain continued - not have intended to limit the range of "matters previously agreed" to matters of which it had itself personal knowledge, but would have wanted to cover *whatever* might have been agreed.

To this the Agent of Qatar responded yesterday by agreeing that Oman would not have known of "the various so-called agreements" reached during the Tripartite Committee meetings.

For that reason, he argued, the phrase in question must be understood as referring to the one item about which Oman knew, namely, the 1987 Agreement. In reply, I ask "Why so?" In particular, I venture to reinforce the submissions that I have previously made to the Court, by the following observation. If, as Qatar suggests, the only item which Oman had in mind as having been previously agreed was the 1987 Agreement, the obvious and natural thing for it to have done would have been to have named it specifically. The fact that it did not do so, but instead used a more obscurantist general expression, is a perfectly understandable reflection of its uncertainty about what might have been agreed, of showing a disinclination to be specific and, therefore, of keeping the position open to cover the possibility that there might have been other matters agreed upon besides those covered by the 1987 Agreement.

THE LEGAL STATUS OF THE 1990 MINUTES

The second matter to be considered is closer to the centre of things. It is whether the 1990 Minutes can properly be regarded as a legally binding treaty or international agreement falling within the scope of Article 36 of the Statute of the Court.

The specific point for consideration is the question raised by Sir Ian Sinclair as to whether the state of mind of the Bahraini Foreign Minister in signing the Doha Minutes could have any relevance to their legal quality. Sir Ian constantly invokes the rules of the Vienna Convention dealing with the interpretation of treaties for the purpose of determining whether there exists an *intent* to create a treaty. In passing to the specific point I want to make, I must observe that this technique suffers from a major flaw. The process of interpreting a

treaty assumes that a treaty exists, that there has been a meeting of minds to bring into being. Here, the issue is rather different. It is whether the treaty has come into existence by reason of a conjunction of wills or intentions. The rules for interpreting a treaty really cannot be applied in an entirely different situation.

However, for the sake of argument, I shall pick up the authority that Sir Ian cites and note one very pertinent element in it. The reference is to the comment of the International Law Commission on what is now Article 31 of the Vienna Convention headed "General Rule of interpretation". This commentary states that "The article ... is based on the view that the text must be *presumed* to be the authentic expression of the intentions of the parties." I would point to the word "presumed". Whatever the text may say, it can only be *presumed* to be the authentic expression of the intentions of the parties. The commentary does not say that the text is the *conclusive* expression of the intention. Nor does it say that the presumption is irrebuttable. It is no more than a presumption. Behind the presumed intention there must be a real intention. If that real intention can be proved, then there is no reason to disregard it.

As I have already submitted in the first round, the evidence of the Bahraini Minister is perfectly admissible. The only question is the weight to be given to it. What the Minister has said has not been challenged by comparable evidence. My submission is that the Court may take that statement into account as an indication that the 1990 Minutes are not intended to be a legally binding instrument.

That said, however, let it not be thought that Bahrain is unwilling to respond to the substance of Qatar's comments on the legal quality of

the 1990 Minutes. As Sir Ian has correctly observed, "a cracked gramophone record is no substitute for reasoned argument". Well, I must suggest that the reiteration by Qatar of its view that the 1990 Minutes were intended to be legally binding partakes more of the former than of the latter quality.

The Court is told that on this matter I distorted my learned friend's argument by complaining that he had not specifically demonstrated the intentions of the Parties and that he had, instead, concentrated on analysing the operative provisions of the text. However, I respectfully adhere to the submission that there is a clear distinction between content and intent. The mere fact that the "content" of an instrument is of a kind that *could* be legally binding if deliberately made so does not mean that it *is* legally binding. The result depends upon context, form and expression. Sir Ian was good enough to bring to the attention of the Court an article that I had quite forgotten that I had written some eighteen years ago entitled "Gentlemen's Agreements". How the follies of one's youth return to haunt one. Unfortunately, apart from reminding me of its existence, Sir Ian did not provide me with a text and time has not permitted me to look it up again. But now that he has put the idea in my mind, I can of course recall that there are many international texts of what may be called "sub-binding" quality. Often they are called "soft law" - prescriptions which are clearly intended to be a guide to conduct, often very specific in content, but not intended to have legal force. The Stockholm Declaration on the Environment would be one example. The so-called "Compromis de Luxembourg" on voting within the Council of the European Community would be another. Other examples will, I am sure, readily occur to the Members of the Court.

As I suggested last Friday, there was no reason why the Bahraini Foreign Minister on 24 December 1990 should have thought that the Doha Minutes were going to differ legally from previous minutes of similar character adopted on previous occasions. No, says Sir Ian. The minutes emanated from "a serious and profound discussion". "Some progress had been made - or so it must have seemed to the vast majority of the participants" - though how that last fact, this is me not him, how that last fact is to be established before you I do not know. "Three important elements had certainly been agreed." And then, hey presto, "Bahrain's negotiators would or should have known that the Doha Minutes were intended to embody legally binding undertakings." What would the negotiators at Stockholm or at Luxembourg have thought?

Here is the old cracked record again. What is it that converts the features mentioned by Sir Ian into "intent to embody legally binding obligations"? Sir Ian speaks of a kind of intent that appears to be something different from *consensus ad idem*. We must remember, I would suggest, that we are in the contractual sphere here where intent has to be bilateral. There has to be intent on both sides and the two intentions must be identical. We are not in the sphere of criminal law where we are concerned only with the separate intention of the individual criminal. Qatar may have intended to create legal relations. But unless Bahrain can be shown to have shared that intent - in content and character - there is no binding legal obligation.

THE VALUE OF THE STATEMENTS MADE BY THE BAHRAINI FOREIGN MINISTER AND BY THE MINISTER OF STATE FOR LEGAL AFFAIRS

Closely related to the point that I have just been discussing is the question of the evidential force and value of the statements made by the Bahraini Foreign Minister and by Dr. Al Baharna. The Agent for Qatar has criticized those statements on a number of grounds and has suggested that the anonymous narrative statements made in the Qatari written pleadings are at least of equal value.

One criticism was that the Bahraini statements were made 18 months after the events. But the first Qatari narrative was itself filed as part of the Qatari Memorial only about 3 months previous to the date of the Minister's statements, so the delay in preparation can hardly be regarded as a significant factor.

Moreover, it remains a fact, as Bahrain has indicated, that the accuracy of the statements has never been challenged. Qatar has referred to the footnote on page 34 of its Reply as being a denial of such accuracy. But if it is read, it will be seen that this footnote is formal and comprehensive. It is notable in the generality of its expression. It cannot possibly have been intended as a denial of all that the Minister said, otherwise it would have been denying facts which it - Qatar - itself admitted. Nowhere does it seek to contradict the statements in any material detail.

The distinguished Agent of Qatar has asked how Qatar could provide evidence to contradict a statement concerning discussions at which it was not present. That would be fair comment if it were relevant. But it does not meet the point that Bahrain is making. The Bahraini statements

were by no means limited to describing matters which took place in the absence of Qatar. It would still have been possible for Qatar to have provided a statement by someone involved in the negotiations to explain why Qatar thought that the Minutes were intended to be a legally binding instrument and, even more important, why Qatar accepted the change of wording from "either of the Parties", "*ayyun min al-tarafayn*", to "the Parties", to "*al-tarafan*", without raising any question or lodging any objection. The Court will also remember that I drew to its attention the evidently recently manufactured explanation given by Qatar to the effect that the change to "*al-tarafan*" was acceptable to Qatar because, so it claimed, it removed the risk that the Party starting the proceedings might have to present both its own case and that of the opposite Party. Could not Qatar have provided a statement to that effect by someone involved in the negotiations to show that that was what was in Qatar's mind at that time? We have not heard another word from Qatar on the subject.

Qatar produces the riposte that "the Prime Minister of Bahrain did not provide a written statement". Quite true. But the Foreign Minister did; and it is on what he says that Bahrain is relying. Qatar, by contrast, has produced no statement at all.

Again, Qatar complains that the statements made by the Bahraini Foreign Minister and Dr. Al Baharna were not made in the form of an affidavit and under oath, and for that reason could not be made the subject of cross-examination. What price formality now! On the one hand, a treaty can assume any form that Qatar favours; on the other, Qatar jibs at the fact that a statement is not formally filed as an affidavit.

The truth remains exactly as Bahrain said it was. No one on the Qatari side has been prepared to give evidence of what happened on 23 to 25 December 1990. This, as the Court will understand must, necessarily, have a direct impact on the interpretation of the central provisions of the 1990 Minutes, to which I shall now turn.

Mr. President, this is a slightly long section on which I am about to embark, you may perhaps find it convenient to take the coffee break now.

The PRESIDENT: Thank you, Mr. Lauterpacht. I believe it is the moment to have a break and the Court will resume shortly.

The Court adjourned from 11.05 a.m. to 11.25 a.m.

The PRESIDENT: Please be seated. Professor Lauterpacht.

Mr. LAUTERPACHT: Thank you, Mr. President. I turn now to the interpretation of the central provisions of the 1990 Minutes.

LINGUISTIC ISSUES

The central question in the case may properly be described as the meaning of the provision in paragraph 2 of the 1990 Minutes:

> "Once that period has elapsed, *the two parties* may submit the case to the ICJ in accordance with the Bahraini Formula accepted by Qatar and the arrangements relating thereto." (Emphasis added.)

In my opening speech I indicated that the two sides were essentially in agreement that the attribution of a meaning to the expression *"al-tarafan"* was dependent upon the context in which it was used.

In pursuit of the context, I began by demonstrating that a "pattern of usage" relating to the words had come into existence on the basis of

the manner in which the words had been employed in earlier texts of comparable character. Qatar does not deny that *"al-tarafan"* as used in those earlier texts has the meaning which Bahrain attributes to the expression, namely, "the parties together", not "either of the parties". However, Qatar makes a number of points which it is desirable to answer one by one.

First, Qatar contends that none of the examples taken from the historical context are relevant because in each case *"al-tarafan"* was used where an *obligation* was placed on both Parties, whereas in the 1990 Minutes the words are used permissively in a phrase which gives a right to both Parties. But although Qatar states that this is a "fundamental difference" of wording, it does not explain *why* this difference in wording should result in a fundamental difference of result.

The Qatari Agent observed that the 1990 Minutes use the word *"yajuz"* ("may") which, he points out, was "not even mentioned by Bahrain's counsel". Quite true. I did not mention the word *"yajuz"* because it did not occupy the front row of our argument, nor am I going to be tempted into placing it there now.

But I should recall in passing, that Bahrain has in fact dealt comprehensively with the meaning of *"yajuz"* in its expert evidence. Unlike Qatar, Bahrain has provided the Court with a comprehensive analysis of the meaning of the crucial sentence and has shown how the elements which make it up, when construed together - which is the only permissible way to construe them - are only susceptible of the interpretation advanced by Bahrain. This analysis was submitted as long ago as the Bahraini Counter-Memorial, but Qatar has not chosen to answer

it and has not produced its own analysis (CMB, Vol. II, pp. 264-272; RejB, pp. 176-178).

I return to the Qatari argument. The Qatari Agent, though accurately pointing to the difference between the word "may" and the word "must" as an abstract matter of language does not prove anything other than that the two words are different. If the Agent wants that distinction to influence the meaning of *"al-tarafan"* as between "either of the parties" or "the two parties", he must prove it in some way. But he does not even embark on that exercise. He assumes that it is a self-evident proposition. Mr. President, in my submission, it is not.

Whether the action is obligatory or optional in either case, the action could be joint or unilateral, depending on the context. Suppose, for a moment, that the rejected Omani text, "either of the two parties" *("ayyun min al-tarafayn")* had been accepted by Bahrain, it would still have allowed for unilateral action, whether such action had been intended to be obligatory or optional. Likewise, the accepted text "*al-tarafan*" meant joint action, regardless of whether a word for "must" or "may" was used after it.

Passing on, it should be said that the Agent of Qatar does not help his case by referring to the use by Dr. Al Baharna of the words *"al-tarafan"* to describe the right of each Party under the Bahraini formula to present its case or claims to the Court. It was clear that Dr. Al Baharna, this was in the course of the Tripartite Committee discussions, was using the expression *"al-tarafan"* in a different context - that of explaining the operation of the Bahraini Formula, where there can be no doubt that the intention is that the Parties shall act separately, not jointly. Not in presenting a case to the Court but in

expressing their claims within the framework of a single case. That is the absolutely fundamental point.

Next the Agent for Qatar came to the very important point about the appearance of the words "each of the parties" in the original Saudi draft and of the words "either party" in the Omani draft, coupled with Bahrain's rejection of the Saudi draft and Bahrain's insistence on the replacement of "either party" in the Omani draft by the words "each party". Bahrain has asked Qatar to explain why it did not question the change in the Omani draft or seek to qualify it by the addition of some words to reinstate the idea to which Qatar was wedded, that it should be each or either of the Parties which should have a right to bring the case to the Court. What sort of reply has Qatar given?

First, it asks "Did Bahrain really reject those drafts?" Well, as regards the Saudi draft, there is no question that it did. The Bahraini Foreign Minister has said so in his statement; Qatar has never denied it; and it is a fact that within hours the Saudi draft was replaced by the Omani draft.

How does Qatar deal with the amendment to the Omani draft? There the Agent says "again there is no evidence of a rejection of unilateral action". What is the basis for this assertion? Only the statement that "Bahrain simply changed the words 'either of the parties' to the words 'the parties'", and I am still within the quotation from the Agent, "thus making clear that both Qatar *and* Bahrain have the right to make a unilateral application".

Mr. President and Members of the Court, I must suggest that it is impossible to understand - in following the argument of Qatar - how the substitution of the words "the parties" for the words "either of the

parties" achieves a change of meaning to - and I will now quote the Agent again - "both Qatar and Bahrain have the right to make a unilateral application". Did they not have that right by reason of the use of the original expression "either of the parties"? Why change one expression for another identical expression? The Qatari explanation simply does not hold water.

The proposition next voiced by the Agent does not advance his argument either:

> "I believe that these objective changes to the draft are not at all rejections of the agreement reached during the discussions at Doha that reference to the Court could now be by unilateral application - but rather subjective statements of the alleged intentions of Bahrain's negotiators."

So, what he is saying is that these objective changes to the draft are subjective statements of the alleged intentions of Bahrain's negotiators. I confess that I am quite baffled. It is a fact that changes of wording took place. It is a fact that Qatar has repeatedly emphasized the importance of giving a meaning to every word in a text. Yet, when we are faced by the undeniable fact of a change in wording, we are told that the change is a "subjective statement of the alleged intentions of Bahrain's negotiators". The words, as I say, are exactly as they appear in the text of the distinguished Agent's speech of yesterday. The proposition just does not make sense.

And that is the end of what the Agent has to say on this crucially important matter. Nor is there any answer offered to the comment that Bahrain made on Monday regarding the extraordinary explanation from Qatar that I mentioned a few moments ago - to the effect that the change of wording was welcomed as alleviating the burden on the party initiating a unilateral action.

Qatar makes no attempt to deny that prior to 1990 a pattern of usage had emerged in comparable texts. There is not a word of comment by Qatar on the detailed contextual study of "*al-tarafan*" within the framework of the 1990 Minutes themselves. There is not a word of response to Bahrain's indication of the importance of the use of the word "matter" in the singular; not a word of comment upon the significance of the reference to the Bahraini formula as an indicator of intention to pursue the procedure always contemplated in the use of that formula - namely, a joint submission by special agreement.

Nor did Qatar respond at all to the concept of negative context, in which I mentioned the significance of Qatar's failure to press for the inclusion of words that would have made its position clear. Yet again, Qatar does not grapple with the comments made by Bahrain in explanation of the letters of the Amir of Qatar to the King of Saudi Arabia of 6 May and 18 June 1991. It is not enough to offer a blunt rejection of the Bahraini explanation and add that had the intention been as Bahrain suggests, the letter would have said that

> "we [i.e., Qatar] intend to enter into contact with Bahrain at the end of the above-mentioned period with a view to the joint submission of the matter to the Court".

The point is not what Qatar intended, but what Saudi Arabia would have understood when it read the letters. Qatar would have had every reason to use the same words as appeared in the Doha Minutes so as to avoid any implication that the words did not have the meaning that Qatar wished them to bear.

CLARIFICATION OF THE MEANING OF THE 1990 MINUTES AND OF SUBSEQUENT EVENTS

Mr. President, I will now attempt to clarify the meaning of certain expressions used in the 1990 Minutes and to refer to certain related subsequent events, which have been the subject of comment by Qatar. Although what I say here will, to some extent overlap with the formal reply that Bahrain will, in due course, file to the questions posed by Vice-President Schwebel, my observations can be regarded as, in part, supplementary to that reply.

At the beginning it is necessary to recall that the 1990 Minutes are not seen by Bahrain as constituting a legally binding agreement. Rather their status is comparable to earlier Minutes adopted in the Tripartite Committee which had identical headings, had virtually identical preambular paragraphs and bore the same signatures. Those Minutes were not formal agreements but recorded tentative commitments accepted for the purpose of moving the discussion forward en route to an eventual agreed joint submission to the Court. Professor Bowett has already amply developed this point.

But bearing in mind this characterization of the Minutes, we may turn to the interpretation of its operative provisions. One is that "the good offices" of the King of Saudi Arabia "in addressing the dispute between the two countries shall continue until May 1991" and the other sentence is that

> "Once that period [i.e., the period expiring on 15 May 1991] has elapsed, the two parties may submit the case to the Court, in accordance with the Bahraini formula accepted by the State of Qatar and the arrangements relating thereto."

I concentrate on the second sentence - it has three aspects.

First Specific Aspect: The Position of Saudi Arabia

The position of Saudi Arabia is determined principally by the preceding sentence: "The good offices of Saudi Arabia shall continue..."

But there is no doubt in the mind of Bahrain and, it would seem also in the mind of Qatar, that the extension of the Mediator's mandate, in the second sentence, related to the substance, not to the mode, of the settlement. The extension thus granted to the Mediator was comparable to the two earlier extensions requested of him in December 1988 and December 1989.

There were two features of this extension. On the one hand, Bahrain and Qatar were making the request together; and, on the other hand, Saudi Arabia was agreeing to resume the exercise of its function of mediation in relation to the substance of the dispute. The renewal of this exercise was to last for 5 months.

Second Specific Aspect: The Position of the Parties during the Period of the Extension

The Parties undertook that during the period of the extension they would not submit the case to the Court. This was a joint undertaking. They would not take the matter to the Court jointly. It went without saying, at any rate for Bahrain, that neither Party could take the matter to the Court separately.

Third Specific Aspect: The Position after the Expiration of the Period

After the end of the period, the Parties were released from their commitment not to go to the Court. Saudi Arabia was, in effect, acknowledging in the Minutes - because, after all, Saudi Arabia was a signatory of the Minutes - that

"after the period of 5 months, we all go back to the position prior to the Doha Minutes in which the two Parties are free to conclude their negotiations for a joint submission to the Court".

The Implementation of the Doha Minutes

Although there is relatively little material to show what happened after 25 December 1990, it may be helpful to piece the story together as best one can from the information on the record.

The fact that, during the 5 months after Doha, Saudi Arabia did not actively pursue its mediation is understandable. Saudi Arabia was rightly preoccupied by the hostilities with Iraq, leading to the liberation of Kuwait.

The Court will recall that the first part of the period from December 1990 to May 1991 coincided with the Allied reaction to the Iraqi invasion of Kuwait. Operation Desert Storm began on 15 January 1991 and, of course, in the weeks leading upto January 15, there was an immense amount of activity that would have competed for the attention of the Saudi authorities and this operation continued until about 28 February 1991. Also within that period of five months was the period of Ramadan which ended only about one month before the terminal date, 15 May.

However, although no mediatory activity took place before the end of the five months, it is clear that there was some discussion of the substance of the dispute in the weeks immediately following 15 May 1991. If the Court will now look at its Hearing Book, if it is convenient to do so, you will see in Item 19 a copy of a letter from the Amir of Qatar to the King of Saudi Arabia dated 6 May 1991. In it the Amir recalls, first, the terms of the 1990 Minutes and that is the content of the first full paragraph on the page I will now read to you. The Court, you will

recall, has already looked at this letter in a different connection when I pointed out on 7 March last that the words "*al-tarafan*" as used here by the Amir of Qatar, would have been unlikely to have put the King of Saudi Arabia on notice of any striking development in Qatar's thinking, since the King of Saudi Arabia would have read the words in their established sense as meaning "the two parties together".

But my present reference to this letter is to a different aspect of this matter. I need only read to you the opening sentence of the second paragraph before taking you, in a moment, to the next letter. The sentence reads:

> "As the agreed period is approaching its end [that will be the letter written on 6 May for a period ending on 15 May], I felt I should write to you hoping that you will kindly renew your good offices in the nearest possible time in accordance with our latest agreement in Doha [that being of course the Doha Minutes]."

We may now turn to the next item in the book, the letter of 18 June 1991, Item 20 in the Hearing Book, from the Amir of Qatar to the King of Saudi Arabia. This letter is written nearly a month or perhaps more than a month after the end of the stipulated period for the renewal of the immediate reactivity. Now, evidently something had happened in the period between 15 May and 18 June; we can deduce this from various indications in this letter and also from the statement of the Foreign Minister of Bahrain.

First, on 3 June, the King of Saudi Arabia and the Amir of Bahrain met in the eastern province of Saudi Arabia. This appears from paragraph 15 of the statement made by the Bahraini Foreign Minister, which is Item 12 in the Hearing Book and it is desirable that you should turn to it now. If you turn to Item 12, paragraph 15, there you will see

that after the meeting in Doha, Bahrain heard nothing from the Mediator regarding the dispute until His Highness the Amir of Bahrain met with King Fahd of Saudi Arabia in the eastern province of Saudi Arabia on 3 June.

> "King Fahd confirmed that he had been approached several times by the Amir of Qatar regarding the matter and that he had asked the Amir of Qatar not to be in such a rush. King Fahd also confirmed that he had sent Prince Saud Al-Faisal, the Saudi Foreign Minister, to Qatar with Saudi Arabia's proposals concerning the matter and when Saud Al-Faisal returned he would send him to Bahrain."

That is all I need to quote now, and that conversation took place on 3 June.

Next we learn from the same letter sent by the Amir of Qatar to the King of Saudi Arabia (Item 20 in the Hearing Book) that Prince Saud Al-Faisal visited Doha the next day, 4 June (and that is where we learn that Prince Al-Faisal visited Doha on 4 June - that is the day after the King of Saudi Arabia had seen the Amir of Bahrain), and the Prince bore with him certain proposals with a view to settling the dispute. Bahrain does not know what those proposals are and has never received a copy or even an intimation of their content.

Then, also from this same letter, it appears that the Amir of Qatar visited Saudi Arabia on 5 June, the very next day. Something that Prince Saud Al-Faisal had said had obviously stirred up the Amir of Qatar. The second paragraph of the Amir's letter of 18 June to the King of Saudi Arabia, expresses the Amir's thanks for the King's welcome and hospitality on that date. During that visit, it appears that the Amir of Qatar must have made some statement to the King expressing the Amir's positive attitude and warm welcome towards the King's "last proposals".

The same letter then goes on to reflect the possibility that the Amir of Qatar may himself have made some counter-proposals because he says, in the next paragraph (which is the one which begins at the bottom of the first page and goes over the page):

> "While hoping that we achieve in the nearest time the friendly desired settlement, I would like to point out that, in the light of the history of our former negotiations with our brethren in the sister State of Bahrain, we cannot await their answer to our last proposals for more than the period of three weeks which we agreed upon at our last meeting in Dahran on June 5, 1991, as we resolve, after the lapse of this period, to take the necessary measures to submit the dispute to the International Court of Justice in accordance with the [Doha] Agreement."

As the Bahraini Foreign Minister has said in his statement, nothing further was heard by Bahrain until the morning of 8 July when he was informed of the filing of Qatar's Application (see Hearing Book, Item 12, para. 15). Mr. Shankardass has taken it upon himself to question the truth of this statement by the Bahraini Foreign Minister in the form of a question

> "is it conceivable that when, at King Fahd's request, the Amir of Qatar later agreed to give Bahrain three more weeks to respond to Qatar's latest proposals [as is explained in the Amir's letter of 18 June 1991], King Fahd would not have informed Bahrain of the proposals on the extended time-limit"?

I have to say, Mr President, that it is a fact that Bahrain was not told of the proposals. Whether it is "conceivable" or not that this should be so is not a matter for Bahrain to answer but for Saudi Arabia, always assuming that Saudi Arabia ever received the Amir's letter.

And, incidentally, to be noted in passing, where did Mr. Shankardass derive the information that the delay of three weeks referred to in the letter was given "at King Fahd's request"? The letter does not say so. It speaks only of "the period of three weeks agreed upon at our last

meeting ... on June 5". It does not say that the Agreement was a response to a request by King Fahd. Does Mr. Shankardass know something that has not been revealed to the Court or to Bahrain? So much for the events subsequent to 25 December, except perhaps to say that it is clear that something was going on, that the momentum of activity between the two sides was certainly not dead but in fact might have been developing and yet, out of the blue, comes the unilateral Application by Qatar.

THE SIGNIFICANCE OF THE FIVE-MONTH TIME-LIMIT

So, Mr. President, that enables me to turn to, I hope, my final point which is the significance of the five-month time-limit that appears in the Doha Minutes. This point, which was raised by Sir Ian Sinclair provides us with an admirable illustration of Qatar's, if I may put it this way, monocular view of a situation which can only be properly perceived by binocular vision.

One of the major weaknesses of the Bahraini first round, we are told by Counsel for Qatar is "that it offers no believable explanation of the five-month time-limit in the Doha Minutes after which the parties would be at liberty to refer matters in dispute to the Court". I take it that that observation is relating to the length of the period of five months. And Sir Ian pointed out, that in contrast with the earlier minutes extending the periods of the Mediator's activity, this one contained a consequence, that the parties might, after its expiry, submit the matter to the Court. Nothing of that kind having been said in relation to the earlier extensions. So, it is said, Bahrain could not have anticipated that the consequence of failure of the Saudi Mediation effort would have been the same as in the earlier cases.

I should begin by saying that I question whether it is really the responsibility of Bahrain to explain why the period was five months rather than six, or seven or twelve or eighteen. That was the period that was written into the Omani draft Minute seen by Qatar before Bahrain saw it and Bahrain accepted that aspect of it. Let us begin by recalling that the original Saudi draft Minutes of 24 December, firstly, contained no provision for an extension of the Mediator's mandate. Secondly, the Saudi draft did not contain a reaffirmation of what had been agreed. Now the Court will remember that Sir Ian had pointed out that it was in the plenary meeting of the Doha Summit that agreement had been reached on three things, the two that I have just mentioned, the extension of the Mediator's mandate, secondly the reaffirmation of what had been agreed, and thirdly, the idea of the parties going to the Court. Now, contrary to what Sir Ian was in fact suggesting, it would seem that Saudi Arabia did not think enough of these alleged agreements concluded in the plenary meeting to record them in the draft of the minutes which it submitted to the two Parties.

Now let us go on to the Omani draft. It is here that we find for the first time the reference to the two items that I have just mentioned, the extension of the Mediator's mandate and the reaffirmation of what had already been agreed, plus the provision that at the end of the five-month period *either* party could go to the Court. The reference to either party in this draft was, as the Court well knows, unacceptable to Bahrain and was replaced by the expression "*al-tarafan*" which, in the understanding of Bahrain - not to say also as a matter of objective interpretation - meant that proceedings could only be started by the two parties together".

So we come to Sir Ian's question:

> "Why a time-limit at all with a particular consequence attached to it, if the consequence was not to permit either party to institute proceedings before the Court on the expiry of the time limit?"

The answer lies, I submit, in the whole pattern of the solution embodied in the Doha Minutes. Those Minutes were aimed primarily at the revival of the Saudi Arabian mediation activity. This process would exclude any recourse to the Court by the Parties. The process during which time Saudi Arabia alone could take any initiative, was not foreseen as being one of indefinite duration. So a term was set to the period - one month after the end of Ramadan. When that period was ended, the Parties were free to pursue their own paths with a view to going to the Court or otherwise - but, now, with the added and important help of the Qatari acceptance of the Bahraini formula.

But if the Parties went to the Court, this would not put an end to the Saudi role, because the last sentence of paragraph 2 expressly provided that if the matter went to arbitration Saudi Arabia's good offices would continue.

If, however, the efforts of the Parties led to a brotherly solution, the case, if by then the Parties had submitted it to arbitration, would be withdrawn.

The idea that each party should be able unilaterally to submit the case to the Court was not an essential element in this pattern. The arrangements could still operate if the previous understanding, that the case could not be brought jointly, was maintained. The change from "either of the two Parties" to "the Parties" did not give rise to any need for consequential alterations in the text. The basic pattern of the

renewed mandate to Saudi Arabia followed by the freedom of the Parties to go to the Court on the basis of the Bahraini formula was preserved.

Mr. President, there is, of course, a great deal more that could be said about the Qatari reply, but I believe that I have already sufficiently imposed on the Court's time.

I thank you, Mr. President and Members of the Court, and would ask you, Mr. President, please to call on the Agent of Bahrain.

The PRESIDENT: Thank you, Mr. Lauterpacht. I give the floor to the Agent of Bahrain.

Dr. AL-BAHARNA: Mr. President, distinguished Members of the Court, as we near the end of these proceedings I take the floor with a sense of disappointment. As Agent for the State of Bahrain I had hoped that, from Qatar's pleadings, we might derive some explanation, some reasons, which would explain why Qatar embarked upon its change of policy at Doha.

I make no secret of the fact that this sudden change of policy caused the deepest dismay - and even distrust - in Bahrain. So I would have been happy if I could have returned to my Government at the conclusion of these proceedings with an explanation for Qatar's conduct which would lessen that dismay, and eliminate that distrust.

It was for this reason that, in concluding Bahrain's First Round presentation, I posed a number of questions to my friend and colleague, the Agent for Qatar (CR 94/6, pp. 62-65). The replies we received were disappointing in the extreme. Let me, by way of illustration, take three of the central questions.

I asked why Qatar did not accept either the Saudi draft of a special agreement of September 1991, or the Bahraini draft of 20 June 1992 - both of which contained the Bahraini formula.

The answer I received is that Qatar had already filed its unilateral Application and furthermore that the 1992 Bahraini draft was intended as a trap for Qatar. Professor Salmon suggested the Bahraini draft was a Trojan horse.

The Agent for Qatar suggested that the Court would be astonished that Bahrain had changed the Bahraini formula despite Qatar and Bahrain's acceptance of it in December 1990. He added that the draft was far from being a perfectly reasonable proposal for a joint submission. Further, he said Bahrain was using its draft special agreement not only in an attempt to withdraw its consent under the Doha Agreement, but perhaps also to evade its consent under the 1987 Agreement. He complained that Bahrain had not made any change to Article V as previously proposed.

No reason whatever is given for Qatar's lack of reaction to the Saudi draft of September 1991. Mr. Shankardass drew attention to what he calls the strange and somewhat mystifying circumstances in which the draft made its appearance and stressed that it was without prejudice to the rights of the Parties to go to Court.

Patently the true answer why Qatar has not responded either to the Saudi draft or to the Bahraini draft is that it hoped by its unilateral Application to obtain advantages which would not be available to it if a special agreement were negotiated between the Parties. Clearly this overrode Qatar's desire to bring the dispute quickly to a judicial resolution by this Court. Given that Qatar's unilateral Application had already been filed and Bahrain had already made its position known there

could be no trap whatsoever for Qatar had it responded to either the Saudi Arabian draft or the Bahraini draft. The Bahraini formula had not changed. What Qatar complains of is, in fact, the addition, only, of the words

> "THE ABOVE REQUEST REFERS TO THE FOLLOWING MATTERS OF DIFFERENCE: THE HAWAR ISLANDS (INCLUDING JANAN); ZUBARAH; FASHT AD DIBAL; QIT'AT JARADAH; ARCHIPELAGIC BASELINES; AND FISHING AND PEARLING AREAS."

These are exactly the list of items agreed between the Parties in the 1988 Sixth Tripartite Meeting as being those constituting the dispute. Where is the trap and where is the Trojan horse?

Then I asked why Qatar expects Bahrain to put its sovereignty over the Hawars in issue before the Court, but refuses to put Zubarah in issue.

No answer has been given to this question. While counsel for Qatar reiterate that Bahrain is free itself to introduce its claims to Zubarah, they equally made plain that Qatar will challenge the admissibility of Zubarah before the Court. Qatar will not accept that the issues of the Hawar Islands and Zubarah be treated on the basis of equality. Bahrain is criticized for seeking a blank cheque in respect of the admissibility of Zubarah but at the same time Qatar makes it clear, for example, that in its view Zubarah was not in issue in 1978 or 1983 and throws doubt on whether Bahrain had raised the question of Zubarah with Saudi Arabia at the time of the 1987 Agreement. The message to Bahrain is clear - Qatar is not willing to agree to Zubarah being included in a joint submission; hence Qatar's unilateral Application.

Then I asked why Qatar objected to Article V of Bahrain's draft, endorsing the general principle that offers or proposals for compromise be not disclosed in litigation.

The only answer I received - and it was not really an answer - was that Bahrain failed to introduce it into the Doha Minutes. Once again, this demonstrates that Qatar's unilateral Application to the International Court of Justice is aimed at having in issue only those matters which suit it and on its own terms. Qatar has at no time in the oral proceedings or in the written pleadings sought to deny its statement in its memorandum of 27 March 1988 (RejB, Ann. I.2, p. 92), which is Item 22 in the Hearing Book, that it intends to use, without any reservation,

> "all the negotiations, contacts, agreements, actions, proposals and reactions relating to the dispute from its beginning until it was submitted to the Court".

If I find Qatar's answers disappointing, I find Qatar's cavalier-like rejection of the work of the Tripartite Committee no less disappointing.

To portray the work of the Tripartite Committee as a failure - as an abortive attempt to secure a special agreement that was frustrated by Bahrain's unreasonableness, and as having been deliberately and conclusively brought to an end - is a travesty of the truth.

Bahrain was not unreasonable. Bahrain had provided a draft special agreement and, when an impasse had arisen over Article II, it was Bahrain who produced the compromise in the Bahraini formula - a compromise Qatar welcomed.

The records show that the Parties were, in fact, on the verge of reaching an agreement. There were, in truth, only three items of difference between the Parties.

The first was Article II, defining the subject-matter of the dispute. As to that, the Bahraini formula had already been agreed as the best way forward in December 1988 - and the range of items which could be brought within the scope of its operation had also been agreed. The suggestion from Qatar that it should be supplemented by annexes was not, frankly, very helpful.

It was not necessary, because the Bahraini formula gave both Parties the freedom they needed to outline their claims, in their own way, in the pleadings that they would submit within the framework of a single, agreed reference to the Court. And if the Court had been faced by two incompatible annexes to a Special Agreement this would have posed difficulties for the Court.

Of course, the reason for Qatar's hesitation was Zubarah. But, Mr. President, if Bahrain was to have its title and long possession over the Hawar brought into question before the Court, why, in justice, should Bahrain not be free to present its claims over Zubarah? That was the real stumbling-block. It was created by Qatar, not Bahrain.

Now, at Doha, Qatar seemed to relent. It seemed that, at long last, Qatar was inclined to accept the Bahraini formula without reservation.

If that acceptance of the Bahraini formula had been genuine, the problem of Article II would have been resolved. The Parties would have been within an inch of concluding a Special Agreement. The two remaining issues, though important, could certainly have been negotiated to a successful conclusion.

As to Article V, the *principle* of that article could scarcely be disputed.

Bahrain would gladly have given Qatar the assurance that Article V was not intended to exclude evidence of the negotiations and mediation over the *procedure* for referring their dispute to the Court. Bahrain would have been fully prepared to explain the phases, or periods, of negotiation it had in mind. I do not believe, Mr. President, that agreement could not have been reached quickly on Article V.

That would have left Bahrain's insistence that the Special Agreement would need ratification in Bahrain. This is a normal, reasonable requirement, and in Bahrain such ratification would not involve a long delay. I really cannot see how this could have prevented the Parties from concluding the Special Agreement.

So, Mr. President, by the time of Doha and after the further period of Saudi mediation on the merits, the position remained as it had been following the Sixth Tripartite Meeting, namely, we were almost at the end of our negotiations for a Special Agreement: the goal was within sight, and within reach.

But then, what happened? Well, Mr. President, what happened is tragic. All this effort, all this work was placed in jeopardy because someone in Doha thought he had a bright idea! The idea was that Qatar would simply drop the search for a Special Agreement and make a unilateral application. And the reason for that change of policy was that it was hoped to get the dispute before the Court *on Qatar's terms*: that is to say, with the issues expressed in a manner favourable to Qatar.

This radical change of policy was not, of course, explained to Bahrain. The tactic seems to have been to try and catch out an unsuspecting Bahrain by slipping into the Doha Minutes the phrase "either

of the two Parties" "*ayyun min al-tarafan*". Fortunately, Bahrain was not caught out.

Having blocked this questionable manoeuvre at Doha, you can imagine Bahrain's dismay when, notwithstanding everything that happened at Doha, Qatar nevertheless filed a unilateral application. It was not simply that Bahrain regarded this as a breach of what had been agreed. Qatar's "initiative" was worse than that. It was a waste! By that I mean, Mr. President, that it wasted the very real opportunity which Doha opened up of proceeding quickly to a Special Agreement. That was the real tragedy of Qatar's ploy: it wasted a real opportunity to move forward to this Court.

I have to tell you, Mr. President, that Bahrain's dismay at Qatar's tactics initially gave rise to discussion in Bahrain over whether Bahrain should now renounce its commitment in principle to refer all its disputes with Qatar to this Court. But on 20 June 1992, Bahrain offered a new draft Special Agreement. Qatar chose to ignore that offer. Despite all this, I can reassure the Court that, even now, Bahrain is ready to resume negotiations with Qatar so as to finalize the Special Agreement both Parties had intended to conclude. In the view of Bahrain, this can be done quickly, provided Qatar understands that it is not entitled to get the dispute before the Court on its own terms so as to gain an advantage. Qatar must treat Bahrain as an equal partner, coming to the Court on an agreed and "neutral" basis, in the same way as most other States engaged in territorial and boundary disputes have done.

I should now like, Mr. President, to summarize the principal points in this case as we see them. Perhaps the most convenient way to do this is in the form of a series of questions and answers.

1. *Do any of the Principles of the Mediation established in 1983 have a bearing on the issues now before the Court?*

Yes. The first Principle provided that *all* issues of dispute between the Parties should be considered as complementary, indivisible issues to be solved comprehensively together.

2. *The 1987 Agreement: did it amount to a consent to the jurisdiction of the Court?*

Yes, but incompletely. It was an essential condition of the consent that the modalities of reference to the Court would be worked out between the Parties in the Tripartite Committee.

3. *What happened in the Tripartite Committee?*

Certain matters were agreed as steps along the way to an eventual submission to the Court:

(a) The reference to the Court would be by way of a special agreement for a joint submission.

(b) There would be an agreed question. Whether it should be supplemented by one or two separate annexes remained to be settled.

(c) The issues to be covered by the question were agreed as the Hawar Islands, including Janan; Dibal shoal and Qit'at Jaradah; Archipelago baselines; Zubarah; and fishing and pearling areas and any other matters related to maritime boundaries.

4. *The Bahrain formula: what is its function?*

The Bahrain formula was proposed by Bahrain to enable each of the Parties, within the framework of a joint submission to the Court in a single case, to specify the matters on which it wished the Court to decide.

5. *Did the Tripartite Committee come to an end in 1988?*

No. The Committee, though inactive for the period 1989-1990, when the King of Saudi Arabia was understood to be pursuing the substantive settlement of the dispute, had not been wound up and was referred to by the King of Saudi Arabia at the Doha Summit.

6. *What is the legal status of the 1990 Minutes?*

A. The 1990 Minutes were not intended to be a treaty or international agreement giving consent to the Court's jurisdiction. Qatar has produced no evidence to the contrary.

B. They were described as "Minutes of Meeting" in the same way as the conclusions of at least two of the Tripartite Committee meetings; they had similar preambular paragraphs; and they were signed in the same way by the Foreign Ministers of the three participants.

7. *What is the content of the 1990 Minutes?*

First, the 1990 Minutes confirm all the agreements previously reached between the Parties.

Second, the Minutes renewed the mandate of the Mediator, as had been done on two previous occasions, to pursue the settlement of the substantive dispute between the Parties, this time until 15 May 1991. During that period the Parties would not continue their discussions about referring the matter to the Court.

Third, the Minutes recorded the acceptance by Qatar of the Bahraini formula.

Fourth, the Minutes indicated Saudi Arabia's agreement that, after the expiry of the extension of the Mediator's mandate, the Parties

would be free to resume negotiations to take the matter jointly to the Court.

8. *Why do the 1990 Minutes not give to Qatar a right to institute proceedings unilaterally?*

First, Bahrain had not, prior to Doha, consented to the jurisdiction of the Court on the basis of a unilateral application by Qatar. *Second*, following Doha itself, the 1990 Minutes do not amount to such a consent. The reasons are as follows:

(i) The words *"al-tarafan"*, translated into English as "the two parties" do not have the meaning "either of the parties" which Qatar places upon them.

(ii) This is because:

(a) The words *"al-tarafan"* had been used consistently in the drafts prepared by both Parties and in their discussions prior to 1990 to mean "the two Parties together".

(b) Initially, in the Saudi draft of the 1990 Minutes and then in the Omani draft, an attempt was made to introduce the idea that proceedings could be started by either Party. The Saudi draft used the words "each of them" and the Omani draft used the words "either of the two Parties". Both of these attempts were rejected by Bahrain which insisted on the inclusion of the words which had an established meaning, *"al-tarafan"* ("the two Parties") in the sense of "the two Parties together".

(c) Qatar did not oppose the change of words to *"al-tarafan"*. Its explanation of its acquiescence is totally unconvincing because Qatar had seen the draft containing

the original words before Bahrain did and had raised no objection to them then.

(d) If Qatar had really intended that the words *"al-tarafan"* should imply a right for either Party to apply unilaterally to the Court, Qatar should have made its position plain. It did not.

(e) The context of *"al-tarafan"* in the 1990 Minutes excludes the possibility of the words meaning "either of the Parties".

- The reference to the acceptance of the Bahraini formula excludes the possibility of action by one Party alone.
- The "reaffirmation" of "what had been agreed previously" covers the agreement to proceed to a joint submission via a special agreement.
- The reference to submitting the matter, in the singular, to the Court indicates that only *one* matter would be submitted. In other words, there could be only one case. Qatar assumes that, to cover Zubarah, there would be two cases - and this is inconsistent with the idea of a single, comprehensive, fully dispositive case.
- The reference to "in accordance ... with the procedures consequent on it [i.e., the Bahraini formula]" also necessarily implies that the Parties would seek to agree on a joint reference.

(f) The subsequent usage by the Parties of the words *"al-tarafan"* is consistent only with the idea of "the two

Parties" jointly. Further, it is evident that Saudi Arabia has understood the words *"al-tarafan"* in the same way.

9. *Does the Application filed by Qatar on 8 July 1991 satisfy the requirements of Article 40 of the Statute and Article 38 (1) of the Rules of Court?*

No. The Application does not conform to the requirements of the Bahraini formula. Moreover, the formula contemplated that all the issues between the Parties would be brought in one case. The omission of Zubarah makes that impossible and this, in turn, leads to the non-compliance with the provisions of the Statute and the Rules relating to the filing of the Application.

10. *Why does Bahrain object to the case coming to the Court on the basis of a unilateral application?*

Bahrain objects because:

A. The scope of the proceedings is set by the application and must be assessed as at the date of the filing of the application.

B. The case as brought by Qatar does not cover Zubarah, the inclusion of which is a condition of Bahrain's consent.

C. Subsequent offers by Qatar not to raise any jurisdictional objection to any separate application in respect of Zubarah, and also not to object to the joinder of such an application, as well as to accept an order for simultaneous pleadings, cannot change the situation.

D. Qatar has avoided acceptance of two major conditions for Bahrain's consent to the jurisdiction: the so-called "Article V" point and the ratification point.

11. *What did the 1990 Minutes achieve?*

The 1990 Minutes did not achieve the objective that Qatar had sought. They were adopted only to save the face of Qatar which had made an unsuccessful attempt to change in a major respect the earlier understandings between the Parties.

For Bahrain, the Minutes record Qatar's acceptance of the Bahraini formula and the reaffirmation of the understanding that the matter would be referred to the Court only by the Parties together and not by Qatar alone.

12. *If consent to the jurisdiction is required, does there have to be a specific consent to the method of seisin, in particular to unilateral seisin?*

Bahrain has no doubt that the answer to this is yes. Qatar's answer that the Court's Statute does not require consent to the method of seisin is wrong. And Bahrain's amendment at Doha clearly eliminated the possibility of unilateral seisin.

13. *What exactly is the title or basis of jurisdiction on which Qatar rests its case?*

As Professor Weil has shown, this remains a matter of complete obscurity.

It would seem Qatar would also like the question of seisin to remain a matter of obscurity. Professor Quéneudec would prefer to leave the issue of seisin unclear - he does not like the orderly certainty of the apothecary's shelves. But the question whether the method of seisin needs consent requires certainty. All States have an interest in a clear ruling by the Court on this point.

I very much hope that this brief summary of the issues, and of how Bahrain views them, will prove helpful to the Court.

Mr. President, distinguished Members of the Court, may I say, on behalf of my Government, and also on behalf of the counsel who have represented Bahrain, that we have greatly appreciated the courtesy and patience which the Court has shown to us during this two weeks of oral argument.

Finally, Mr. President, it falls to me as Agent for the State of Bahrain, to read out Bahrain's Submission, as is customary. They are as follows:

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

The PRESIDENT: Thank you, Your Excellency. The Court takes note of your final Submissions on behalf of the State of Bahrain. That brings us to the end of the oral proceedings.

I thank the Agents, H. E. Minister Najeeb Al-Nauimi and H.E. Minister Mohammed Husain Al Baharna, and counsel and advocates of the State of Qatar and the State of Bahrain for the great assistance which they have given the Court. In accordance with the usual practice, I request the two Agents to remain at the disposal of the Court for any further assistance it may require. With that reservation, I declare closed the oral proceedings devoted to questions of jurisdiction and admissibility in the case concerning *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*. The Court will now withdraw to deliberate, and the Agents will in due course be informed of the date on which its Judgment will be delivered. The sitting is closed.

The Court rose at 12.40 p.m.
