INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN

(QATAR v. BAHRAIN)

JURISDICTION AND ADMISSIBILITY

JUDGMENT OF 1 JULY 1994

1994

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA DÉLIMITATION MARITIME ET DES QUESTIONS TERRITORIALES ENTRE QATAR ET BAHREÏN

(QATAR c. BAHREÏN)

COMPÉTENCE ET RECEVABILITÉ

ARRÊT DU 1ER JUILLET 1994

Official citation:
Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112

Mode officiel de citation:
Délimitation maritime et questions territoriales entre Qatar et Bahreïn, compétence et recevabilité, arrêt, C.I.J. Recueil 1994, p. 112

ISSN 0074-4441
ISBN 92-1-070716-9

Sales number
N° de vente: 651

1 JULY 1994

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1 July
General List
No. 87

YEAR 1994

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(QATAR *v.* BAHRAIN)

JURISDICTION AND ADMISSIBILITY

Jurisdiction of the Court — Legal nature of texts relied on to found jurisdiction — 1987 exchanges of letters and 1990 "Minutes" creating rights and obligations in international law for the Parties and therefore constituting international agreements.

Intentions of the signatories of the text — Subsequent conduct of the Parties.

Formula implying that the whole of the dispute would be submitted to the Court — Application comprising only some of the elements of the dispute.

Opportunity afforded to the Parties by the Court to ensure submission to it of the entire dispute — Submission either by joint act or separate acts.

JUDGMENT

Present: *President* BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, Sir Robert JENNINGS, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA; *Judges* ad hoc VALTICOS, RUDA; *Registrar* VALENCIA-OSPINA.

In the case concerning maritime delimitation and territorial questions between Qatar and Bahrain,

between

the State of Qatar,

represented by

H.E. Mr. Najeeb Al-Nauimi, Minister Legal Adviser,
as Agent and Counsel;
Mr. Adel Sherbini, Legal Expert,
Mr. Sami Abushaikha, Legal Expert,
as Legal Advisers;
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,

and

the State of Bahrain,

represented by

H.E. Mr. 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 at the University of Cambridge,
Mr. Keith Highet, Member of the Bars of the District of Columbia and 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 Institute of International Law,
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,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 8 July 1991 the Minister for Foreign Affairs of the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings against the State of Bahrain (hereinafter referred to as "Bahrain") in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was forthwith communicated by the Registrar to the Government of Bahrain; in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified by the Registrar of the Application.

3. In its Application Qatar founded the jurisdiction of the Court upon two agreements between the Parties stated to have been concluded in December 1987 and December 1990 respectively, the subject and scope of the commitment to jurisdiction being determined, according to the Applicant, by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990.

4. By letters addressed to the Registrar of the Court on 14 July 1991 and 18 August 1991 Bahrain contested the basis of jurisdiction invoked by Qatar. At a meeting between the President of the Court and the representatives of the Parties held on 2 October 1991 it was agreed that questions of jurisdiction and admissibility should be separately determined before any proceedings on the merits.

5. By an Order dated 11 October 1991 the President of the Court, after referring to that meeting of 2 October 1991, noted that it was necessary for the Court to be informed of all the contentions and evidence of fact and law on which the Parties relied in connection with those questions; having consulted the Parties under Article 31 of the Rules of Court, and taking into account the agreement between them concerning the procedure, the President decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application.

6. By the same Order the President fixed 10 February 1992 as time-limit for the Memorial of Qatar and 11 June 1992 as time-limit for the Counter-Memorial of Bahrain on the questions of jurisdiction and admissibility, and those pleadings were duly filed within the time-limits so fixed. By an Order dated 26 June 1992 the Court, considering that the filing of further proceedings by the Parties was necessary, directed that a Reply by Qatar and a Rejoinder by Bahrain be filed on the questions of jurisdiction and admissibility, and fixed 28 September 1992 and 29 December 1992 respectively as time-limits therefor; those pleadings were duly filed within the time-limits so fixed.

7. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; Bahrain chose Mr. Nicolas Valticos, and Qatar Mr. José María Ruda.

8. At a meeting with the Registrar on 8 January 1993, the Agents of the two Parties stated that their Governments had agreed that neither Party would call any witnesses or experts at the hearings. The agreement was confirmed to the

Registrar by a letter from the Agent of Qatar dated 20 November 1993 and a letter from the Agent of Bahrain dated 23 November 1993.

9. By a letter addressed to the Registrar on 11 January 1994 the Agent of Bahrain, referring to Article 56 of the Rules of Court, submitted certain documents which Bahrain wished to produce and refer to during the oral proceedings. Copies were communicated to the Agent of Qatar who, by a letter dated 10 February 1994, indicated that Qatar did not object to the production of the documents submitted by Bahrain, reserved the right to comment thereon, and submitted documents under Article 56, paragraph 3, of the Rules of Court. Copies were communicated to the Agent of Bahrain.

10. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and annexed documents should be made accessible to the public from the date of the opening of the oral proceedings.

11. At public hearings held between 28 February and 11 March 1994, the Court heard the oral arguments addressed to it by the following:

For Qatar: H.E. Mr. Najeeb Al-Nauimi, *Agent*,
Sir Ian Sinclair, Q.C.,
Mr. R. K. P. Shankardass,
Mr. Jean Salmon,
Mr. Jean-Pierre Quéneudec,
Sir Francis Vallat, Q.C.

For Bahrain: H.E. Mr. Husain Mohammed Al Baharna, *Agent*,
Mr. Derek W. Bowett, Q.C.,
Mr. Elihu Lauterpacht, Q.C.,
Mr. Eduardo Jiménez de Aréchaga,
Mr. Prosper Weil,
Mr. Keith Highet.

12. During the oral proceedings, questions were put by a Member of the Court to both Parties. In accordance with Article 61, paragraph 4, and Article 72 of the Rules of Court, the Parties supplied written replies to these questions after the close of the hearings, and each Party commented in writing upon the reply given by the other.

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Qatar,

in the Memorial and in the Reply:

> "the State of Qatar respectfully requests the Court to adjudge and declare, rejecting all contrary claims and submissions, that —
>
> The Court has jurisdiction to entertain the dispute referred to in the Application filed by Qatar on 8 July 1991 and that Qatar's Application is admissible."

On behalf of Bahrain,

in the Counter-Memorial and in the Rejoinder:

> "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."

14. In the course of the oral proceedings submissions were presented by the Parties identical to those presented by them in the written proceedings.

* *

15. The dispute between Bahrain and Qatar has a long history which there is no need to recall at this stage. However, it seems useful to summarize the circumstances in which a solution to that dispute has been sought over the past two decades.

16. These endeavours to find a solution took place in the context of a mediation, sometimes referred to as "good offices", beginning in 1976, by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar. The first consequence of that mediation was that a set of "Principles for the Framework for Reaching a Settlement" was approved during a tripartite meeting in March 1983.

The first principle specified that

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

The second and third principles were aimed at the maintenance of the status quo, and of a cordial atmosphere between the Parties. The third principle also provided that the Parties undertook "not to present the dispute to any international organization".

Under the fourth principle, a Tripartite Committee was formed, with the aim of reaching substantive solutions acceptable to the two Parties.

Lastly, according to the fifth principle,

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

17. For the next few years, there was no progress towards a settlement of the dispute. The King of Saudi Arabia then sent the Amirs of Qatar and Bahrain letters in identical terms dated 19 December 1987, in which he put forward new proposals. Those proposals were accepted by letters from the two Heads of State, dated respectively 21 and 26 December 1987. The Saudi proposals thus adopted included four points.

The first was that

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

The second point was once more directed at the maintenance of the status quo.

The third provided for formation of a committee composed of representatives of the States of Bahrain and Qatar and of the Kingdom of Saudi Arabia,

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued".

Lastly, according to the fourth point, the Kingdom of Saudi Arabia was to "continue its good offices to guarantee the implementation of these terms".

In addition, on 21 December 1987 an announcement was issued by Saudi Arabia, the terms of which were approved by the two Parties. That announcement stated that Bahrain and Qatar accepted

> "that the matter be submitted for arbitration, in pursuance of the principles of the framework for settlement which had been agreed by the two sisterly States, particularly the fifth principle"

as adopted in 1983, the text of which was quoted. It went on to state that "under the five principles" it had been agreed to establish a Tripartite Committee whose task was described in the same terms as in the exchanges of letters of December 1987.

18. That Tripartite Committee held a preliminary meeting in Riyadh in December 1987. Qatar then presented a draft of a joint letter to the Court which expressly contemplated, *inter alia*, the drafting of a special agreement. Bahrain proposed an agreement of a procedural character, relating to the organization and functioning of the Committee.

The Committee subsequently held its first formal meeting on 17 January 1988. Bahrain then filed a revised version of its draft stating expressly that the Committee was formed with the aim of reaching a special agreement. After a discussion, it was agreed that each of the Parties would present a draft special agreement.

Several texts were subsequently presented to the Committee by Bahrain and Qatar, but no agreement could be reached in the course of the first four meetings. Then, on 26 October 1988, following an initiative by Saudi Arabia, the Heir Apparent of Bahrain, when on a visit to Qatar, transmitted to the Heir Apparent of Qatar a text (subsequently known as the "Bahraini formula") which reads as follows:

"*Question*

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

During the fifth meeting of the Committee on 15 November 1988, the representative of Saudi Arabia appealed to the Parties to come to an agreement and pointed out that

> "the date of the beginning of the CCASG [Co-operation Council of Arab States of the Gulf] summit [in December 1988] is the date for terminating the Committee's mission whether or not it succeeded to achieve what was requested from it".

The Committee held its sixth meeting on 6-7 December 1988. Qatar asked for a reformulation of the text presented by Bahrain, and also proposed

> "that the agreement which would be submitted to the Court should have two annexes, one Qatari and the other Bahraini. Each State would define in its annex the subjects of dispute it wants to refer to the Court."

Bahrain stated that these proposals would be studied.

The Tripartite Committee proceeded moreover to a discussion with the

> "objective of defining exhaustively the matters which would be referred to the Court, which are:
>
> 1. The Hawar Islands, including the island of Janan
> 2. Fasht al Dibal and Qit'at Jaradah
> 3. The archipelagic baselines
> 4. Zubarah
> 5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries."

The two Parties agreed in principle upon the points thus mentioned, although Qatar made it clear that it could only accept the inclusion of the question of Zubarah in that list "if the content relates to private rights", not to sovereignty over Zubarah. Bahrain's reply was that it intended to submit its claims in that regard to the Court, "without any limitation".

With this sixth meeting, the Saudi mediator considered that the mission of the Tripartite Committee would come to an end, and in fact no further meetings of the Committee were held.

19. The matter was again the subject of discussion two years later, on the occasion of the annual meeting of the Co-operation Council of Arab States of the Gulf at Doha in December 1990. Qatar then let it be known that it was ready to accept the Bahraini formula. Following that meeting,

the Foreign Ministers of Bahrain, Qatar and Saudi Arabia signed Minutes recording that "Within the framework of the good offices of . . . King Fahd Ben Abdul Aziz", consultations concerning the existing dispute between Bahrain and Qatar had taken place between the Foreign Ministers of those States in the presence of the Foreign Minister of Saudi Arabia.

The text of those Minutes was in Arabic, and the English translations supplied by the Parties differ on certain points. The translation supplied by Qatar is as follows:

> "The following was agreed:
>
> (1) to reaffirm what was agreed previously between the two parties;
>
> (2) to continue the good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, between the two countries till the month of Shawwal, 1411 H, corresponding to May of the next year 1991. After the end of this period, the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom. Saudi Arabia's good offices will continue during the submission of the matter to arbitration;
>
> (3) should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration."

The translation supplied by Bahrain is as follows:

> "The following was agreed:
>
> 1. To reaffirm what was previously agreed between the two parties.
>
> 2. The good offices of the Custodian of the Two Holy Mosques, King Fahd b. Abdul Aziz will continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. The two parties may, at the end of this period, submit the matter to the International Court of Justice in accordance with the Bahraini formula, which the State of Qatar has accepted, and with the procedures consequent on it. The good offices of the Kingdom of Saudi Arabia will continue during the period when the matter is under arbitration.
>
> 3. If a brotherly solution acceptable to the two parties is reached, the case will be withdrawn from arbitration."

20. The good offices of King Fahd did not lead to the desired outcome within the time-limit thus fixed, and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain

> "in respect of certain existing disputes between them relating to sov-

> ereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States".

According to Qatar, the two States:

> "have made express commitments in the agreements of December 1987 . . . and December 1990 . . ., to refer their disputes to the . . . Court".

As both Parties had "given their requisite consent through the international agreements referred to above", Qatar considers that the Court has been enabled "to exercise jurisdiction to adjudicate upon those disputes" and, as a consequence, upon the Application of Qatar.

Bahrain maintains on the contrary that the 1990 Minutes do not constitute a legally binding instrument. It goes on to say that, in any event, the combined provisions of the 1987 exchanges of letters and of the 1990 Minutes were not such as to enable Qatar to seise the Court unilaterally. It emphasizes in this respect that a preliminary version of the 1990 Minutes provided that "Either of the two parties" should be entitled to seise the Court, and that, on the insistence of Bahrain, this text was modified to permit of such seisin only by "the two parties". From this Bahrain concludes that the Court lacks jurisdiction to deal with the Application of Qatar.

* * *

21. The Court will first enquire into the nature of the texts upon which Qatar relies before turning to an analysis of the content of those texts.

22. The Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations. Bahrain however maintains that the Minutes of 25 December 1990 were no more than a simple record of negotiations, similar in nature to the Minutes of the Tripartite Committee; that accordingly they did not rank as an international agreement and could not, therefore, serve as a basis for the jurisdiction of the Court.

23. The Court would observe, in the first place, that international agreements may take a number of forms and be given a diversity of names. Article 2, paragraph (1) *(a)*, of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that for the purposes of that Convention,

> " 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

Furthermore, as the Court said, in a case concerning a joint communiqué,

> "it knows of no rule of international law which might preclude a

> joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 39, para. 96).

In order to ascertain whether an agreement of that kind has been concluded, "the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up" *(ibid.)*.

24. The 1990 Minutes refer to the consultations between the two Foreign Ministers of Bahrain and Qatar, in the presence of the Foreign Minister of Saudi Arabia, and state what had been "agreed" between the Parties. In paragraph 1 the commitments previously entered into are reaffirmed (which includes, at the least, the agreement constituted by the exchanges of letters of December 1987). In paragraph 2, the Minutes provide for the good offices of the King of Saudi Arabia to continue until May 1991, and exclude the submission of the dispute to the Court prior thereto. The circumstances are addressed under which the dispute may subsequently be submitted to the Court. Qatar's acceptance of the Bahraini formula is placed on record. The Minutes provide that the Saudi good offices are to continue while the case is pending before the Court, and go on to say that, if a compromise agreement is reached during that time, the case is to be withdrawn.

25. Thus the 1990 Minutes include a reaffirmation of obligations previously entered into; they entrust King Fahd with the task of attempting to find a solution to the dispute during a period of six months; and, lastly, they address the circumstances under which the Court could be seised after May 1991.

Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.

26. Bahrain however maintains that the signatories of the Minutes never intended to conclude an agreement of this kind. It submitted a statement made by the Foreign Minister of Bahrain and dated 21 May 1992, in which he states that "at no time did I consider that in signing the Minutes I was committing Bahrain to a legally binding agreement". He goes on to say that, according to the Constitution of Bahrain, "treaties 'concerning the territory of the State' can come into effect only after their positive enactment as a law". The Minister indicates that he would therefore not have been permitted to sign an international agreement taking effect at the time of the signature. He was aware of that situation, and was prepared to subscribe to a statement recording a political understanding, but not to sign a legally binding agreement.

27. The Court does not find it necessary to consider what might have

been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement.

28. Bahrain however bases its contention, that no international agreement was concluded, also upon another argument. It maintains that the subsequent conduct of the Parties showed that they never considered the 1990 Minutes to be an agreement of this kind; and that not only was this the position of Bahrain, but it was also that of Qatar. Bahrain points out that Qatar waited until June 1991 before it applied to the United Nations Secretariat to register the Minutes of December 1990 under Article 102 of the Charter; and moreover that Bahrain objected to such registration. Bahrain also observes that, contrary to what is laid down in Article 17 of the Pact of the League of Arab States, Qatar did not file the 1990 Minutes with the General Secretariat of the League; nor did it follow the procedures required by its own Constitution for the conclusion of treaties. This conduct showed that Qatar, like Bahrain, never considered the 1990 Minutes to be an international agreement.

29. The Court would observe that an international agreement or treaty that has not been registered with the Secretariat of the United Nations may not, according to the provisions of Article 102 of the Charter, be invoked by the parties before any organ of the United Nations. Non-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement. The same conclusion follows as regards the non-registration of the text with the General Secretariat of the Arab League. Nor is there anything in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question. Accordingly Bahrain's argument on these points also cannot be accepted.

30. The Court concludes that the Minutes of 25 December 1990, like the exchanges of letters of December 1987, constitute an international agreement creating rights and obligations for the Parties.

* * *

31. Turning now to an analysis of the content of these texts, and of the rights and obligations to which they give rise, the Court would first observe that, by the exchanges of letters of December 1987 quoted in paragraph 17 above, Bahrain and Qatar agreed that

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

The same exchanges of letters constituted a Tripartite Committee

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court".

The Parties thus entered into an undertaking to refer all the disputed matters to the Court and to determine, with the assistance of Saudi Arabia, the way in which the Court was to be seised in accordance with the undertaking thus given.

32. The determination of the "disputed matters" was the subject of lengthy negotiations at meetings of the Tripartite Committee. Those negotiations were unsuccessful in 1988 and the question was only settled by the Minutes of December 1990. Those Minutes placed on record the fact that Qatar had finally accepted the Bahraini formula. Both Parties thus accepted that the Court, once seised, should decide "any matter of territorial right or other title or interest which may be a matter of difference between [the Parties]"; and should "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

33. The formula thus adopted determined the limits of the dispute with which the Court would be asked to deal. It was devised to circumscribe that dispute, but, whatever the manner of seisin, it left open the possibility for each of the Parties to present its own claims to the Court, within the framework thus fixed. For example, it permitted Qatar to present its claims in respect of the Hawar islands, just as it permitted Bahrain to present its claims in respect of Zubarah. However, while the Bahraini formula permitted the presentation of distinct claims by each of the Parties, it nonetheless presupposed that the whole of the dispute would be submitted to the Court.

34. The Court notes that at present it has before it solely an Application by Qatar setting out the particular claims of that State within the framework of the Bahraini formula. Article 40 of the Court's Statute, which provides that cases are brought before the Court "either by the notification of the special agreement or by a written application", also provides that, "In either case the subject of the dispute and the parties shall be indicated." These indications are thus requirements common to

both modes of approach to the Court. They are also laid down in the Rules of Court in Article 38 for cases instituted by application; and in Article 39 for notification of a special agreement. In the present case the identity of the parties presents no difficulty; but the subject of the dispute is another matter.

35. What, then, is "the subject of the dispute" referred to in Qatar's Application? That Application only presents the questions which Qatar would like the Court to decide. Qatar's "requests" in its Application are thus as follows:

> "Reserving its right to supplement or amend its requests, the State of Qatar requests the Court:
>
> I. To adjudge and declare in accordance with international law
>
> (A) that the State of Qatar has sovereignty over the Hawar islands; and,
> (B) that the State of Qatar has sovereign rights over Dibal and Qit'at Jaradah shoals;
>
> and
>
> II. With due regard to the line dividing the sea-bed of the two States as described in the British decision of 23 December 1947, to draw in accordance with international law a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain."

36. In argument before the Court it was made abundantly clear by Bahrain that in its view the Qatar Application comprises only some of the elements of the subject-matter intended to be comprised in the Bahraini formula; in particular there is the omission of any reference to a dispute over Zubarah to which Bahrain attaches importance, though this is not the sole subject of its concern. The fact that the subject-matter of Qatar's Application corresponds to only part of the dispute contemplated by the Bahraini formula was in effect acknowledged by Qatar, which invited Bahrain to remedy the matter by bringing a separate application or a counter-claim respecting, for example, Zubarah.

37. As early as 1983, the Parties, when adopting the "Principles for the Framework for Reaching a Settlement" (to which reference was made in the 1987 agreement) had agreed that

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

The 1987 agreement provides that "All the disputed matters shall be

referred to the International Court of Justice, at The Hague, . . .". The 1990 Minutes refer to the "matter" (in the singular) being submitted to the International Court of Justice; they also refer to the "matter" being submitted to arbitration. Finally they provide that if the good offices of the King of Saudi Arabia — which were certainly directed to the whole of the dispute — were successful, "the case will be withdrawn from arbitration". The authors of the Bahraini formula conceived of it with a view to enabling the Court to be seised of the whole of those questions, as defined by each of the Parties within the general framework thus adopted.

38. The Court has consequently decided to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed. Such submission of the entire dispute could be effected by a joint act by both Parties with, if need be, appropriate annexes, or by separate acts. Whichever of these methods is chosen, the result should be that the Court has before it "any matter of territorial right or other title or interest which may be a matter of difference between" the Parties, and a request that it "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters". This process must be completed within five months of the date of this Judgment.

39. On the completion thus of the reference of the whole dispute to the Court, the Court will fix time-limits for the simultaneous filing of pleadings, i.e., each Party will file a Memorial and then a Counter-Memorial within the same time-limits.

*

40. The Court notes that Bahrain has attached importance to a matter which was referred to in Article V of a draft Special Agreement put forward by Bahrain during the 1988 discussions in the Tripartite Committee, which Article provided:

> "Neither party shall introduce into evidence or argument, or publicly disclose in any manner, the nature or content of proposals directed to a settlement of the issues [to be referred to the Court], or responses thereto, in the course of negotiations or discussions between the parties undertaken prior to the date of this Agreement, whether directly or through any mediation."

The inclusion of an Article on these lines was objected to by Qatar, and no such provision appears in the 1990 Minutes. In any event, there is a rule of customary international law in this domain, defined in 1927 by the

Permanent Court of International Justice, namely that the Court cannot take account of declarations, admissions or proposals which the parties may have made in the course of direct negotiations when the negotiations in question have not led to an agreement between the parties (*Factory at Chorzów, Jurisdiction, P.C.I.J., Series A, No. 9*, p. 19; see also *Factory at Chorzów (Claim for Indemnity), Merits, P.C.I.J., Series A, No. 17*, pp. 51, 62-63). The continued existence of the rule was recognized by the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, which commented as follows on the dictum of the Permanent Court:

> "This observation . . . refers to the common and laudable practice — which, indeed, is of the essence of negotiations — whereby the parties to a dispute, having each advanced their contentions in principle, which thus define the extent of the dispute, proceed to venture suggestions for mutual concessions, within the extent so defined, with a view to reaching an agreed settlement. If no agreement is reached, neither party can be held to such suggested concessions." (*I.C.J. Reports 1992*, p. 406, para. 73.)

* * *

41. For these reasons,

THE COURT,

(1) By 15 votes to 1,

Finds that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain dated 19 and 26 December 1987, and the document headed "Minutes" and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, are international agreements creating rights and obligations for the Parties;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; *Judges* ad hoc Valticos, Ruda;

AGAINST: *Judge* Oda.

(2) By 15 votes to 1,

Finds that by the terms of those agreements the Parties have undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the text proposed by Bahrain to Qatar on 26 Octo-

ber 1988, and accepted by Qatar in December 1990, referred to in the 1990 Doha Minutes as the "Bahraini formula";

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; *Judges* ad hoc Valticos, Ruda;

AGAINST: *Judge* Oda.

(3) By 15 votes to 1,

Decides to afford the Parties the opportunity to submit to the Court the whole of the dispute;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; *Judges* ad hoc Valticos, Ruda;

AGAINST: *Judge* Oda.

(4) By 15 votes to 1,

Fixes 30 November 1994 as the time-limit within which the Parties are, jointly or separately, to take action to this end;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; *Judges* ad hoc Valticos, Ruda;

AGAINST: *Judge* Oda.

(5) By 15 votes to 1,

Reserves any other matters for subsequent decision.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; *Judges* ad hoc Valticos, Ruda;

AGAINST: *Judge* Oda.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of July, one thousand nine hundred and ninety-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the State of Qatar and the Government of the State of Bahrain, respectively.

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge SHAHABUDDEEN appends a declaration to the Judgment of the Court.

Vice-President SCHWEBEL and Judge *ad hoc* VALTICOS append separate opinions to the Judgment of the Court.

Judge ODA appends a dissenting opinion to the Judgment of the Court.

(Initialled) M.B.

(Initialled) E.V.O.