INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING MARITIME DELIMITATION

AND TERRITORIAL QUESTIONS

BETWEEN

QATAR AND BAHRAIN

(QATAR V. BAHRAIN)

MEMORIAL

SUBMITTED BY

THE STATE OF QATAR

(Questions of Jurisdiction and Admissibility)

VOLUME I

10 February 1992

TABLE OF CONTENTS

INTRODUCTION

This Memorial is filed in accordance with the Order of the Court dated 11 October 1991 which fixed 10 February 1992 as the time-limit for the Memorial of the State of Qatar.

CHAPTER I
THE PROCEEDINGS BEFORE THE COURT

SECTION 1. Qatar's Application filed on 8 July 1991 and Bahrain's letters of 14 July and 18 August 1991

1.01 As stated in the Order of the Court, on 8 July 1991 the State of Qatar ("Qatar") filed in the Registry of the Court the Application instituting proceedings against the State of Bahrain ("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. Paragraphs 2 to 10 of the Application contained a very brief indication of the geographical and historical background to the disputes, and paragraphs 11 to 25 gave a brief description of the subject of the disputes. Paragraphs 26 to 39 outlined the efforts to settle the disputes which until now have failed to result in a settlement.

1.02 As stated in paragraph 40 of the Application, Qatar founds the jurisdiction of the Court upon certain Agreements between the Parties concluded in December 1987 ("the 1987 Agreement") and December 1990 ("the Doha Agreement"). These Agreements are referred to in paragraphs 32 and 33 of the Application and paragraphs 37 and 38 of the Application respectively[1].

1.03 For the subject and scope of the disputes referred to the Court, the Application (paragraph 40) relies on the Bahraini formula, an English version of which, as provided by Bahrain, is given in paragraph 36 of the Application[2]. The formula was proposed by Bahrain on 26 October 1988 and accepted by Qatar in

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1 The relevant texts may be found in Annexes II.15 and II.16, Vol. III, pp. 101 and 107 and Annex II.32, Vol. III, p. 205 hereto.

2 See, also, Annex II.29, Vol. III, p. 191.

December 1990. It was incorporated into the December 1990 Agreement by the words "may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar". The formula as quoted in paragraph 36 of the Application reads as follows:

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

1.04 The formula thus adopted by the Parties is unquestionably wide enough to cover the claims of Qatar as presented in the requests to the Court formulated in paragraph 41 of the Application. It is, indeed, a formula which may well open the way for Bahrain to submit to the Court a claim based on any relevant dispute on which Bahrain may wish to seek adjudication, but it is not for Qatar to formulate and submit any such claim.

1.05 By letters dated 14 July 1991 and 18 August 1991 mentioned in the Order of the Court[3], Bahrain contested the basis of jurisdiction invoked by Qatar. The letter of 14 July went even further and, relying on Article 38, paragraph 5, of the Rules of Court, requested that the Application should not be entered in the General List, and that no action should be taken in the proceedings. Article 38, paragraph 5, being clearly inapplicable in the present circumstances, the case was, in due course, given a title and entered in the General List as recorded in the Order. The equally unfounded contention made in the letter of 14 July, that the continuation of the Mediation precluded a unilateral application to the Court, will be dealt with later in this Memorial.

1.06 The letter of 18 August 1991 contested the jurisdiction of the Court in strong terms and at some length but on grounds which, as will be shown subsequently in this Memorial, are ill-founded.

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3 As these two letters are mentioned in the Order and now form part of the record of the Court, copies are not annexed to this Memorial.

SECTION 2. The Order of the Court of 11 October 1991

1.07 The Order, made by the President of the Court on 11 October 1991, took account of agreement reached between representatives of the Parties at the meeting held in his chambers on 2 October 1991 that questions of jurisdiction and admissibility should be separately determined before any proceedings on the merits, and fixed time-limits for written proceedings on these questions. Clearly referring to the "questions of jurisdiction and admissibility", the Order also stated that "it is necessary for the Court to be informed of all the contentions and evidence of fact and law on which the Parties rely in that connection". This Memorial is accordingly restricted to those considerations of fact and law which may assist the Court in deciding the questions of "jurisdiction and admissibility in this case".

SECTION 3. Questions of "jurisdiction and admissibility in this case"

1.08 In the decision given in the Order these questions are more fully described as "the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application". It is worth noting that the Order speaks here of "dispute" in the singular. This highlights one of the features of this case, which is that the disputes submitted to the Court by Qatar form an integral whole, as they were already regarded in the course of the Mediation by Saudi Arabia[4]. Nevertheless, by acceptance of the Bahraini formula Qatar has also accepted in full reciprocity the possibility of other disputes being added by Bahrain, provided they are existing and established disputes falling within the scope of that general formula. Bahrain itself, while making no attempt to make use of the breadth of the formula, has not alleged that the disputes submitted by Qatar's Application go beyond the formula. On the contrary, the fourth paragraph of the letter from Bahrain dated 18 August 1991 accuses Qatar of narrowing the scope of the "Question" (i.e., the accepted formula).

1.09 In addressing the issues of fact and law which arise at this stage of the proceedings, it is necessary, in accordance with the Order of the Court, to distinguish between questions of jurisdiction and of admissibility. It is well-known that it is difficult to draw a sharp and clear-cut distinction between these questions, but help may be drawn from the Court's Statute and Rules and its

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4 See, para. 3.14 below.

jurisprudence. The principal source of guidance on the meaning of "the jurisdiction of the Court" may be found in Article 36 of the Statute of the Court and in the jurisprudence of the Court. Paragraph 1 of Article 36 reads -

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

This provision does not mention the question of the admissibility of an application. Objection to the admissibility of an application is, however, mentioned in Article 79, paragraph 1, of the Rules of Court under the title "Preliminary Objections". Therefore, the reference to the "admissibility of the Application" in the Order of the Court should be interpreted in relation to Article 79, paragraph 1, of the Rules and in accordance with the jurisprudence of the Court on preliminary objections.

1.10 It would not be appropriate in this Introduction to dwell at length on this matter. It may suffice at this point to adopt the characterization made by Sir Gerald Fitzmaurice as accurately reflecting the essential content of objections to the "jurisdiction" and to the "admissibility of the application" in the jurisprudence of the Court. He states that, although both are, as a general rule, in the nature of "preliminary objections" and their common aim is "to prevent... a decision on the merits", there is -

> "... a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits: the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim[5]."

1.11 Putting on one side the irregularity of the letters from Bahrain of 14 July 1991 and 18 August 1991, including the fact that when they were despatched Bahrain had not appointed an Agent as required by the Statute and Rules of Court, for the purposes of the present stage of the proceedings, Qatar will treat those letters as if they had raised a preliminary objection. These letters "contested the basis of jurisdiction invoked by Qatar" as declared in the fourth paragraph of

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5 Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", British Year Book of International Law, Vol. 34, 1958, pp. 1-161, at pp. 12-13 (footnote omitted).

the Order of the Court. In fact, both the letter of 18 August and the Annex thereto submit "that the Court does not have jurisdiction" in the present case. There are essentially two grounds given for this objection. Bahrain contends, first, that the December 1990 Agreement does not amount to a treaty in force for the purposes of Article 36, paragraph 1, of the Statute of the Court and, second, that this Agreement on which Qatar relies does not authorize the Parties to submit a unilateral application to the Court. Neither of these contentions, which are rejected by Qatar, raises any objection of inadmissibility. Bahrain has also complained that Qatar's Application has "narrowed the substantive scope of the Question" referred to the Court and that continuation of the Mediation excludes the possibility of unilateral application. The exact purpose of these complaints is not clear but they seem to be directed to an attempt to lend colour to the two objections just mentioned. All these matters will be addressed later in this Memorial[6].

1.12 The fact that Bahrain has not expressly made any objection on grounds of inadmissibility does not prevent the Court from considering aspects of the case which, while not affecting the jurisdiction of the Court in the sense indicated in paragraph 1.10 above, nevertheless may render the Application inadmissible. This possibility has been recognized in the Order of the Court which includes questions of both jurisdiction and admissibility as issues to be addressed first in the written proceedings. The concept of admissibility is fairly flexible, but important relevant factors are to be found in Article 36, paragraph 2, of the Statute which limits to legal disputes the jurisdiction of the Court by virtue of declarations made under that paragraph, and in Article 38 which defines the function of the Court as deciding "in accordance with international law such disputes as are submitted to it". The jurisprudence of the Court has confirmed beyond doubt that, even if a matter falls prima facie within the terms of an agreement conferring jurisdiction on it, the Court will not entertain the case unless there is an existing legal dispute between the parties, or, in other words, unless the "difference" is a justiciable dispute. This means that the Court should be fully informed as to the origin and nature of the dispute as well as the attempts made to settle it and the results of any attempt at settlement.

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6 See, in general, Chapter V below.

SECTION 4. Structure of Qatar's Memorial

1.13 In accordance with the Order of the Court, this Memorial is directed not to the merits of the disputes submitted by Qatar to the Court but to "the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application". The structure of the Memorial appears from the Table of Contents, but a few words of explanation may be of assistance to the Court.

1.14 The Memorial is divided into three Parts:

Part I The Disputes Submitted by Qatar to the Court

Part II The Basis of the Jurisdiction of the Court in the Present Case

Part III Summary.

1.15 Part I is divided into two Chapters. Chapter II deals with the origin and history of the disputes and Chapter III with efforts to settle the disputes, including the Saudi Mediation. The history of Qatar and Bahrain has a direct bearing on the origin and nature of the disputes, especially with respect to the Hawar islands. The general history is dealt with very briefly in Chapter II, Section 1. The rest of Chapter II is devoted to the history of the disputes themselves, dealing in turn with the disputes concerning the Hawar islands, maritime delimitation and the Dibal and Qit'at Jaradah shoals.

1.16 Chapter III concerning the efforts to settle the disputes and the Mediation of Saudi Arabia is at the heart of the facts of concern in the present stage of proceedings in this case. It has direct relevance to the nature of the disputes, their continuance and the failure to find either an acceptable settlement or effective means of settlement until the Agreement of December 1987 was implemented by the Doha Agreement of 1990.

1.17 Part II on the basis of jurisdiction of the Court in the present case deals in Chapter IV both with the interpretation of the 1987 and 1990 Agreements and with the principle of consent as the basis for the jurisdiction of the Court. Chapter V contains Qatar's observations on Bahrain's contentions. The Memorial concludes with a Summary in Part III and the Submissions of Qatar.

1.18 Attached to the Memorial are two Volumes of Annexes. Volume II contains documents relevant to the disputes submitted by Qatar to the Court. This Volume contains the English and Arabic versions of the documents when both versions were found in the British Archives, as well as Qatar's English translations of certain Arabic original documents. Volume III contains documents relevant to the Saudi Mediation. This Volume contains original documents in English but only the English translation of original Arabic documents. Qatar has deposited a copy of the original Arabic documents with the Registry of the Court. Also contained in Volume III are an Opinion by Professor Ahmed S. El-Kosheri and an Opinion by Professor Shukry Ayyad. Finally, Qatar has deposited with the Registry a copy in Arabic of documents relating to the Tripartite Committee in accordance with Article 50, paragraph 2, of the Rules of Court, together with Qatar's English translation.

1.19 Qatar presents its Memorial in the confidence that the considerations submitted will satisfy the Court that it has jurisdiction to entertain the dispute and that the Application is admissible.

PART I
THE DISPUTES SUBMITTED BY QATAR TO THE COURT

CHAPTER II
THE ORIGIN AND HISTORY OF THE DISPUTES

Introduction

2.01 With reference to the question of admissibility, Qatar considers that it has a duty to provide information to the Court concerning the existence of legal disputes between Qatar and Bahrain, so that the Court, according to its Statute, can take cognizance of such disputes and discharge its judicial functions.

2.02 Article 38 of the Statute of the Court states that the function of the Court "is to decide in accordance with international law such disputes as are submitted to it ...". Several conditions must be fulfilled in order for the Court to be in a position to exercise its judicial functions:

- there must be a dispute;
- the dispute must be of a legal character; and,
- it must be a dispute which is to be decided in accordance with international law.

2.03 The jurisprudence of the Court has on several occasions insisted on the conditions which have to be fulfilled in order to show that there is a dispute. Thus, in the Mavrommatis Palestine Concessions case, the Permanent Court of International Justice said in its Judgment of 30 August 1924:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[7]."

These requirements were further specified by the same Court in its Judgment of 25 August 1925 in the case of Certain German Interests in Polish Upper Silesia where the Court observed that -

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7 Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

> "... a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views[8]."

2.04 Subsequently, the International Court of Justice pointed out in its Advisory Opinion of 30 March 1950 in the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania case that:

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence[9]."

After a reference to the facts of that case, the Court concluded:

> "There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question ... Confronted with such a situation, the Court must conclude that international disputes have arisen[10]."

Similarly, in its Judgment of 21 December 1962 on the preliminary objections in the South West Africa case, the Court stated as follows:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other[11]."

2.05 The Court has also on several occasions insisted on the fact that it is only concerned with legal disputes where international law is applicable. For example, in its Judgment of 20 December 1988 in the Border and Transborder Armed Actions (Nicaragua v. Honduras) case, dealing with the question of the admissibility of the application, the Court expressed itself as follows:

> "The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the

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8 Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.

9 First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

10 Ibid.

11 Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

sense of a dispute capable of being settled by the application of principles and rules of international law...[12]".

2.06 In compliance with the need expressed in the Order dated 11 October 1991 for the Court to be informed of all the relevant contentions and evidence of fact and law, Qatar intends in the briefest possible way hereafter to show that the disputes referred to in its Application filed on 8 July 1991 are disputes of a legal and international character.

2.07 The disputes submitted by Qatar to the Court relate to sovereignty over the Hawar islands, the delimitation of the maritime areas of the two States, and sovereign rights over the shoals of Dibal and Qit'at Jaradah. In order to explain these disputes, it is necessary briefly to retrace the development of the separate identities of Qatar and Bahrain up to the 1930s, before turning to the history of the disputes themselves.

SECTION 1. Qatar and Bahrain up to the 1930s

2.08 As shown on Map No. 1, facing this page, Qatar and Bahrain lie on the southern side of the Arabian/Persian Gulf about half way between the Strait of Hormuz and the Shatt al Arab[13]. Qatar is a peninsula with a number of islands lying close to its coastline. Bahrain is comprised of a compact group of islands lying some 18 nautical miles to the west of the Qatar peninsula, and about midway between it and the coastline of Saudi Arabia. As can be seen from Map No. 2 facing page 19, which shows this area on a larger scale, Qatar and Bahrain form two distinct geographical entities separated by an expanse of open sea[14].

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12 Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 91, para. 52.

13 This Map, reproduced here for illustrative purposes only, is an extract from a "Map of the Persian Gulf, Oman and Central Arabia" compiled between 1905 and 1908 for The Gazetteer of the Persian Gulf, Oman and Central Arabia. The Gazetteer, prepared by J.G. Lorimer, a senior British civil servant in the Government of India, was published in 1915, and was reprinted by Archive Editions in 1986. The Map is taken from Volume 6 of that reprint.

14 Map No. 2, also reproduced here for illustrative purposes only, is a copy of an extract from Limits in the Seas, No. 94, Continental Shelf Boundaries: The Persian Gulf, issued on 11 September 1981 by the Office of the Geographer, United States Department of State. Qatar has added the location of the Dibal and Qit'at Jaradah shoals on Map No. 2. Qatar has also modified the Map to show the meeting point of the Qatar-Iran and Bahrain-Iran boundaries as a broken line in order to reflect the terms of the relevant delimitation agreements.

A. The Separate Identities of Qatar and Bahrain in the Agreements of 1868

2.09 Qatar and Bahrain had emerged as distinct political and legal entities in the 19th century at a time when British maritime power had established its supremacy throughout the Gulf. The British had entered into treaty relations with a number of the independent Arab sheikhs of the southern Gulf in 1820 with a view to eradicating piracy in the area. As explained in paragraph 4 of Qatar's Application to the Court, the Sheikhs of Bahrain entered into a Preliminary Treaty to this effect on 5 February 1820[15], and on 23 February 1820 gave their adherence to the General Treaty of Peace entered into by the British with other Arab sheikhs[16].

2.10 British efforts to preserve the maritime peace continued after the 1820 agreements with the enforcement of a maritime truce between various warring sheikhdoms in 1835. This truce was renewed from year to year until a Treaty of Peace in Perpetuity was entered into with effect from 4 May 1853[17]. Although the Sheikh of Bahrain was not a party to this treaty he became subject to many of the same treaty obligations by a separate agreement he entered into with the British Government on 31 May 1861[18].

2.11 It was against this background that the events between Bahrain and Qatar referred to in paragraph 5 of Qatar's Application occurred. In 1867, Bahraini maritime forces, acting in alliance with the Sheikh of Abu Dhabi, attacked the towns of Doha and Wakrah on the east coast of the Qatar peninsula. Qatari forces launched a retaliatory attack resulting in a severe naval engagement. The British regarded these events as a serious test of their policy of maintaining the maritime peace and immediately despatched a naval force to the area to re-establish the peace.

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15 Annex I.2, Vol. II, p. 5.

16 Annex I.3, Vol. II, p. 9.

17 Annex I.4, Vol. II, p. 17.

18 Annex I.5, Vol. II, p. 21.

2.12 Thereafter, in 1868, the British concluded two agreements, one with the Chief of Bahrain and one with the Chief of Qatar, which bear witness to their recognition of the separate status of Qatar and Bahrain[19]. Thus, on 6 September 1868, the British Political Resident in the Persian Gulf, Colonel Pelly, concluded an Agreement with Sheikh Ali bin Khalifah of Bahrain providing, inter alia, for the Sheikh to pay certain reparation in settlement of the affair and underlining the need to preserve the maritime peace.

2.13 After securing this Agreement, Colonel Pelly proceeded to Qatar and, on 12 September 1868, concluded a separate Agreement with Sheikh Mohamed bin Thani, who was described by Pelly in his report on the conclusion of the Agreement as "the principal Chief of Katar[20]". In this Agreement, Mohamed bin Thani promised, inter alia, not to put to sea with hostile intention and to preserve peaceful relationships with the Chief of Bahrain.

2.14 The importance of these events is that at least from 1868 Qatar and Bahrain were explicitly recognized by the British as distinct and separate entities, with the sea to act as a buffer between them. The position of Sheikh Mohamed bin Thani as Chief of Qatar and of Sheikh Ali bin Khalifah as Chief of Bahrain was also recognized. The Al-Thani and Al-Khalifah families with whom these Agreements were made have ruled Qatar and Bahrain respectively to this day.

B. Qatar and Bahrain during the Turkish Presence in Qatar

2.15 Turkish expansion in the Arabian peninsula and the region of Bahrain and Qatar began even before 1868. In 1867, the Turks completed a survey and prepared a map showing the "boundaries" of Bahrain[21]. Subsequently, in 1872, having already persuaded Mohamed bin Thani's son, Sheikh Jasim bin Thani, to agree to their presence in Qatar and to fly the Turkish flag, they installed a garrison at Doha. The Turkish presence in Qatar was to last until 1915.

2.16 Having obtained Sheikh Jasim bin Thani's further agreement to act as Kaim-Makam (the equivalent of Deputy Governor) of the peninsula, the Turkish authorities repeatedly informed the British during their presence in Qatar that

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19 Annexes I.7 and I.8, Vol. II, pp. 33 and 47.

20 Annex I.9, Vol. II, p. 43.

21 Annex I.6, Vol. II, p. 27.

they held the peninsula within their jurisdiction, and that it came under the administrative control of one district of their Empire. They took steps to appoint officers at various towns on the peninsula and to establish guard posts around the coastline. They also presented Sheikh Jasim with a steam launch to enable him to control the coasts and waters within his jurisdiction[22], and themselves carried out a survey of Qatar's territory[23].

2.17 The British recognized the de facto Turkish control over Qatar. In practice, British concerns seem to have been twofold. The first concern was to prevent any Turkish claim over Bahrain, and to prevent Bahrain from becoming entangled in any way in the affairs of Qatar. The British sought to obtain assurances from the Porte that it had no intention of making claims over Bahrain. They also concluded a form of exclusive agreement with Bahrain on 22 December 1880, in part to prevent any arrangement being reached between Turkey and the Al-Khalifah Sheikhs of Bahrain[24]. A further agreement, similar in content, was entered into on 13 March 1892 under which the Sheikh of Bahrain bound himself to the following conditions:

> "1st. - That I will on no account enter into any agreement or correspondence with any Power other than the British Government.
>
> 2nd. - That without the assent of the British Government, I will not consent to the residence within my territory of the agent of any other Government.
>
> 3rd. - That I will on no account cede, sell, mortgage or otherwise give for occupation any part of my territory save to the British Government[25]."

No such agreements were entered into with the Sheikh of Qatar at the time due to the Turkish presence.

2.18 The second concern was to continue to maintain the maritime peace and to control piracy. In this regard, the British feared that pirates acting from ports or villages in Qatar might use the Turkish jurisdiction over the territorial sea

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22 Annex I.13, Vol. II, p. 59.

23 Annex I.11, Vol. II, p. 49.

24 Annex I.10, Vol. II, p. 45.

25 Annex I.12, Vol. II, p. 55.

around the peninsula as a line of retreat from their raids. For this reason, the British repeatedly informed the Porte of their duties under treaty to preserve the maritime peace and to control piracy.

2.19 These events thus confirmed the continuing separate political and legal status of Qatar and Bahrain. This was also implicit in the fact that the Agreements of 1880 and 1892 dealt only with the territory of Bahrain, and was further confirmed in the 1913 Convention discussed below.

C. Further Confirmation of the Separate Identities of Qatar and Bahrain by the United Kingdom and Turkey in 1913

2.20 In 1911 the United Kingdom and Turkey entered into negotiations with a view to confirming their respective areas of authority in the Gulf region. This resulted in the signing on 29 July 1913 of the "Convention relative au Golfe Persique et aux territoires adjacents" referred to in paragraph 8 of Qatar's Application[26].

2.21 Although the Treaty did not enter into force due to the outbreak of World War I, it contained important provisions relating to Qatar and Bahrain. The relevant part of Article 11 of the provisions relating to Qatar reads as follows:

> "... Le Gouvernement Impérial ottoman ayant renoncé à toutes ses réclamations concernant la presqu'île d'El-Katr, il est entendu entre les deux Gouvernements que ladite presqu'île sera, comme par le passé, gouvernée par le cheikh Djassim-bin-Sani et par ses successeurs. Le Gouvernement de Sa Majesté britannique déclare qu'il ne permettra pas au cheikh de Bahreine de s'immiscer dans les affaires intérieures d'El-Katr, de porter atteinte à l'autonomie de ce pays ou de l'annexer[27]."

2.22 Article 13 of the provisions relating to Bahrain reads as follows:

> "Le Gouvernement Impérial ottoman renonce à toutes ses réclamations concernant les îles Bahreine, y compris les deux îlots Lubainat-el-Aliya et Lubainat-es-Safliya, et reconnaît

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26 Annex I.14, Vol. II, p. 63.

27 This Article was confirmed in Article III of the Anglo-Turkish Convention respecting the Boundaries of Aden signed on 9 March 1914 and ratified on 3 June 1914. See, Annex I.15, Vol. II, p. 81.

> l'indépendance de ce pays. De son côté, le Gouvernement de Sa Majesté britannique déclare qu'il n'a aucune intention d'annexer à ses territoires les îles Bahreine."

Article 12 also defines certain rights of the inhabitants of Bahrain on Zakhnuniyah island as follows:

> "Il sera permis aux habitants de Bahreine de visiter l'île de Zahnounié pour la pêche et d'y demeurer en pleine liberté pendant l'hiver comme par le passé, sans qu'aucun nouvel impôt leur soit imposé."

2.23 The Convention thus reconfirmed the separate identity of the Qatar peninsula under Al-Thani rule, and its separation from Bahrain. It is worth noting that while Articles 12 and 13 define the Bahrain islands as well as certain rights of the inhabitants of Bahrain on Zakhnuniyah island, they make no reference to the Hawar islands.

D. The Agreement of 1916

2.24 After the departure of the Turks in 1915, Qatar entered into an agreement with the British Government on 3 November 1916[28]. That Agreement recognized the territorial integrity of Qatar and the continuity of Al-Thani rule in Qatar from 1868 to 1916 and included an undertaking by the Sheikh not to "have relations nor correspond with, nor receive the agent of, any other Power", nor to "cede to any other Power or its subjects, land either on lease, sale, transfer, gift, or in any other way whatsoever" nor to grant oil concessions, without the consent of the British Government. In return, the British Government undertook to accord to the Sheikh, his subjects and vessels, the same treatment as it conferred on "the friendly Shaikhs, their subjects and their vessels" (Article II), to give protection against aggression by sea and to try to exact reparation for injuries suffered at sea (Article X), and to grant good offices should the Sheikh or his subjects "be assailed by land within the territories of Qatar" (Article XI).

2.25 As a result of the 1916 Agreement, which came into force in 1918, Qatar acquired treaty relations with the British to some extent similar to those held by Bahrain and the other independent Arab sheikhdoms.

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28 Annex I.16, Vol. II, p. 85.

2.26 This Agreement did not contain a precise description of the limits of the territories of either Qatar or Bahrain. However, in his Gazetteer of the Persian Gulf, Oman and Central Arabia, published in 1915, Lorimer described the peninsula of Qatar in some detail, including the Hawar islands among the features of the western side of the peninsula[29]. Bahrain, on the other hand, was described by the same source as "a compact group" of islands "almost in the middle of the gulf which divides the promontory of Qatar from the coast of Qatif[30]". Similarly, in a report by the British India Office in 1928 entitled "Status of Certain Groups of Islands in the Persian Gulf", the Bahrain archipelago is defined as consisting of "the islands of Bahrein, Muharraq, Umm Na'assan, Sitrah, and Nabi Salih, and a number of lesser islets and rocks forming part of the same compact geographical group[31]". It will be noted from the above descriptions that the Hawar islands were considered as a part of Qatar and not as a part of the Bahrain islands.

E. Conclusions

2.27 As shown above, the separate identities of Qatar and Bahrain were established during the second half of the 19th century. This was confirmed by subsequent events and, in particular, by the various treaty relations entered into by Britain, Turkey, Qatar and Bahrain.

Section 2. The Disputes

A. Introduction

2.28 Although from 1918 Qatar and Bahrain had somewhat similar treaty relationships with the British, the situation of the two States was very different. Already early in the 19th century Bahrain had been recognized by the British as a trading centre for the Gulf. In 1904, it was considered important enough for the British to appoint a Political Agent in Bahrain. This officer was the direct subordinate of the Political Resident in the Persian Gulf, who was based in Bushire (in what was then Persia) and was responsible for British interests in the

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29 Annex I.17, Vol. II, p. 95.

30 Ibid., p. 97 (emphasis added). Qatif is a town on the coast of Saudi Arabia to the west of Bahrain.

31 Annex I.18, Vol. II, p. 99 (emphasis added).

Gulf as a whole. The importance of Bahrain to Britain was accentuated by the creation of the post of Assistant Political Agent in 1934.

2.29 Increasingly, Bahrain was to become a strategic and political centre for the British. With the construction of an airfield for the Royal Air Force, and with the creation of a naval base in Bahrain after the abandonment of Basrah as a British base in 1935, Bahrain became Britain's military centre in the Gulf. Soon after the end of the Second World War in 1939 it had also become the political centre. The seat of the British Political Resident in the Gulf was transferred from Bushire to Bahrain in 1946.

2.30 This process went hand in hand with the development of oil in Bahrain. In 1925 an oil concession was granted by the Ruler, with the approval of the British Government, to the Eastern and General Syndicate Limited, a British corporation. In August 1930 this concession was assigned, again with the approval of the Ruler and the British Government, to the Bahrain Petroleum Company ("BAPCO"), a company with a large element of American control. BAPCO struck oil in Bahrain in 1932 and the first shipment was made in 1934, before production began in any of the other sheikhdoms.

2.31 The situation in Qatar was very different. Unlike Bahrain which had a British adviser from 1928, Qatar had no British adviser. It was not until 1949 that the British Government recognized Qatar's importance and appointed a political agent to reside in Doha. It was in the same year that the first shipment of oil was made from Qatar.

2.32 Exclusive exploration rights for oil were granted by Qatar only in 1932, to the Anglo-Persian Oil Company ("APOC"), with the approval of the British Government. In 1933, APOC carried out a survey of the area over which it had exploration rights and included the Hawar islands within the area of the survey. A concession was later granted in 1935 because of the discovery of the potential for oil in the area covered by the survey. A company called Petroleum Development (Qatar) Ltd. was formed to operate the concession, which was later assigned to it[32], and which it operated in cooperation with Petroleum

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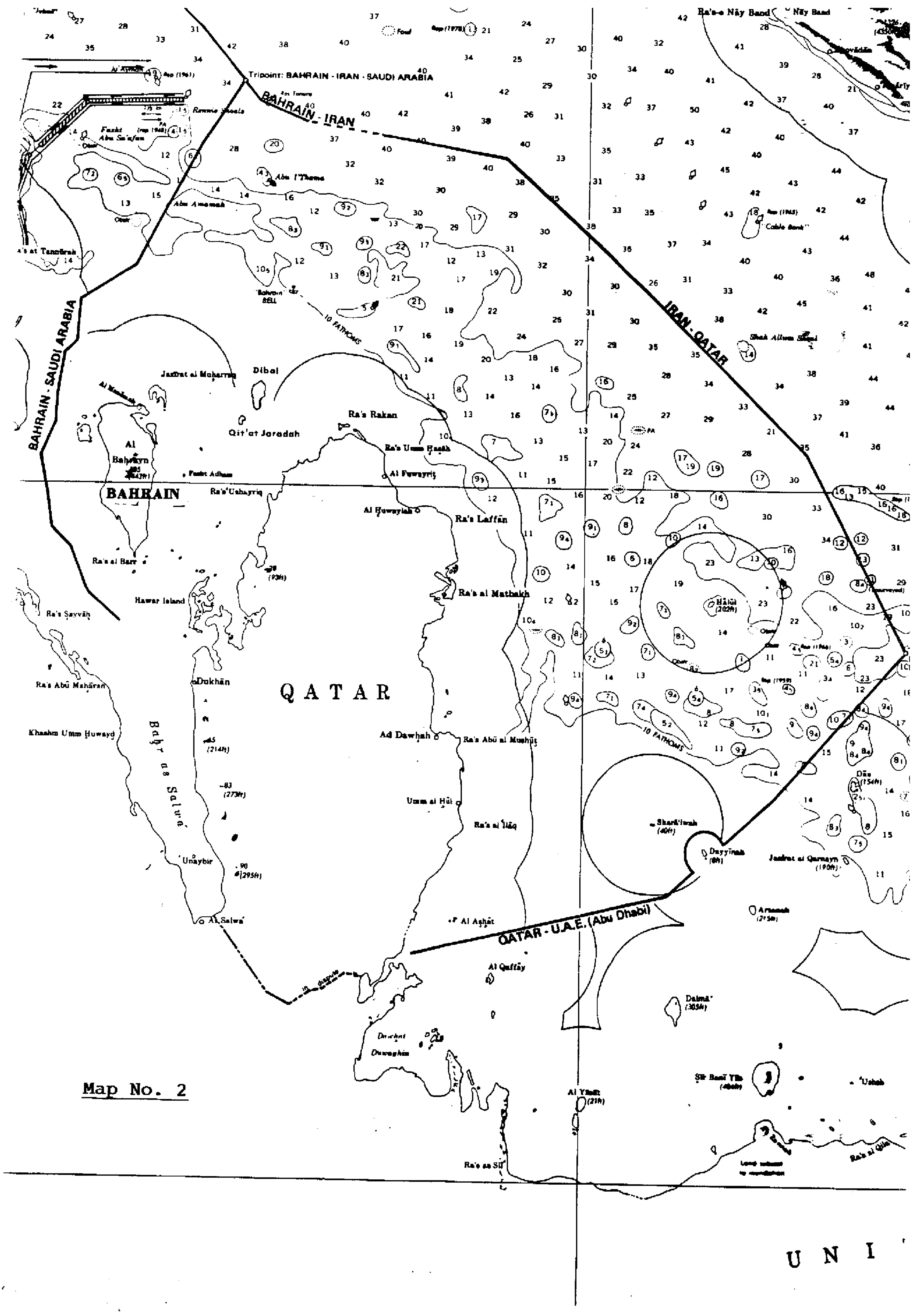
32 The British Government and the Ruler of Qatar approved the assignment of the concession in 1936, but the assignment was not formally effected until April 1946.



Tripoint: BAHRAIN - IRAN - SAUDI ARABIA
BAHRAIN - IRAN
IRAN - QATAR
BAHRAIN - SAUDI ARABIA
QATAR - U.A.E. (Abu Dhabi)
Abu l'Thama
Abu Amamah
Fasht Abu Sa'afah
Rennie Shoals
Bahrain BELL
10 FATHOMS
Jazirat al Muharraq
Dibal
Qit'at Jaradah
Ra's Rakan
Ra's Umm Hasah
Al Fuwayrit
Al Huwaylah
Ra's Laffan
Ra's al Matbakh
Al Bahrayn
Fasht Adham
BAHRAIN
Ra's 'Ushayriq
Ra's al Barr
Hawar Island
Ra's Sayyah
Ra's Abu Maharan
Khashm Umm Huwayd
Dukhān
QATAR
Bahr as Salwa
Ad Dawhah
Ra's Abū al Mushūţ
Umm al Hūl
Ra's al 'Ilāq
Unaybir
Al Salwa
Al Ashat
Ḥālūl (202ft)
Shah Allum Shoal
Cable Bank
Shara'iwah (40ft)
Dayyinah (8ft)
Jazirat al Qarnayn (190ft)
Da's (154ft)
Arzanah (215ft)
Al Qaffay
Dalmā (305ft)
Sir Bani Yas (486ft)
Al Yāsāt (21ft)
Ra's as Sila
Ra's-e Nay Band
Nay Band
Ra's at Tannurah
Ju'aymah
UNI

Map No. 2

Concessions Ltd. ("PCL"), a company of the same group. Operations began in 1938 at Dukhan, on the western side of the peninsula just south of the Hawar islands, and oil was discovered there shortly before World War II.

2.33 The disputes between Qatar and Bahrain arose against this background and in the specific context of the negotiations in the 1930s between BAPCO, PCL and the Ruler of Bahrain over Bahrain's "unallotted area". This area was the area not already allotted to BAPCO pursuant to the 1925 concession, and Bahrain's claims to certain rights over territory lying between itself and the Qatar peninsula were made in an effort to extend the territory to be included in that area. It was these circumstances that led to the disputes which Qatar has submitted to the Court.

B. The Dispute relating to Sovereignty over the Hawar Islands

2.34 A brief description of the Hawar islands was given in paragraph 11 of Qatar's Application to the Court. As can be seen from Map No. 2, facing this page, the islands are situated close to the western coast of the Qatar peninsula. They lie just to the north of Qatar's main onshore oilfield, which extends to the south of Ras Dukhan. The closest island in the group is less than one nautical mile from the Qatar coast and a substantial number of islands (including the greater part of the main Hawar Island) lie within three nautical miles of the Qatar coast. In general, the waters between the islands and Qatar are extremely shallow even at high tide. In fact, the Hawar islands are physically an integral part of the landmass of Qatar. Bahrain has no such links with the Hawar islands and is separated from them by a relatively deep channel and a distance of some 12 nautical miles.

2.35 None of the Hawar group of islands is, in its natural state, capable of sustaining human habitation and economic life. The islands are barren and there is no natural supply of water. In the past, the islands were visited by seasonal fishermen from the area. From 1937 onwards they have been occupied only by Bahraini military forces.

1. Bahrain's first claim to the Hawar islands

2.36 Until subsequent research, Qatar was not informed of the events described in paragraphs 2.36-2.38. In March 1936, PCL obtained permission from the British Government to compete with BAPCO in the negotiations with the Ruler of Bahrain over the unallotted area. Immediately thereafter, on 28 April 1936, Bahrain's first claim to the Hawar islands was submitted to the Political Agent in Bahrain by the Adviser to the Bahrain Government, Charles Dalrymple Belgrave.

2.37 In his letter of 28 April 1936, the Adviser informed the Political Agent that the Sheikh of Bahrain had instructed him "to state to you that the Hawar group of islands lying between the southern extremity of Bahrain island and the coast of Qatar is indisputably part of the State of Bahrain[33]". He went on to point out that the Sheikh regarded his sovereignty over the Hawar islands "which includes one of the largest islands belonging to Bahrain" as a matter of "very great importance" and that he considered that this fact should be stated officially in writing. According to the Adviser, both companies "appeared to attach great value to the oil prospects of the Hawar Islands[34]".

2.38 This claim was never shown to Qatar, nor was Qatar asked about its views on the matter. However, the British were predisposed to acknowledge Bahrain's claim immediately. In forwarding the Adviser's letter to the Political Resident, the Political Agent observed that "it might in certain circumstances suit us politically to have as large an area as possible included under Bahrain[35]". The matter was in turn passed on to the Government of India. At a meeting on 10 July 1936, Bahrain's Adviser was informed of the Government of India's provisional decision that Hawar belonged to the Sheikh of Bahrain, although it was acknowledged that the Sheikh of Qatar might have a claim to the islands and that this might have to be heard before a final decision could be made[36].

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33 Annex I.19, Vol. II, p. 105.

34 Annex I.23, Vol. II, p. 121.

35 Annex I.20, Vol. II, p. 110.

36 Annex I.21, Vol. II, p. 111.

Similarly, PCL, who were interested in the negotiations over the unallotted area, were also informed of the decision[37]. However, Qatar was not informed of the provisional decision.

2. Bahrain's attempt to annex the Hawar islands and the protests of Qatar

2.39 In 1937, after being informed of the provisional decision, Bahrain began a programme of building on the Hawar islands, which included the building of a fort and a cistern on the main island and the erection of beacons for navigational purposes on a number of the small islets.

2.40 It was the Ruler of Qatar's protests against these infringements of his sovereignty that marked the beginning of the dispute relating to sovereignty over the Hawar islands. In February 1938, the Ruler of Qatar complained orally to the Political Agent in Bahrain against the various actions of Bahrain on the main Hawar island, including the fact that "the Bahrain Government were building and were drilling for water in Hawar[38]". On 10 May 1938, he followed this up with a written protest against these "interferences" which he regarded as a "deliberate encroachment" on his territory[39]. Referring implicitly to the British obligations under the 1916 Agreement to preserve the maritime peace and to protect Qatar against aggression, the Ruler ended his letter of 10 May 1938 as follows:

> "I prefered [sic] to inform you, as it is necessary for me to do, and hope that you will let me know of your decision as it is necessary to take prompt action and to prevent the aggressors who ventured to take these actions without my knowledge. I am quite confident that you will, in order to keep the peace and tranquility [sic], do what is necessary in the matter[40]."

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37 Annex I.22, Vol. II, p. 115.

38 This conversation is reported in a letter from the Political Agent in Bahrain to the Political Resident dated 15 May 1938. Annex I.25, Vol. II, p. 131.

39 Annex I.24, Vol. II, p. 126. The citation here is from the British translation of the original Arabic of the Ruler of Qatar's letter, as appearing in the British Foreign Office files. It should be noted that the British Archives very often contain both Arabic and English versions of the same text prepared internally by the British Authorities.

40 Ibid.

3. The procedure adopted by the British in making their decision of 11 July 1939

2.41 At the time the British received the Ruler of Qatar's protests, they were also being pressed by the oil companies as to their final position on the ownership of the Hawar islands. This led them to contact both Bahrain and Qatar in this regard.

2.42 In a letter dated 20 May 1938 from Weightman, the Political Agent in Bahrain, the Ruler of Qatar was told that Bahrain had a prima facie claim to the islands and was in actual occupation of them[41]. The Ruler was asked to state his claim if he had one, but he was not informed of the substance of Bahrain's case nor was he given a copy of Bahrain's 1936 claim. He was told to produce his claim and evidence "at the earliest possible moment". A copy of this letter was sent to the Adviser to the Bahrain Government by the Political Agent, with the promise that he would be informed if it became necessary to request the Government of Bahrain to submit a counter-claim[42].

2.43 The Ruler of Qatar replied within one week on 27 May 1938[43]. He asserted his long-held sovereignty over the Hawar islands, pointed out that Bahrain had only recently occupied the islands, and requested that the Bahrain Government be ordered to cease its interference in the islands.

2.44 On 14 August 1938, the Government of Bahrain was formally asked to state its counter-claim to the islands. It was also sent a copy of Qatar's letter of 27 May 1938 and no time-limit was imposed on its reply[44]. The formal counter-claim was presented over four months later on 3 January 1939[45]. However, on or about 29 May 1938, and before Bahrain had been requested to make its counter-claim, the Political Agent had already received a detailed but undated

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41 Annex I.26, Vol. II, p. 135.

42 Annex I.27, Vol. II, p. 141.

43 Annex I.28, Vol. II, p. 145.

44 Annex I.30, Vol. II, p. 161.

45 Annex I.31, Vol. II, p. 165.

memorandum from the Adviser to the Bahrain Government, Belgrave, setting out Bahrain's position as well as the evidence on which it relied for its claim to sovereignty[46].

2.45 On 5 January 1939, Bahrain's counter-claim was sent to the Ruler of Qatar who was again asked to reply as soon as possible[47]. He was not sent a copy of the 1936 claim or of Belgrave's memorandum delivered in May 1938.

2.46 In March 1939, the concession negotiations for Bahrain's unallotted area were coming to a head and the British began to insist that the Ruler of Qatar give his answer. On 17 March 1939, he was informed that he had 14 days in which to respond[48]. Despite his further protestations at the procedure being followed by the British[49], and despite the fact that Bahrain had had significantly longer in which to submit its counter-claim, the Ruler submitted his reply on 30 March 1939[50]. Belgrave subsequently wrote to Weightman amending in certain respects Bahrain's claims[51], although the Ruler of Qatar was not informed of this.

2.47 The outcome of these events was the British decision communicated to the Rulers in the letters dated 11 July 1939. The letter to the Ruler of Qatar stated in relevant part as follows:

> "... on the subject of the ownership of the Hawar Islands I am directed by His Majesty's Government to inform you that, after careful consideration of the evidence adduced by you and His Highness the Shaikh of Bahrain, they have decided that these Islands belong to the State of Bahrain and not to the State of Qatar[52]."

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46 Annex I.29, Vol. II, p. 153.

47 Annex I.32, Vol. II, p. 173.

48 Annex I.33, Vol. II, p. 177.

49 See, Annexes I.34 and I.35, Vol. II, pp. 181 and 185.

50 Annex I.36, Vol. II, p. 191.

51 Annex I.37, Vol. II, p. 219.

52 The letters of 11 July 1939 to the Rulers of Qatar and Bahrain appear in Annex I.38, Vol. II, p. 223.

4. The aftermath of the decision of 11 July 1939

2.48 Whereas Bahrain readily accepted the British Government's decision[53], Qatar immediately rejected it and has continued to protest against it and to maintain that it is invalid. In his first letter of protest of 4 August 1939, the Ruler of Qatar, whilst reserving his rights to the islands, noted that no reason or explanation had been given for the decision[54]. He renewed his protests in letters dated 18 November 1939 and 7 June 1940, in which he again expressed his refusal to submit to the decision and reserved his rights[55].

2.49 As indicated in paragraph 16 of Qatar's Application, Qatar's view is that the 1939 British decision cannot have modified Qatar's sovereignty over the Hawar islands: it ignored the facts, the applicable law, and local customs, as was acknowledged even by some British officials; in any event, it went beyond the powers of the British in relation to the two States, it cannot be construed as an arbitral decision, and cannot ever have bound the State of Qatar.

2.50 The senior British official in the Gulf recognized immediately after the decision was made not only that it was unfair but also that it was substantively wrong. Lieutenant-Colonel Prior, who took office as British Political Resident in the Persian Gulf in September 1939, after the decision had been made, had to deal with the Ruler of Qatar's protests against the decision. In a minute dated 25 September 1939, Prior had already stated, referring to the question of Hawar, that he had "little doubt that a grave miscarriage of justice has occurred" but that it was "too late to do anything now[56]". And indeed, despite his serious misgivings, Prior wrote to the Ruler of Qatar on the same date informing him that the matter could not be reopened[57].

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53 Annex I.39, Vol. II, p. 229.

54 Annex I.40, Vol. II, p. 233.

55 Annexes I.43 and I.45, Vol. II, pp. 247 and 257.

56 Annex I.42, Vol. II, p. 243.

57 Annex I.41, Vol. II, p. 239.

2.51 In a letter of 26 October 1941 to the India Office, Prior outlined his views more explicitly[58]:

> "The moment I saw the decision on the Hawar Islands case I told Fowle that I thought it most unfair to Qatar and the explanations he gave me for his recommendations were not ones which would carry any weight with any Arab.
>
> ...
>
> The Hawar Islands case has been decided according to western ideas, and no allowance has been made for local custom and sentiment. During 3 1/2 years in Bahrain [Prior had been Political Agent in Bahrain from 1929 to 1932] I never heard anything to suggest that these islands belonged to Bahrain, and believed them to belong to Qatar, a view supported by Lorimer."

Prior then went on to look at Bahrain's claims, noting that such claims "may carry weight in western minds but mean nothing to an Arab". He summed up his position as follows:

> "The view of independent Arabs is that Hawar belongs to Qatar and I am convinced the decision is inequitable, but I do not feel that it is practical politics to reverse it now."

2.52 Despite later questioning of the decision among British officials, it was to be given effect in the maritime delimitation carried out by the British in 1947. As will be seen in subsection C below, both Qatar and Bahrain protested the part of that delimitation concerning the Hawar islands. However, Qatar has been forced to submit to the de facto occupation of the islands by Bahraini military forces since 1937, while continuing to reserve its rights. As will also be shown in Section 1 of the next Chapter, on 21 April 1965 Qatar addressed a Note Verbale to the British Government rejecting claims by Bahrain concerning maritime delimitation and, in an effort to settle the disputes, recommending arbitration between the two States[59]. Qatar also insisted on the fact that the Hawar islands, not expressly mentioned in these Bahraini claims, should form part of the existing disputes to be submitted to arbitration. The process of arbitration over the claims of the two States gained the support of the British Government[60].

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58 Annex I.46, Vol. II, p. 263.

59 Annex I.57, Vol. II, p. 351.

60 Annex I.58, Vol. II, p. 363.

2.53 These events show that a legal dispute between Qatar and Bahrain on sovereignty over the Hawar islands began in 1938. Such a matter is indisputably an issue governed by international law. The views of the Parties on this subject conflict in matters of fact as well as in matters of law, and the dispute has continued until now.

C. The Dispute relating to Maritime Delimitation

2.54 The area involved in this dispute is shown on Map No. 2, facing page 19. It runs from the mouth of the Dawhat Salwah in the south (shown as "Bahr as Salwa" on Map No. 2), up to the Gulf median line between the Islamic Republic of Iran on the one side and Qatar and Bahrain on the other.

1. The British decision of 23 December 1947

2.55 After their 1939 decision, the British authorities came under further pressure from the oil companies operating in the area to effect a seabed delimitation between the two States as soon as possible, so that the limits of their respective concession areas could be determined. The question was suspended for the duration of World War II and only revived in mid-1946.

2.56 As subsequent research has revealed[61], the British considered that three main issues had to be dealt with in respect of the seabed delimitation: first, the general principles upon which the delimitation would be based had to be determined; second, a solution had to be found for the Hawar islands which, although they had been declared by the British in 1939 to be under Bahraini sovereignty, lie very close to Qatar's western coast. The third issue, which will be discussed in subsection D below, related to the two shoals of Dibal and Qit'at Jaradah, over which Bahrain had asserted a claim of sovereignty but which lie closer to Qatar than to Bahrain.

2.57 The British Government, by letters of 23 December 1947 issued by the British Political Agent in Bahrain, informed the Rulers of Qatar and Bahrain of its decision to delimit the seabed boundary in accordance with a line on a map enclosed with the said letters[62]. The letters further stated that the delimitation

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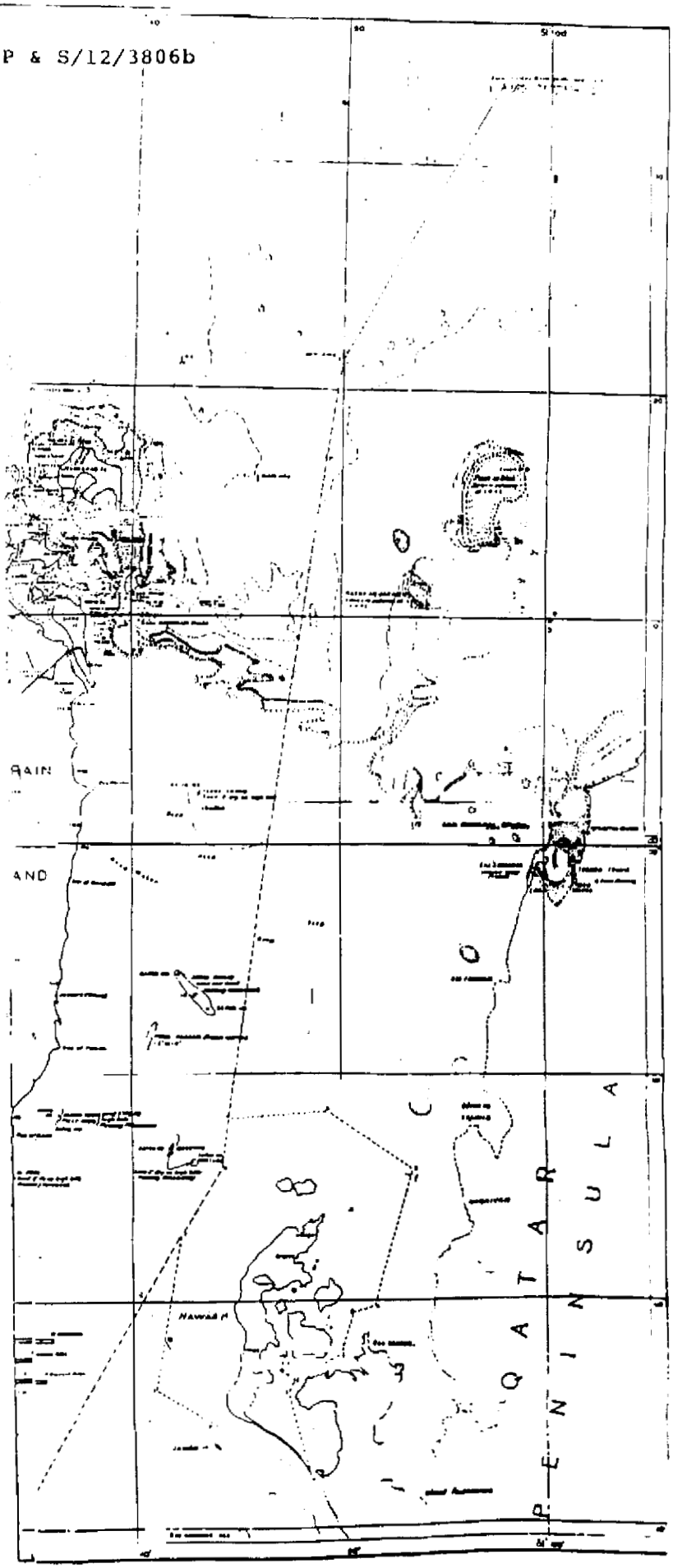
61 See, in general, Annexes I.48, I.50, I.51 and I.52 in Volume II.

62 Annex I.53, Vol. II, p. 309.

L/P & S/12/3806b

Map No. 3



was made in accordance with equitable principles and corresponded to a median line based generally on the configuration of the coastlines of the main island of Bahrain and of the peninsula of Qatar. The seabed to the west of the line would in future be regarded as being under the sovereignty of Bahrain, and the seabed to the east as under the sovereignty of Qatar. The letters stated two exceptions to this general rule concerning areas where the Sheikh of Bahrain was recognized by the British as having sovereign rights on the Qatari side of the line. The first area related to the shoals of Dibal and Qit'at Jaradah, and will be discussed in subsection D below. The second is described as follows:

> "Hawar Island, the islands of the Hawar group and the territorial waters pertaining thereto and delimited again in accordance with the usual principles of international law. These islands and their territorial waters are shown on the map enclosed by the line A, B, C, D, E, F, G, H, I, J, K, and L. As this delimitation will, however, leave a narrow tongue of water (formed by the points M, J, and I) pertaining to Qatar it has been decided to alter the line H, I, J, to H, P, Q, thus exchanging an equal area P I O for O J Q. It should be noted that Janan Island is not regarded as being included in the islands of the Hawar group."

The line referred to in the letters, including the line around the Hawar group, is shown on Map No. 3, facing this page.

2. The aftermath of the 1947 decision

2.58 The reaction of the Ruler of Qatar to the British decision may be found in a letter dated 21 February 1948 to the Political Agent in Bahrain[63]. As mentioned in paragraphs 20-22 of Qatar's Application, Qatar has not opposed the part of the line which the British Government stated was based on the configuration of the coastlines of the two States and was determined in accordance with equitable principles. On the other hand, Qatar has rejected and continues to reject that part of the line which enclaves "Hawar Island, and the islands of the Hawar group". Qatar has also rejected and continues to reject the treatment of the Dibal and Qit'at Jaradah shoals.

2.59 Bahrain has protested against the line itself as well as the treatment of the Hawar islands and of Dibal and Qit'at Jaradah. The reaction of the Ruler of Bahrain was communicated to the Political Agent in a letter dated 31 December

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63 Annex I.55, Vol. II, p. 321.

1947[64]. While the Ruler made general claims to all the seas lying between the coast of Bahrain and the Qatar peninsula, he also asserted that the Dibal and Qit'at Jaradah shoals should have fallen on the Bahraini side of the line, and objected to the enclave around the Hawar islands, arguing that it should have been extended to include Janan island. In conclusion, the Ruler contended that -

> "... the delimination [sic] described in your letter should be readjusted and the dividing line should run from and including Jinan up to the north east corner of Dibal, including the whole length of the shoal which starts at Sitra and which appears above the surface at Dibal and Jaradah."

2.60 As will be explained in more detail in Section 1 of Chapter III below, in September 1964 Bahrain again requested the British to make a modification of the line indicated in the 1947 decision, moving it east and extending it into the maritime area to the north of the Qatar peninsula. It also alleged that Dibal and Qit'at Jaradah were islands with territorial waters and belonged to Bahrain[65]. As noted above, the British Government concurred in Qatar's proposal that such matters be referred to arbitration[66].

2.61 These events show that a legal dispute began in 1947 between Qatar and Bahrain over the extent and delimitation of their respective areas of seabed as originally defined by the British Government. In addition, the two States have not reached an agreement for the delimitation of the disputed northern area between the Bahrain Light Vessel, which is the northernmost point of the line indicated in the 1947 decision, and the Gulf median line. Such a matter, bearing on sovereign rights over maritime areas and the delimitation thereof, is indisputably an issue governed by international law. The respective protests of Qatar and Bahrain to the delimitation of the seabed made by the British Government and the opposed claims of both States with regard to the northern area which had not been delimited by the British Government show that the views of the Parties on this issue conflict in matters of fact as well as in matters of law. This dispute has continued until today.

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64 Annex I.54, Vol. II, p. 315.

65 Annex I.56, Vol. II, p. 327.

66 See, Annexes I.57 and I.58, Vol. II, pp. 351 and 363.

D. The Dispute relating to the Dibal and Qit'at Jaradah Shoals

2.62 Although dealt with by the British in the context of the delimitation described above, the dispute over the Dibal and Qit'at Jaradah shoals involves different considerations of law and fact and thus has to be dealt with separately. The two shoals, which lie close to each other, are shown on Map No. 2, facing page 19. Dibal lies some 11 nautical miles from Qatar, and 15 nautical miles from Bahrain. Qit'at Jaradah lies approximately 11 nautical miles from Qatar, and 12 nautical miles from Bahrain. Dibal is a coral reef, and Qit'at Jaradah is part coral reef, part sand bank. Dibal remains completely submerged at high tide, and the only features permanently above water are or were artificial structures. This is confirmed by the 1982 edition of the Persian Gulf Pilot which states that "Fasht ad Dibal ... dries in places and its N edge is fairly steep-to[67]". The southern edge of Qit'at Jaradah, which is a sand bank, varies in shape and elevation with the wind[68]. However, the whole of the shoal is usually covered by water at high tide, and the only features which remain permanently above water are artificial. Thus, as for Dibal, the Persian Gulf Pilot reports that Qit'at Jaradah "dries in patches". The shoals were and are still today in their natural state totally incapable of sustaining any human habitation or economic life.

1. The British decision of 23 December 1947 on the Dibal and Qit'at Jaradah shoals

2.63 During the negotiations over the unallotted area, Bahrain had alleged that Dibal lay within that area. However, the question of Dibal was left pending after the 1939 decision on Hawar.

2.64 In a letter of 26 March 1940 to the Political Resident, the Political Agent set forth what amounted to Bahrain's case for its claim to sovereignty over Dibal and Qit'at Jaradah. He stated that he had found no evidence that the Ruler of Qatar had ever claimed Dibal, and that Bahrain had erected a "national mark" on both Dibal and Qit'at Jaradah in the winter of 1937-38, with no protest from the Ruler of Qatar. This in his view was sufficient to establish Bahrain's rights over the shoals, although he added that if he were instructed to enquire from the Ruler of Qatar whether he claimed them, the Ruler would undoubtedly accept the

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67 Annex I.66, Vol. II, p. 423.

68 Ibid., p. 424.

implied suggestion and make a claim. The Political Agent also reported that he had been informed that at all states of the tide a small part of both shoals remained exposed[69].

2.65 After the War Belgrave, the British Adviser to the Government of Bahrain, sent a series of letters to the Political Agent, which contained an increasing number of allegations in support of Bahrain's claim to sovereignty over the Dibal and Qit'at Jaradah shoals. Meanwhile, in a letter of 13 July 1946, the Ruler of Qatar had put to the Political Agent the basis for his own claim to the shoals[70].

2.66 On 2 December 1946, the Political Resident stated that the question of ownership of Dibal and Qit'at Jaradah was not a separate issue but should be dealt with in the context of the maritime delimitation[71]. However, as noted above, the idea that Dibal and Qit'at Jaradah should cause any deviation of the line of delimitation was ultimately rejected by the British authorities. It was also decided that the shoals should not generate territorial waters, but that Bahrain should be recognized as having sovereign rights over them.

2.67 The relevant part of the British decision of 23 December 1947 reads as follows in this regard:

> "His Highness the Shaikh of Bahrain is recognised as having sovereign rights in
>
> (i) The areas of the Dibal and Jaradah shoals which are above the spring tide low-water level. After a full examination of the position under international law, His Majesty's Government are of opinion that these shoals should not be considered to be islands having territorial waters[72]."

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69 Annex I.44, Vol. II, p. 251. At this time, there was doubt as to the physical nature of these two features. It had earlier been assumed that Dibal was an island. However, in the Political Agent's letter referred to here it was stated that both features were reefs.

70 Annex I.47, Vol. II, p. 269.

71 Annex I.49, Vol. II, p. 277.

72 Annex I.53, Vol. II, p. 311.

2. The aftermath of the 1947 decision on the Dibal and Qit'at Jaradah shoals

2.68 As stated above, both Bahrain and Qatar have objected to the British decision on Dibal and Qit'at Jaradah contained in the letters of 23 December 1947[73]. In a Memorandum of September 1964, Bahrain alleged that these two shoals were islands and should carry territorial waters for the benefit of Bahrain. This was denied by Qatar both in fact and in law and the British Government concurred with the proposal of Qatar that this matter be referred to arbitration[74].

2.69 These events show that a legal dispute between Qatar and Bahrain concerning their sovereignty or their sovereign rights over the features called Dibal and Qit'at Jaradah began in 1947. Such a matter is indisputably an issue governed by international law. The views of the Parties on this subject conflict in matters of fact as well as in matters of law, and the dispute has continued until today.

Conclusions

2.70 In view of the above, Qatar maintains that the three subjects on which its Application requested the Court to pronounce are disputes of a legal character which are governed by international law and which remain outstanding. They are, therefore, in Qatar's submission, admissible disputes in accordance with the Statute, the Rules and the jurisprudence of the Court.

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73 See, paras. 2.58-2.59 above.

74 See, Section 1 of Chapter III below.

CHAPTER III
EFFORTS TO SETTLE THE DISPUTES

SECTION 1. The Continuity of the Disputes and Attempts to solve them prior to the Saudi Mediation

3.01 The State of Qatar continued to make various protests over the years, rejecting the British decision of July 1939 relating to the Hawar islands. This dispute, together with those in regard to the delimitation of the maritime areas of the two States and over the Dibal and Qit'at Jaradah shoals, continued. In the 1960s further significant events occurred concerning these disputes. In a Memorandum dated September 1964, the Government of Bahrain raised with the British authorities the question of making a modification of the line resulting from the 1947 decision. Bahrain alleged that Dibal and Qit'at Jaradah were islands belonging to Bahrain and that the fact that Bahrainis fished for pearls in the area to the east of the line was a special circumstance within the meaning of Article 6 of the 1958 Geneva Convention justifying modification of the line[75]. Bahrain's proposed new line passed to the east of the Dibal and Qit'at Jaradah shoals and extended into the maritime area to the north of the Qatar peninsula.

3.02 In reply to this Memorandum, Qatar addressed a Note Verbale to the British Government on 21 April 1965 enclosing a Memorandum which rejected Bahrain's claims and recommended arbitration as a solution to the disputes between the two States. Qatar also asserted that the Hawar islands, not mentioned in the Bahraini Memorandum, were part of the existing disputes to be submitted to arbitration[76].

3.03 In a Note to the Government of Qatar dated 27 October 1965 the British Political Agent in Doha confirmed that Qatar's Note Verbale had been forwarded to the British Political Resident for communication to the Government of Bahrain and went on to state:

> "It is now understood that the Government of Bahrain, like the Government of Qatar, wish the matter to be referred to arbitration, and that Her Majesty's Government have agreed to a process of arbitration in settling this dispute. Her Majesty's Government have instructed me to inform you that they should be consulted about the

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75 Annex I.56, Vol. II, p. 327.

76 Annex I.57, Vol. II, p. 351.

> persons chosen as neutral arbitrators and about their terms of reference, and should be kept informed of the course of the negotiations[77]."

The British Government thus acknowledged the fact that neither its July 1939 decision on the Hawar islands nor the December 1947 decision delimiting the seabed between Qatar and Bahrain and granting Bahrain sovereign rights over the Dibal and Qit'at Jaradah shoals had been accepted by the Parties, and that there was a continuing dispute. It therefore gave its blessing to proposals to have the dispute settled by arbitration. It was now a question of consulting with the British Government with a view to choosing arbitrators. On 8 November 1965, the Government of Qatar informed the Political Agent in Doha that it had appointed Professor Charles Rousseau as its arbitrator[78]. On 12 December 1965, the British approved this nomination[79].

3.04 On 30 January 1966, the Government of Qatar sent a letter to the Political Agent in Doha enclosing a draft arbitration agreement. Article 3 of this agreement contained two questions to be addressed to the arbitral tribunal. The first concerned the delimitation of the maritime areas, the second the attribution of sovereignty over the Hawar islands[80]. However, progress on this procedure was suddenly halted when on 29 March 1966 the Political Agent informed the Government of Qatar that the Government of Bahrain had now taken the position that, if there was to be recourse to arbitration, it should be limited to the issue of the line of delimitation and should not include any question relating to the Hawar islands[81].

3.05 As a result of this information, a protest was addressed by the Government of Qatar to the British Political Agent in Doha, in a letter dated 13 April 1966[82]. It was maintained by Qatar that the two States had already agreed on arbitration to cover both the issues of the line of delimitation and the Hawar islands and that it was unacceptable for Bahrain now to try to limit the issues in question just to

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77 Annex I.58, Vol. II, p. 365.

78 Annex I.59, Vol. II, p. 367.

79 Annex I.60, Vol. II, p. 371.

80 Annex I.61, Vol. II, p. 375.

81 Annex I.62, Vol. II, p. 387.

82 Annex I.63, Vol. II, p. 391.

the line of delimitation. Qatar went on to insist that direct amicable means could not settle the dispute and that arbitration was necessary, and that Bahrain and Qatar had previously been in agreement on this issue. There was no response to this from Bahrain who thus frustrated this attempt at arbitration.

3.06 In April 1967, however, negotiation did briefly recommence with a Bahraini proposal concerning the maritime areas under dispute, but this proposal was rejected by Qatar in July 1967 inter alia because again it gave no consideration to the status of the Hawar islands. Instead, Qatar made an alternative suggestion which included proposals relating to the Hawar islands.

3.07 From July 1967 to May 1969 no response was given by the Government of Bahrain to Qatar's proposals. On 6 May 1969, the Government of Bahrain finally replied, making certain further proposals concerning the maritime areas between the two States but again excluding the Hawar islands. These were therefore also found unacceptable by Qatar.

3.08 No significant further progress was made until the commencement of the Saudi Mediation which is discussed in the next Section, although protests at the de facto situation continued[83]. In the interim, the British, having announced their intention to withdraw their forces from the Gulf in 1968, finally left the area east of Suez in 1971. Thus, when the British presence in Bahrain and Qatar ended on 15 August and 3 September 1971, respectively, the disputes between the two States remained outstanding.

SECTION 2. The Mediation of Saudi Arabia

A. The 1978 Principles for the Framework to reach a Settlement

3.09 In view of the pre-eminent position of the Kingdom of Saudi Arabia and the high regard and esteem in which it is held by all the Arab Gulf States, Qatar decided to seek the Kingdom's guidance and help in achieving resolution of its existing disputes with Bahrain.

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83 Annex I.64, Vol. II, p. 409.

3.10 In 1975, during a visit to Qatar of His Highness Prince Fahd bin Abdul-Aziz, the Heir Apparent of Saudi Arabia, issues relating to the disputes were raised with him. Soon after this visit the Amir of Qatar, Sheikh Khalifa bin Hamad Al-Thani, addressed a letter dated 21 September 1975 to His Majesty King Khalid of Saudi Arabia in which he stated:

> "I have already spoken to His Royal Highness, Prince Fahd bin Abdul Aziz on this subject of the dispute raised without any legitimate or acceptable authority by sisterly Bahrain. I presented to H.R. Highness a brief memo on the subject, explaining that we, on our part, have done all that is brotherly possible, and offered all possible proposals for a cordial settlement of the subject, which would restore to the rightful his due. But all those attempts and proposals were to no avail.
>
> Since the question of the sovereignty of any state over its territory is a matter that cannot be compromised, but rather it is the most important duty of the state to safeguard this sovereignty, I decided that my brother Suhaim bin Hamad Al-Thani should have the honour of meeting with you and listening to your sound views[84]."

3.11 The issues in the pending disputes were again taken up with King Khalid during his visit to Qatar early in 1976. All aspects of the disputes with regard to the Hawar islands, the Dibal and Qit'at Jaradah shoals and the enclave around the Hawar islands were discussed with him.

3.12 Thereafter, as a result of meetings during 1975 and 1976 between King Khalid, the Amir of Qatar and the Amir of Bahrain, it was agreed that the Kingdom of Saudi Arabia would undertake mediation between Qatar and Bahrain to resolve the outstanding disputes.

3.13 During the fourteen years that followed, in the process of the agreed Mediation, the King of Saudi Arabia took various initiatives and actions, outlined below, to seek a resolution of the disputes and to prevent a deterioration in the traditional friendly relationship between Qatar and Bahrain. These efforts by Saudi Arabia as Mediator were directed, at different times, at securing a settlement of the substance of the pending disputes, at submitting the matter to adjudication, and at preventing or resolving incidents creating tension between the Parties.

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84 Annex I.65, Vol. II, p. 417.

3.14 In the course of the Mediation, King Khalid of Saudi Arabia proposed, early in 1978[85], a set of "Principles for the Framework for Reaching a Settlement" (hereafter referred to as "the Framework")[86]. The First Principle of the Framework provided 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."

This First Principle demonstrated the understanding of the Parties that the subject matter of the dispute between Qatar and Bahrain included questions of sovereignty over certain islands, maritime boundaries, and territorial waters.

3.15 The Second Principle provided for the maintenance of the status quo and declared that any act to change the status quo would have no legal effect. The Third Principle incorporated undertakings by the Parties to refrain from engaging in propaganda activities against each other or to do anything to sully the cordial atmosphere necessary to facilitate fruitful negotiations and not to present the dispute to any international organisation. The Fourth Principle envisaged the formation of a Committee with representatives from Qatar, Bahrain and Saudi Arabia "with the aim of reaching solutions acceptable to the two Parties on the basis of justice, good neighbourhood, balance of interests and security requirements of both Parties".

3.16 The Fifth Principle, as originally proposed, provided that:

> "The Parties shall undertake to settle all disputed matters by cordial and peaceful means by agreement through negotiations. Should the Parties fail to reach agreement on any of the disputed matters, they will authorize the Kingdom of Saudi Arabia to propose a compromise on the point or points disputed, which shall be considered to be the solution agreed upon between the Parties."

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85 The original draft of the Framework was dated 13 March 1978, and not 17 April 1978 (which was the date of its receipt by Qatar) as mentioned in paragraph 28 of Qatar's Application.

86 Annex II.1, Vol. III, p. 3.

The draft of the Framework was discussed on various occasions and by a Note Verbale of 10 June 1981, Saudi Arabia formally sought the views of Qatar on the proposed text[87]. In a Note Verbale in response of 2 July 1981 to Saudi Arabia, the Ministry of Foreign Affairs of Qatar submitted that -

> "Since the circumstances of the dispute under consideration and the efforts to resolve it are extremely sensitive due to the fact that the two disputing States are linked by very intimate ties of brotherhood and strong relations of common interest, and are also linked to their bigger sister Saudi Arabia by the same ties and relations; and
>
> Since the dispute is a purely legal one, as has already been made clear;
>
> For all these reasons, and in order to avoid any embarrassment which could arise from the above-mentioned sensitivity in case of failure to resolve the dispute through the fraternal Saudi good offices;
>
> ... the resolution of the dispute be left to the rule of law, that is to the principles and rules of international law which govern it[88]."

Qatar consequently proposed the following amended text of the Fifth Principle:

> "In case of failure of the negotiations provided for in the Fourth Principle to reach agreement on the solution of one or more of the aforementioned disputed matters, the Governments of the two Parties undertake to consult the Government of the Kingdom to determine the best possible means to resolve that matter or matters in accordance with the provisions of international law. The decision of the authority, which will be agreed upon for this purpose, shall be final and binding on both Parties[89]."

3.17 The consideration of the proposed Framework extended over a period of years until May 1983[90]. During this period Bahrain engaged in various acts and made provocative media statements which heightened tension between Qatar and Bahrain. Some of these are described in the Amir of Qatar's letter of 1 April 1980 to King Khalid[91]. The worst incident during this period occurred on 3 and 4 March 1982, when Bahrain inaugurated a battleship called "Hawar" and carried

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87 Annex II.3, Vol. III, p. 15.

88 Annex II.4, Vol. III, p. 23.

89 Ibid., pp. 23-24.

90 See, paras 3.19-3.20 below.

91 Annex II.2, Vol. III, p. 5.

out military exercises with live ammunition in the area of the Dibal shoal. Qatar registered a strong protest against these actions which were also the subject of letters exchanged between the Amir of Qatar and King Khalid on 6 and 16 March 1982[92].

B. The Gulf Cooperation Council Resolutions of 1982

3.18 These events and the disputes between Qatar and Bahrain were brought to the attention of the Gulf Cooperation Council ("GCC") which, at a Ministerial meeting on 8 March 1982, resolved as follows:

> "Firstly: The Kingdom of Saudi Arabia is requested to resume its good offices immediately for the purpose of ending the dispute between the two countries.
>
> Secondly: The agreement reached by the States of Bahrain and Qatar to undertake to freeze the situation and avoid any action that might escalate the dispute, is to be recorded at the General Secretariat of the Cooperation Council.
>
> Thirdly: Cessation of the reciprocal media campaigns between the two countries, and abstention from recourse to 'propaganda'.
>
> Fourthly: Confirmation of the continuation of fraternal relations between the two countries, and restoration of the situation to its former state[93]."

C. The Meeting in May 1983

3.19 Pursuant to an agreement, reached at the time of the GCC summit in Bahrain in November 1982, between His Majesty King Fahd bin Abdul Aziz of Saudi Arabia (who succeeded King Khalid in June 1982), the Amir of Qatar and the Amir of Bahrain, Saudi Arabia convened a meeting of the Parties in Riyadh on 22 May 1983 "to discuss the dispute on Hawar Islands and the maritime boundaries[94]". The meeting was attended by representatives of Saudi Arabia, Qatar and Bahrain. This meeting finally approved the Framework proposed by Saudi Arabia in 1978, but incorporating the amended Fifth Principle proposed by

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92 Annexes II.5 and II.7, Vol. III, pp. 25 and 27.

93 Annex II.6, Vol. III, pp. 35-36.

94 The Saudi Arabian communication of 10 May 1983 and Qatar's letter of acceptance of 11 May 1983 are Annexes II.8 and II.9, Vol. III, pp. 41 and 45.

Qatar[95]. The meeting also recommended, inter alia, that Prince Naif bin Abdul-Aziz of Saudi Arabia would visit Qatar and Bahrain to continue the Saudi good offices pursuant to the Fourth Principle of the Framework.

3.20 During the period following the meeting of 22 May 1983, despite efforts made by Saudi Arabia and in particular by Prince Naif, no significant progress was made in achieving a settlement of the disputes. In the meantime there were a number of occasions when Qatar found it necessary to protest against actions on the part of Bahrain which were considered by Qatar to be contrary to the Second and Third Principles of the Framework requiring the Parties to maintain the status quo and to refrain from acts that would impede or sully the atmosphere for negotiations[96].

D. The 1986 Incident concerning the Dibal Shoal

3.21 By April 1986, Qatar had discovered increasing evidence that, contrary to the Second Principle of the Framework, Bahrain had undertaken some construction work on the Dibal shoal in an attempt to transform it into an artificial island, and had built on it a facility to make it a post for its coastguard. On 26 April 1986, Qatar sent a security force to put an end to this violation. Saudi Arabia immediately intervened by diplomatic action and increased its efforts to resolve the dispute between the two States.

3.22 In order to find a solution to the immediate problem, King Fahd of Saudi Arabia made a number of proposals for steps to be taken and terms to be observed by the Parties on the basis of which troop withdrawals could take place. The proposals were considered and finalized in an exchange of letters between the Amir of Qatar and King Fahd in April and May 1986[97]. These proposals (the acceptance of which by the Parties was confirmed in King Fahd's letter of 22 May 1986[98]) envisaged, inter alia, the establishment of a joint committee to study all matters relating to boundary questions and the continuation of Saudi Arabia's Mediation.

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95 The text of the 1983 Framework is Annex II.10, Vol. III, p. 49.

96 A summary of these actions is contained in a letter of 16 February 1986 from the Amir of Qatar to King Fahd which is Annex II.11, Vol. III, p. 53.

97 Annex II.12, Vol. III, p. 63.

98 Ibid., p. 86.

3.23 In responding to the proposal for such a joint committee, the Amir of Qatar stated as follows in his letter of 6 May 1986:

> "... I need not say to Your Majesty that I do welcome such a committee to try to find for these matters the desired, and cordial, just solution for which we have done our best, as Your Majesty is aware, to reach with the brothers in Bahrain who have met our efforts and approach with disregard and neglect. My only request is that a specific reasonable term be laid down for this committee to complete its task. If it succeeds in attaining that dear wish during the set period, then it would be most blessed. But should it fail - and we do sincerely hope it will succeed - then I would like to remind Your Majesty that the State of Qatar has already proposed, while expressing its viewpoint on the Saudi proposal containing the five Principles constituting the Framework for the solution of this dispute, that in the event of the impossibility of finding through negotiation a solution acceptable to the two Parties, the matter should be settled in accordance with the principles and rules of international law[99]."

3.24 King Fahd also made it clear in his letter of 14 May 1986 that -

> "In case Saudi Arabia is unable to find a solution acceptable to both Parties, the matter will be submitted to an arbitration commission to be sanctioned by both Parties and whose rulings shall be final and binding upon the two Parties[100]."

3.25 No joint committee as envisaged in the proposals mentioned above was however formed. Only a Joint Military Committee was formed to monitor implementation of the agreement on troop withdrawals. The events of April 1986 were also considered by the GCC. It is relevant to mention that in a Memorandum to the GCC on 27 August 1986 Bahrain reaffirmed its adherence to the necessity of solving the disputes between the States of Bahrain and Qatar in accordance with the principles of international law and the United Nations Charter, which call for the resolution of disputes between countries by peaceful means and prohibit recourse to force for their solution.

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99 Annex II.12, Vol. III, pp. 73-74.

100 Ibid., p. 79.

SECTION 3. The Agreement of 1987 accepting the Jurisdiction of the Court

A. The Agreement of December 1987

3.26 During the year that followed, various complaints by both Parties about infringements of the Second Principle of the Framework, requiring the maintenance of the status quo, continued to be made. Saudi Arabia increased its efforts to mediate and on 15 July 1987 conveyed some of its ideas on resolving the problems of "the disputed Hawar Islands, Dibal and Jaradah Shoals and the sea territories" and sought the views of Qatar and Bahrain[101]. In his response of 24 August 1987, the Amir of Qatar reiterated Qatar's position that -

> "... for the reason that the subject of the dispute is the right of sovereignty, which is a purely legal subject, settling it in a friendly way can only be achieved by referring it to international arbitration so as to apply the established international legal rules which govern the subject[102]."

3.27 Thus, efforts in the course of Saudi Arabia's Mediation over the past eleven years to secure an agreement on the substance of the disputes had not yet been successful. In view of this, King Fahd of Saudi Arabia wrote identical letters to the Amirs of Qatar and Bahrain on 19 December 1987 in which he stated[103]:

> "The contacts made by the Kingdom of Saudi Arabia with the two brotherly countries resulted in a proposal, presented by the Kingdom of Saudi Arabia and approved by the two countries, that the matter be referred to arbitration in accordance with the fifth of the principles of the framework for a settlement, which you saw that it should read as follows:
>
> > 'In case that the negotiations provided for in the fourth principle fail to reach agreement on 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.'

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101 Annex II.13, Vol. III, p. 91.

102 Annex II.14, Vol. III, p. 96.

103 See, Annex II.15, Vol. III, p. 101. Bahrain acknowledged that it received an identical letter to that received by Qatar at page 1 of the Annex attached to its letter of 18 August 1991.

In the light of the foregoing, I am happy to present to Your Highness and dear brother, the following proposals as a basis for settling the dispute:

Firstly: 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.

Secondly: Until a final settlement for the disputed matters is reached in accordance with the preceding Article, the two sisterly States of Qatar and Bahrain shall abide by the principles of the framework for a settlement on which they agreed on 10/8/1403 H - corresponding to 22/5/1983 - and by the following in particular:

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

(b) The parties undertake to refrain from to-date from any media activities against each other whether in connection with this dispute or any other matters and until such time as the desired settlement is reached.

(c) The parties undertake to refrain from any action that would impede the course of the negotiations or disturb the brotherly atmosphere necessary for the achievement of their objectives.

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

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

Together with his letter King Fahd also enclosed a draft of a proposed public announcement to be made by the Saudi Arabian Government[104].

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104 Annex II.15, Vol. III, p. 105.

3.28 Both Qatar and Bahrain accepted this proposal[105]. The Government of Saudi Arabia thereafter proceeded to make a public announcement of the Agreement on 21 December 1987 in terms of the draft previously communicated to Qatar and Bahrain[106]. There has been no denial of this Agreement by either Party.

B. The Purpose and Content of the December 1987 Agreement

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

3.30 The second item is essentially directed towards maintenance of the status quo.

3.31 The third item provided for the formation of a committee comprised of representatives of Qatar, Bahrain and Saudi Arabia "for the purpose of approaching the International Court of Justice". This Committee (hereinafter referred to as the "Tripartite Committee") was to ensure compliance with the regulations and instructions of the Court so that a final and binding ruling could be obtained.

3.32 It will be noted that the terms of this item are "enabling" and procedural in nature and do not in any sense detract from the consent and commitment of the Parties under the first item to refer their disputes to the Court. There is no implication here that any particular method or procedure is to be followed to invoke the jurisdiction of the Court as agreed under the first item. The participation of Saudi Arabia in the Tripartite Committee was clearly intended to help the Parties to work out the modalities so as to approach the Court by any of

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105 The Amir of Qatar's letter of acceptance dated 21 December 1987 is Annex II.16, Vol. III, p. 107.

106 Annex II.15, Vol. III, p. 105.

the methods available in accordance with the Statute and Rules of Court. This is further supported by the fourth item which provided for the continuation of Saudi Arabia's good offices "to guarantee the implementation of these terms".

3.33 This Agreement of December 1987, by expressly invoking the Fifth Principle of the Framework, was thus clearly intended as a final and effective basis for achieving resolution of the long existing and established disputes between Qatar and Bahrain. This Agreement secured by Saudi Arabia did not envisage failure or frustration.

SECTION 4. The Work of the Tripartite Committee on Methods to approach the International Court of Justice

3.34 Pursuant to the Agreement of December 1987, the Tripartite Committee consisting of high level delegations including the Foreign Ministers of Qatar, Bahrain and Saudi Arabia, held a preliminary meeting in Riyadh during the GCC summit meeting in December 1987. At this meeting each Party presented a draft agreement, with the aim of effecting the seisin of the Court in compliance with the requirements of the Court[107]. A formal First Meeting of the Tripartite Committee was held in Riyadh on 17 January 1988[108]. In opening the Meeting Prince Saud Al-Faisal of Saudi Arabia stated that the deliberations of the Committee were governed by what had been agreed either in the Five Principles of the Framework or in the December 1987 Agreement and defined the main purpose of the Meeting as being the consideration of ways and means for referring the disputes to the Court in accordance with the conditions and procedures of the Court. The Meeting considered the drafts of the proposed agreements that had been presented at the preliminary meeting by Qatar and Bahrain as well as an amended draft from Bahrain in regard to the method to be adopted to implement the Agreement of December 1987 to approach the Court[109]. No agreement could however be reached at this Meeting. In view of these differences Prince Saud reminded the Committee of the commitments incorporated in the December 1987 Agreement and the legal and moral duty of

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107 See, Annexes II.17 and II.18, Vol. III, pp. 113 and 119.

108 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

109 A copy of Bahrain's amended draft is contained in Annex II.19, Vol. III, p. 123.

the Committee to transform these into a communication to be submitted to the Court. He observed that there could be no possibility of failure in discharging this duty as otherwise the Committee would not be honouring its commitments.

3.35 In the final Minutes of the Meeting signed by the Foreign Ministers of the three States, it was stated:

> "The Committee met to consider measures through which the commitment of the State of Bahrain and the State of Qatar to submit the dispute existing between them to the International Court of Justice will be carried out[110]."

The Minutes further recorded a decision to hold the next meeting on 2 April 1988, and in the meantime the Parties were to exchange by 19 March 1988 drafts of a proposed agreement for referring the disputes to the Court.

3.36 The Parties duly submitted such drafts of a possible text of a special agreement. Qatar's draft dated 15 March 1988 sought in Article II to have the following referred to the Court:

> "The questions for the decision of the Court in accordance with Article I are:-
>
> 1. To which of the two States does sovereignty over Hawar Islands belong ?
>
> 2. What is the legal status of the Dibal and Jaradeh shoals ? In particular, does either State have sovereignty, if any, over the Dibal or Jaradeh shoal or any part of either shoal ?
>
> 3. By a letter dated 23 December 1947, the British Political Agent in Bahrain informed the Ruler of Qatar and the Ruler of Bahrain of the decision of the British Government establishing the existing median line which at present determines the respective continental shelves of the two States. Does that median line represent the right boundary between the said continental shelves ?
>
> 4. Having regard to the answers to questions one, two and three, what should be the course of the boundary or boundaries between the maritime areas appertaining respectively to the State of Qatar and the State of Bahrain[111] ?"

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110 Annex II.20, Vol. III, p. 131.

111 Annex II.21, Vol. III, p. 136.

3.37 However, Bahrain's draft of March 1988 proposed in Article II(1) and (2) of a possible text of a special agreement the following for reference to the Court:

> "1. The Parties request the Court
>
> (a) to draw a single maritime boundary between the respective maritime areas of Bahrain and Qatar; such boundary to pass between the easternmost features of the Bahrain archipelago including most pertinently the Hawar Islands, Fasht ad Dibal and other adjacent or neighbouring features and the coast of Qatar, and to preserve Bahrain's rights in the pearling banks which lie to the north east of Fasht ad Dibal, and in the fisheries between the Bahrain archipelago and Qatar.
>
> (b) to determine the rights of the State of Bahrain in and around Zubara.
>
> 2. The Court is requested to describe the course of the maritime boundary in terms of geodetic lines connecting geographic coordinates of points on Revised Nahrwan Datum. The Court is also requested, for illustrative purposes only, to depict the course of the boundary on a chart[112]."

Furthermore, by Article V Bahrain sought to include the following in the agreement:

> "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 referred to in Article II of this Agreement, 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[113]."

Thus Bahrain's draft of the subject matter of the disputes to be referred to the Court in effect required an implied recognition by Qatar that the Hawar islands and the Dibal and Qit'at Jaradah shoals belonged to Bahrain, and the questions proposed by Bahrain only asked for a decision of the Court on a maritime boundary based upon such recognition, despite the fact that the December 1987 Agreement clearly envisaged that disputes relating to these islands and shoals were pending. Furthermore, for the first time Bahrain raised a claim - which at no time had been the subject matter of Saudi Arabia's Mediation since 1978 - for the determination by the Court of Bahrain's alleged rights "in and around Zubara" on

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112 Annex II.22, Vol. III, pp. 141-142.

113 Ibid., p. 143.

the western coast of Qatar, without any indication of the nature or basis of such rights. In addition, in its draft, Bahrain also sought an agreement that neither Party would make any reference during the proceedings before the Court to any proposals directed to a settlement of the issues in dispute.

3.38 In his letter to King Fahd of 25 March 1988 written immediately after receipt of Bahrain's draft, the Amir of Qatar expressed great surprise at the flagrant violation by Bahrain of the Agreement reached between the three States in 1987. In commenting on Article II(1) of Bahrain's draft the Amir of Qatar stated inter alia:

> "1) The Bahraini draft - instead of presenting the dispute actually existing between the two States with regard to sovereignty over Hawar Islands and Dibal and Jaradah Shoals, and over the legal status of these two Shoals as regards their being islands or shoals, and consequently whether they have or not territorial waters, as should have been done, and as the Qatari draft did and as is the practice in all similar agreements - it asserts with regard to the said dispute determining that Hawar Islands, Dibal Shoal and other adjacent or neighbouring areas existing between the coasts of the two countries belong to the Bahrain archipelago. Not only this, but the Bahrain draft goes to the extent of expressly stating that the State of Qatar joins the State of Bahrain in requesting the Court to draw a single maritime boundary line between the respective maritime areas of the two countries on the grounds that the said areas belong to Bahrain[114]."

With regard to the proposed Article V of Bahrain's draft, he observed:

> "It is obvious that this provision of the Bahraini draft, in addition to its implied contradiction to all the public appreciation voiced by Bahrain of the Saudi mediation and its results, leads to dissimulate from the Court positions to which the two Parties could have committed themselves during the Saudi mediation and which could reveal established facts of great importance in enlightening the Court while considering the dispute. One of these positions, for instance, is the agreement by the two countries on the subjects of dispute, which, as already stated, is included in the documents of the mediation[115]."

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114 Annex II.23, Vol. III, p. 150.

115 Ibid., p. 152.

Summing up his views on Bahrain's draft, the Amir of Qatar concluded:

> "It is clear from these comments, that the Bahraini draft can only be met by our total rejection coupled with our strongest protest. It is quite obvious that the purpose of submitting that draft, in the extremely abnormal form in which it was written, is to block intentionally the measures for submitting the dispute to the ICJ, and to raise obstacles before this objective which has been definitively agreed upon by all of us. This would keep the disputed areas in a position which, on the grounds of the strongest historical and legal evidence, constitutes a flagrant aggression on the inalienable rights of our sovereignty over those areas[116]."

3.39 Furthermore, a Memorandum dated 27 March 1988 incorporating Qatar's detailed views on Bahrain's proposed special agreement was also circulated to the Tripartite Committee[117]. In summarizing the views expressed, Qatar submitted that -

> "It is clear... that the main articles of substance (Two and Five) in the Bahrain draft are based on extremely strange provisions which, in brief, mean the imposition on the State of Qatar of express admission of the non-existence of the dispute which actually exists between it and the State of Bahrain over the areas effectively disputed between the two countries since a long time ago, and of conceding all Bahrain's claims as well as abstaining from including in the evidence and arguments presented by it any documents whose dates precede the date of the Special Agreement.
>
> In the face of all this, the Government of the State of Qatar cannot but totally reject the Bahraini draft, and couple this rejection with the strongest possible protest."

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

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116 Annex II.23, Vol. III, p. 154.

117 Annex II.24, Vol. III, p. 165.

3.41 The drafts submitted by Qatar and Bahrain were extensively discussed at the Second Meeting of the Tripartite Committee held on 3 April 1988[118], but in view of the wide divergence of views regarding the definition of the subject matter of the disputes to be submitted to the Court, no agreement could be reached. In a statement at the Meeting, the leader of Bahrain's delegation stated that -

> "It is clear that the essence of the differences between the two draft Special Agreements lies in the formulation of the Question to be put to the Court. I see little difficulty in resolving the other differences between the two draft Agreements[119]."

3.42 In view of the differences between the Parties, Prince Saud of Saudi Arabia sought their opinion on whether it would be possible "merely to inform the Court that disagreements exist between the two countries as Qatar claims so and so, while Bahrain claims so and so[120]". While Qatar stated that it did not consider that Zubarah could be included within the subject matter of the dispute to be referred to the Court, Bahrain sought time to consider its response. Prince Saud concluded the Meeting by stating -

> "To summarize the discussion: the subject matter of this meeting was the definition of cases at issue to be put before the International Court of Justice. Both countries have expressed their points of view regarding this matter (article 2).
>
> Regarding other questions, both countries have agreed that all other disagreements are marginal[121]."

3.43 The Third Meeting of the Tripartite Committee was held on 17 April 1988[122] where discussions continued on each of the drafts submitted by Bahrain and Qatar. However, the Meeting was inconclusive, with Qatar and Bahrain

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118 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

119 Annex II.25, Vol. III, p. 171.

120 Ibid., p. 169.

121 Ibid., p. 170.

122 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

reaffirming their commitment to the Five Principles of the Framework and to the 1987 Agreement to refer their disputes to the Court and also to the continuation of Saudi Arabia's Mediation.

3.44 In a letter addressed to King Fahd on 7 May 1988, the Amir of Qatar repeated Qatar's objections to the wording of the question for reference to the Court as proposed by Bahrain in Article II of its draft[123] and also stated:

> "As for the second objection relating to Qatar's position concerning Article V of the Bahraini draft, the Qatari delegation has stated that what Qatar does not accept is the exclusion from hearing by the Court of the agreements actually reached by the two sides, which are included in the documents of the Saudi mediation, and not the proposals, contacts, negotiations, correspondence or the like. It is the agreements that were actually reached which are meant here, such as the agreement to refer the dispute to the I.C.J.; the agreement on subjects of dispute; the agreement on prohibiting any of the two sides from undertaking any act to strengthen its legal position or weaken the legal position of the other side...[124]".

Referring to the past discussions of the Tripartite Committee, the Amir of Qatar further stated -

> "It is clear from these facts and discussions that the Committee has failed to reach agreement on a form for the special agreement whereby to put into effect the commitment of the two sides to refer their dispute to the I.C.J.
>
> The last meeting of the Committee, which was its third, was adjourned without fixing a new date. Hence, it seems as if the mission of the Committee has been frozen, and the proceedings to refer the matter to the Court have run into a blind alley[125]."

3.45 The Fourth Meeting of the Tripartite Committee was thereafter convened and held on 28 June 1988[126]. At this Meeting, each of the States also presented a second draft of Article II of its proposed special agreement, but these were again found unacceptable.

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123 See, para. 3.38 above.

124 Annex II.26, Vol. III, p. 178.

125 Ibid., p. 179.

126 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

3.46 The revised version of Article II of Bahrain's draft on the matters to be referred to the Court read as follows:

> "The Court is requested:
>
> 1) to determine the extent to which the two States have exercised sovereignty over the Hawar Islands and have thus established such sovereignty.
>
> 2) to determine the legal status of and sovereign and other rights of both States in any features, other than Fasht ad Dibal and the Bahraini island of Qitat Jaradah in the Bahrain archipelago, or in any natural resources both living and non-living which may affect the delimitation referred to in paragraph 4) below.
>
> 3) to determine any other matter of territorial right or other title or interest claimed by either State in the land or maritime territory of the other.
>
> 4) having regard to the determination made pursuant to the preceding paragraphs to draw a single maritime boundary, which shall pass to the east of the features in the Bahrain archipelago known as Fasht ad Dibal and the Bahraini island of Qitat Jaradah, between the respective maritime areas of the Bahrain archipelago and the Qatar peninsula according to the relevant principles of international law[127]."

3.47 In a letter addressed to King Fahd of Saudi Arabia on 9 July 1988, the Amir of Qatar, commenting on Bahrain's second draft of Article II, stated that -

> "Bahrain has presented a draft - a copy of which is herewith enclosed - in which it followed the very course it took in preparing its first draft. It is a course that involves total disregard of the established facts relating to the history of the dispute between the two countries and the circumstances through which its stages passed, and a total disregard for the position of Qatar towards the subjects of that dispute and the claims it made, as well as for the agreement reached under the Saudi mediation to refer the agreed upon subjects of dispute to the International Court of Justice for its decision according to International Law. These subjects are defined by the first principle of the Saudi mediation and have been reaffirmed in the score of messages which Your Majesty, my brother, has exchanged with the State of Qatar and Bahrain. The new draft, like the previous one, states that Qatar and Bahrain are in agreement to deny the existence of the agreed upon subjects of dispute, which actually exist between the two countries, and to issue a prior decision by both of them on the validity of all the claims of Bahrain. The new draft goes further than the first one in that it

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127 Annex II.27, Vol. III, pp. 181.

> makes Qatar participate in dictating the will of Bahrain on the court to decide the subjects of dispute in the manner that serves the interests of Bahrain and realizes its claims[128]."

The Amir of Qatar also expressed his frustration at Bahrain's tactics and stated in the letter:

> "In presenting their second draft, which comprises the same provisions contained in their first draft, if not worse, the brethren in Bahrain seem to be pursuing, in spite of everything, a plan that will block the way to reaching a joint, genuine formula for the Special Agreement, and hence preclude referring the dispute to the I.C.J.[129]."

3.48 Eventually, as a result of a Saudi Arabian initiative, Sheikh Hamad bin Isa Al-Khalifah, the Heir Apparent of Bahrain, during a visit to Qatar, transmitted to Sheikh Hamad bin Khalifa Al-Thani, the Heir Apparent of Qatar, on 26 October 1988, a general formula for reference of the disputes to the Court, 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[130]."

The proposed general formula was discussed at the Fifth Meeting of the Tripartite Committee held on 5 November 1988[131]. Qatar welcomed the proposed general formula as a good step forward. However, it was of the view that the proposed text entitled either of the Parties to claim sovereignty over any area of land or maritime territory of the other Party, and this unlimited right was unacceptable: Qatar continued to hold the view that any claim such as the one relating to Zubarah could not be raised and that the only disputes that could be referred to the Court were already well-defined in the course of Saudi Arabia's Mediation.

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128 Annex II.28, Vol. III, p. 188.

129 Ibid., p. 189.

130 Annex II.29, Vol. III, p. 191.

131 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

3.49 In commending the idea of a common formula to the Parties, Prince Saud of Saudi Arabia stated:

> "... I would say that there is a basis for discussion to reach a common formula to refer the dispute instead of considering the proposals that had been submitted by the two countries and rejected. In the communication the Custodian of the Two Holy Mosques has had with the leaders of the two countries, he felt that there was a movement. Undoubtedly, without these contacts we would not have reached to the paper submitted by Bahrain recently. The Custodian of the Two Holy Mosques is keen that we should accept what we have reached and proceed from there[132]."

There was no further discussion of any of the previous proposals including those relating to withholding from the Court information about the Mediation or any other efforts to settle the disputes[133].

3.50 Towards the close of the Fifth Meeting of the Tripartite Committee, Prince Saud stated:

> "I am directed to submit a report on the progress of our Committee. The Custodian of the Two Holy Mosques considers that the date of the beginning of the CCASG [GCC] summit is the date for terminating the Committee's mission whether or not it succeeded to achieve what was requested from it[134]."

Accordingly, the Sixth Meeting of the Tripartite Committee held in Riyadh on 6 and 7 December 1988, shortly before the summit was the last effort to achieve an agreement on a method for approaching the Court. At this Meeting[135], in the course of a further discussion of Bahrain's general formula, Qatar suggested that it could accept the idea of a general formula if any claim in relation to Zubarah

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132 Annex II.30, Vol. III, pp. 197.

133 It may be stated that contrary to what is suggested by Bahrain, Qatar never received nor was a discussion ever held on the document which is Attachment 7 to the Annex to Bahrain's letter to the Court of 18 August 1991, i.e., a copy of a so-called draft special agreement incorporating the Bahraini general formula. Qatar only received the "Question" (i.e., the general formula transmitted by Bahrain) on a separate piece of paper on 26 October 1988. See, para. 3.48 above.

134 Annex II.30, Vol. III, p. 198.

135 A copy of the entire Minutes of this Meeting in Arabic has been deposited with the Registry in accordance with Article 50, paragraph 2, of the Rules of Court, together with an English translation.

was restricted to claims of private rights and not sovereignty. The suggestion was not accepted by Bahrain. Qatar proposed an amended version of Bahrain's general formula and also suggested that the reference of the disputes to the Court could be made on the basis of such general formula accompanied by two annexes, one from each Party, with each Party setting out in its annex the subjects of the disputes it wished to refer to the Court[136].

3.51 The Bahraini delegation sought further time to study the Qatari proposal and the amended text of the general formula. A record of the position of each Party at that time can be found in the signed Minutes of the Sixth Meeting dated 7 December 1988 which set out the Bahraini general formula and the amended version of the formula suggested by Qatar[137].

3.52 Thus, by the time of the opening of the GCC summit meeting in Bahrain in December 1988, the Tripartite Committee had failed to achieve an agreement between Bahrain and Qatar on the method to be adopted for the purpose of approaching the Court, the task entrusted to it under the third item of the December 1987 Agreement. In the GCC summit in Bahrain, King Fahd proposed and it was agreed by the Parties that Saudi Arabia be given a further period of six months to try to achieve an agreement on the substance of the disputes through its Mediation. As no agreement was achieved during 1989, the unresolved situation was again discussed during the GCC summit meeting held in Muscat in December 1989. Once again it was agreed that the Saudi Arabian Mediation be given a further period of two months to achieve an agreement on the substance, and the implementation of the 1987 Agreement to refer the disputes to the Court was deferred for that period.

SECTION 5. The Doha Agreement

A. The Background and Negotiation of the Agreement

3.53 The next GCC summit meeting was held in Doha in December 1990. It took place against the background of the recent invasion and occupation of Kuwait (one of the GCC Member States) by Iraq, and the United Nations Security Council resolutions authorizing the use of all necessary means to secure

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136 Annex II.31, Vol. III, p. 202.

137 Annex II.31, Vol. III, p. 199.

the withdrawal of Iraqi forces from Kuwait. The Member States had condemned Iraq's violations of international law in connection with a boundary dispute with Kuwait, and were meeting during a time of hectic preparations in the area for an impending war to secure the liberation of Kuwait in implementation of the Security Council resolutions. They were deeply conscious of the need to resolve all boundary and other disputes between the Member States by mutual agreement or other peaceful means.

3.54 Following the understanding reached at the December 1988 GCC summit in Bahrain and again at the December 1989 summit in Muscat allowing Saudi Arabia further time to secure settlement of the substance of the disputes, Saudi Arabia's Mediation efforts during 1989 and 1990 had not resulted in a settlement of the existing and established disputes between Qatar and Bahrain.

3.55 Qatar therefore raised this subject at the opening session of the GCC summit meeting in Doha on 23 December 1990. Bahrain stated that Saudi Arabia's Mediation should be further extended without any time-limit. This was strongly opposed by Qatar. King Fahd of Saudi Arabia expressed the view that the basic agreement reached in the past was that, if a solution was not achieved by other efforts, the Parties would refer their disputes to the International Court of Justice for a final and binding ruling. As the proceedings of the Court would take some time, during this period Saudi Arabia's efforts at reaching a settlement on the substance could be continued. He also indicated that he wished that he had not asked for a further extension of time at the December 1989 summit in Muscat, as otherwise the disputes would now be before the Court. During the discussion, the Sultan of Oman observed that it was clear that the principle of going to the Court prevailed but that the Parties seemed willing to allow the Saudi Mediation a further short period, until after the month of Ramadan, before the matter be referred to the Court. In order to reach a solution on the subject and scope of the disputes to be referred to the Court, the Amir of Qatar stated that Qatar now accepted the Bahraini general formula. King Fahd observed that now that Qatar had accepted the Bahraini formula, there was no excuse for Bahrain not to refer the dispute to the Court.

3.56 After the end of the opening session of the summit meeting, the Omani delegation took the initiative to finalize and incorporate into a written document the agreement on reference of the disputes to the Court after the month of Shawwal (i.e., after 15 May 1991) resulting from the previous discussions. In the

course of two days, on 24 and 25 December, the Foreign Minister of Oman held discussions with the two Parties separately. He finally secured their agreement on the draft which became the basis of the document that was eventually signed on 25 December 1990. This Agreement in the form of Minutes (hereinafter referred to as the "Doha Agreement") followed the general conclusion reached at the opening session of the summit meeting to the effect that Saudi Arabia's Mediation would be extended up to 15 May 1991 (Shawwal 1411 H.), and that, at the end of that period, the matter could be submitted to the International Court of Justice. It was further agreed that the scope of the reference would be in terms of the Bahraini general formula that had been accepted by Qatar.

B. The Contents of the Doha Agreement

3.57 The Doha Agreement was signed by the Foreign Ministers of Bahrain, Qatar and Saudi Arabia. The Bahraini delegation present in Doha consisted of the Prime Minister, representing the Head of State, and the Foreign Minister, who were joined by the Minister of Legal Affairs. The Agreement stated as follows:

> "Within the framework of the good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, consultations concerning the existing dispute between Bahrain and Qatar took place between H.E. Shaikh Mohammed Bin Mubarak Al-Khalifa, Bahrain's Foreign Minister, and H.E. Mr. Mubarak Ali Al-Khater, Qatar's Foreign Minister, and were attended by H.R.H. Prince Saud Al-Faisal, Saudi Arabia's Foreign Minister, on the sidelines of the 11th Summit of the Co-operation Council for the Arab States of the Gulf in Qatar from 5-7 Jumada Al-Akher, 1411 H.
>
> 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.

Written in Doha on 8/6/1411 H.
Corresponding to 25/12/1990.

Foreign Minister,
State of Bahrain
(signed)
Mohammed ibn Mubarak
Al-Khalifah

Foreign Minister,
State of Qatar
(signed)
Mubarak ibn Ali
Al-Khater

Foreign Minister
Kingdom of Saudi Arabia
(signed)
Saud Al-Faisal[138]"

It will be noted that this Agreement was reached within the Framework previously accepted and was in the nature of a final agreement and was clearly intended to take effect upon signature and by its own force. It did not envisage any failure in its implementation. It was reached on the basis that each Party had separate claims to make and that the Bahraini general formula accepted by the Parties would enable each of them to frame and pursue its own separate claims by filing an application before the International Court of Justice.

3.58 Qatar submits that the Doha Agreement amounted to a final compliance with the requirements to be fulfilled so as to enable the Court to exercise jurisdiction in relation to the disputes between the Parties. Under paragraph 1 of the Agreement, the commitment and consent of the Parties to refer the disputes to the Court, incorporated in the Agreement of December 1987, was reaffirmed. Under paragraph 2, the subject and scope of the disputes to be referred to the Court as well as the method of seisin of the Court were also agreed.

3.59 The sole condition to be fulfilled before any reference could be made to the Court was that Saudi Arabia's Mediation would be given another chance, up to 15 May 1991, to try to reach a settlement of the disputes. Although Saudi Arabia's good offices were to continue up to 15 May 1991, as well as thereafter, these were now clearly to be directed at resolving the disputes on the merits. There was to be no further effort with Saudi Arabian participation through a Tripartite Committee or otherwise "for the purpose of approaching the

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138 Annex II.32, Vol. III, p. 205.

International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions...", as provided in the December 1987 Agreement[139].

3.60 As shown above, Qatar has always sought the amicable settlement of the disputes but has also maintained at all times that the subject matter of the disputes between the Parties involves questions of sovereignty, which are purely legal subjects, and that, failing an amicable settlement, a solution should be achieved by referring the disputes to international arbitration and by the application of international law. Qatar and Bahrain agreed in December 1987 to seek adjudication by the Court of the disputes. However, they were unable to resolve differences over the description of the disputes to be referred to the Court. On 26 October 1988, Bahrain proposed its general formula enabling each Party to raise any relevant claim before the Court. Eventually, Qatar accepted the Bahraini formula and the Doha Agreement was concluded on 25 December 1990.

SECTION 6. From December 1990 to 8 July 1991

3.61 After the signature of the Doha Agreement neither Party sought any further meeting to discuss or agree on any special agreement or other procedure for approaching the Court. This was clearly because no such discussion or further agreement was necessary to enable submission of the disputes to the Court.

3.62 Immediately after the signing of the Agreement, on 30 December 1990, the Amir of Qatar wrote to King Fahd of Saudi Arabia as follows:

> "I am deeply confident that implementation of what has been agreed upon in our above-mentioned meeting for putting an end, once and for all, to our dispute with our brothers in Bahrain, whether through your good offices or through the International Court of Justice, will surely guarantee what we all care for... in the best interest of their mutual good and the general good of our region as a whole[140]."

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139 Annex II.15, Vol. III, p. 104.

140 Annex II.33, Vol. III, p. 212.

After the end of the armed action in the Iraq/Kuwait area, the Amir of Qatar again wrote to King Fahd, on 6 May 1991, stating:

> "As the agreed period is approaching its end, 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 and in pursuance of the sincere efforts you have persistently undertaken to resolve this dispute that have over-shadowed relations between Qatar and Bahrain and their brotherly peoples. In pursuance of the above agreement, we intend to take the necessary measures to submit the matter to the I.C.J. at the end of the above-mentioned period[141]."

3.63 Saudi Arabia therefore increased its efforts as Mediator to reach a settlement on the substance of the disputes. The Heir Apparent of the State of Bahrain expressed his optimism about the progress being made in an interview published in "Asharq Al-Awsat" on 20 June 1991[142].

3.64 After a meeting with King Fahd in Dahran on 5 June 1991, the Amir of Qatar, in a letter of 18 June 1991 addressed to King Fahd, stated:

> "I would like to take this opportunity to affirm to you once again my statement to you during our fruitful meeting at Dahran on June 5th 1991, regarding our positive attitude and warm welcome towards your last proposals with a view to settling this dispute, brought to us by H.R.H. Prince Saud Al-Faisal on his visit to Doha on June 4th 1991, hoping that your good efforts in this sense shall be crowned with the conspicuous success that they deserve, thus adding to your tremendous achievements in the service of our Gulf peoples and our Arab and Islamic nations a new historic achievement.
>
> 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 5th 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 agreement of December 25th 1990 referred to above. This measure will not prevent the continuation of your honourable efforts aiming at arriving to the friendly settlement contained in your last proposals, as the said agreement stipulated to continue the good endeavours of the Kingdom of Saudi Arabia during the

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141 Annex II.34, Vol. III, p. 215.

142 Annex II.36, Vol. III, p. 221.

> submission of the dispute to the International Court of Justice and to withdraw the matter in case of the achievement of a brotherly settlement acceptable to both parties[143]."

3.65 Despite the continuing efforts of the Kingdom of Saudi Arabia, no settlement of the outstanding disputes between Qatar and Bahrain could be reached in the course of the Mediation by Shawwal 1411 H. (corresponding to 15 May 1991) or during the further period of three weeks from 5 June 1991 agreed upon in Dahran and mentioned in the Amir of Qatar's letter of 18 June 1991 cited above.

3.66 On 28 June 1991, Qatar requested the registration of the Agreement of December 1987 and the Doha Agreement of 25 December 1990 in accordance with Article 102 of the United Nations Charter[144].

3.67 Qatar filed its Application on 8 July 1991 in accordance with Article 40, paragraph 1, of the Statute of the Court.

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143 Annex II.35, Vol. III, pp. 219-220.

144 See, Annex II.37, Vol. III, p. 225.

PART II
THE BASIS OF THE JURISDICTION OF THE COURT IN THE PRESENT CASE

CHAPTER IV
THE CONSENT OF THE PARTIES IN THE 1987 AND DOHA AGREEMENTS AND THE COURT'S JURISDICTION

SECTION 1. Introduction

A. The Question of the Court's Jurisdiction

4.01 The question of the Court's jurisdiction is "an objective question of law[145]". In the Judgment of the Court of 20 December 1988 in the case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, this characterization of the issue of jurisdiction was also confirmed when the Court dealt with the arguments of the Parties on the onus of prooving of the Court's jurisdiction[146].

4.02 In Qatar's submission, three main propositions arise from these pronouncements of the Court. First, "The existence of the jurisdiction of the Court in a given case is... not a question of fact, but a question of law to be resolved in the light of the relevant facts[147]". Second, facts which are relevant to the Court's jurisdiction are the acts or conduct of each Party related to the "basis of jurisdiction" that a Party has relied upon before the Court. For Nicaragua and Honduras, according to the 1988 Judgment, these were "the existence of the Parties' declarations under Article 36 of the Statute, the signature and ratification of the Pact of Bogota, etc.[148]". Third, "The determination of the facts may raise

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145 Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 54.

146 I.C.J. Reports 1988, p. 76.

147 Ibid.

148 Ibid. Sir Gerald Fitzmaurice has considered that proof of consent "should be a simple matter. If consent exists at all, it must be evidenced by something fairly concrete - a treaty, a declaration of acceptance, a compromis, a diplomatic note, or even by conduct, as where an arbitrator is appointed, or an agent to conduct proceedings, or a memorial is filed. About the existence or non-existence of some such factual piece of unequivocal evidence as one of these, there should normally be no doubt." "Hersch Lauterpacht - The Scholar as Judge. Part II", British Year Book of International Law, Vol. 38, 1962, p. 34.

questions of proof[149]". But if the relevant facts concerning the jurisdiction of the Court are duly ascertained and are not in dispute between the Parties, "the issue is, what are the legal effects to be attached to them[150] ?"

4.03 In the present case, the relevant facts to be ascertained with respect to the question of jurisdiction relate to the basis of jurisdiction relied upon by Qatar in its Application. That is, in addition to the other antecedents in Saudi Arabia's Mediation, the following:

(i) The existence of the proposals made in the letters from King Fahd of Saudi Arabia to the Amirs of Bahrain and Qatar, respectively, dated 19 December 1987, and the Announcement made public by Saudi Arabia on 21 December 1987 that Qatar and Bahrain had agreed to the proposals made by the Kingdom of Saudi Arabia in the said letters; and

(ii) The existence of the Minutes dated 25 December 1990 incorporating the Bahraini formula and signed in Doha by the Minister of Foreign Affairs of Qatar, the Minister of Foreign Affairs of Bahrain and the Minister of Foreign Affairs of Saudi Arabia.

As was the position in the case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Bahrain, in its letter of 18 August 1991 addressed to the Registrar of the Court, has not disputed the existence of the text of these instruments although it contests their legal character and effects (a matter which will be dealt with in Chapter V). Consequently, given that the existence of the text of these instruments is not in dispute between the Parties, Qatar is entitled to consider that the issue before the Court is a question of law, i.e., to determine the legal effects to be attached to the 1987 and 1990 Agreements in accordance with the principles and norms governing the Court's jurisdiction.

B. Consent as the Basis of the Jurisdiction of the Court

4.04 The principle of consent of the Parties as the basis of the jurisdiction of the Court to decide in contentious cases is embodied in Article 36 of the Statute and

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149 I.C.J. Reports, 1988, p. 76.

150 Ibid.

has been confirmed by the Court on numerous occasions. Indeed, in 1927 the Permanent Court declared that "the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it[151]", and it was early admitted by the jurisprudence of the Permanent Court that -

> "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it[152]."

Similarly, in its Judgment in the case concerning the Factory at Chorzow, Merits, the Permanent Court referred to the above Judgment and stated that "Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the Parties[153]".

4.05 The principle of consent has been confirmed by the present Court on several occasions[154]. In recent years, the Court has also had occasion to recall the principle of the consent of the parties as the basis of its jurisdiction, in its Judgments concerning requests by third States for permission to intervene under Article 62 of the Statute in cases between two other States brought before the Court[155]. There is thus a continuity and consistency in the jurisprudence of the

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151 Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 32.

152 Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 22.

153 Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 37.

154 See, for example, Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, p. 27; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 178; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952, pp. 102-103; Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, p. 33; Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 76.

155 See, Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984, p. 22, and, in particular, the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment of 13 September 1990, paras. 94-95.

Court, including that of its predecessor, which is clearly evidenced in the Judgment of 20 December 1988, where the Judgment in the Factory at Chorzow, Jurisdiction case is quoted[156].

4.06 Qatar submits that the consent of the Parties to confer jurisdiction upon the Court in the present case in respect of defined and established disputes existing with Bahrain is clearly evidenced by the Agreement entered into by Bahrain and Qatar in December 1987. This Agreement, which provides 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", has not been disputed by Bahrain. The December 1987 Agreement has subsequently been confirmed by the Minutes signed in Doha on 25 December 1990, where the Parties not only reaffirmed what had been previously agreed, but also provided that after 15 May 1991 "the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom".

C. Heads of Jurisdiction under Article 36 of the Statute

4.07 As noted above, "Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the Parties[157]". An expression of consent by the Parties further to the one represented by their participation in the Statute of the Court is required in order for the Court to be in a position to hear and decide a contentious case between States. However, Article 36 of the Statute provides that this further expression of consent may manifest itself in various ways. The manner in which consent is given, as well as the stage at which it is given, may differ from case to case. These possible variations in the manifestation of the further expression of consent required by Article 36 of the Statute allow distinct "heads or titles of jurisdiction" to be distinguished in the jurisdiction exercised by the Court.

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156 Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 76, referring to Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 32.

157 See, para. 4.04 above and Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 37.

4.08 In ascertaining the existence of consent, the moment when it was given is relevant. If given ante hoc by a treaty provision or by a declaration made under Article 36, paragraph 2, of the Statute -

> "It may well happen, and has happened, that when eventually a dispute arises which is alleged to be covered by a consent or an acceptance thus given, it arises many years later, in relation to circumstances which the consenting or accepting State did not foresee, and possibly could not have foreseen, at the time[158]."

On the other hand, if consent is given post hoc or ad hoc, and it is clearly evidenced by act or conduct or by an agreement referring the case to the Court, it is difficult to admit that the submission of the dispute to the Court was not foreseen by the parties.

4.09 Furthermore, the existence and recognition of different heads of the Court's jurisdiction introduce an element of flexibility into the operation of the principle of consent embodied in Article 36 of the Statute. This flexibility, developed in the jurisprudence of the Court, is a response to the needs of States in respect of the judicial settlement of disputes. As has been said by Sir Hersch Lauterpacht, in matters of jurisdiction and of adjective law generally "the Court has endeavoured to steer a middle course between rule and discretion". Although he states that "The will of the parties is its charter", he adds that "It is that will which the Court respects rather than the attempts, based on formal and procedural objections, to render nugatory an undertaking once given[159]".

4.10 In the present case, Qatar relies upon Article 36, paragraph 1, of the Statute. It submits that by the Agreements concluded between Qatar and Bahrain in 1987 and 1990 under the Mediation of King Fahd of Saudi Arabia the Parties have agreed to refer to the Court their disputes on territorial questions and maritime delimitation.

4.11 As shown in Chapter III above, when those Agreements were entered into in 1987 and 1990, disputes between Bahrain and Qatar were already in existence with respect to the territorial questions and maritime delimitation at issue which

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158 Sir Gerald Fitzmaurice, op. cit., British Yearbook of International Law, Vol. 38, 1962, p. 35.

159 Sir Hersch Lauterpacht, The Development of International Law by the International Court, London, Stevens & Sons, 1958, p. 209.

had been submitted to the Mediation of Saudi Arabia prior to 1987. The consent to refer such disputes to the Court was given by the two States in the December 1987 Agreement and reaffirmed in the Doha Agreement. It is an ad hoc consent. The jurisdiction of the Court stems, therefore, from the will of both States to refer to it, in accordance with Article 36, paragraph 1, of the Statute, their existing and established disputes.

D. The Essential Aspects of Consent

4.12 Three essential aspects of the consent given under the 1987 and Doha Agreements need to be considered: first, the consent of both States to refer the disputes to the Court; second, their consent to the subject and scope of the disputes; and, third, their consent to the seisin of the Court. These three aspects, together with the relevant circumstance of the Saudi Mediation, which constitutes the general framework within which consent was given by Bahrain and Qatar in 1987 and 1990, will be examined in detail in Section 3 below.

SECTION 2. The Reality and Extent of Consent in Treaties and Conventions under Article 36, paragraph 1, of the Statute

A. The Interpretation of Consent

4.13 Consent to the jurisdiction of the Court has been given under the Agreement made in 1987 and reaffirmed in the Doha Agreement. With regard to the first Agreement, Bahrain has denied neither the existence nor the content of the consent. On the other hand, with regard to the Doha Agreement, Bahrain has not only denied its validity and effect, but has argued that reference of the case to the Court must be made by a joint submission.

4.14 However, as observed by Sir Gerald Fitzmaurice, when two States give their consent to the Court's jurisdiction and conclude a treaty or make declarations accepting an obligation to have recourse to judicial settlement, "these are deliberate operations, and the consent given is unlikely to be unreal or vitiated[160]" on grounds invalidating the obligation assumed. Therefore, the question is not usually whether consent exists, but "what and how much is covered

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160 Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", British Year Book of International Law, Vol. 34, 1958, p. 87.

by the consent given[161]"; and this issue resolves itself into a question of interpretation of the treaty or convention relied upon as the basis of the Court's jurisdiction.

1. Approaches to interpretation

4.15 If the question of the Court's jurisdiction resolves itself into questions of interpretation of treaties in order to determine the reality of the consent and its extent, the interests involved in the process of interpretation may be appraised either from the point of view of the parties' interests or of the interests of the legal order within which the judicial settlement of disputes entrusted to the Court operates.

4.16 If the interests of the parties in international litigation are considered, the reality and extent of consent may be interpreted in either a liberal or a restrictive manner, but the results of interpretation may differ to a great extent, depending on whether they concern the applicant or the respondent State. Thus, a liberal interpretation of consent by the Court has been considered unfair to the respondent State "by imputing to it a consent which it may not really have intended to give, or realized it was giving". On the other hand, a restrictive interpretation is unfair to the applicant State "by depriving it of a means of recourse the benefit of which it was entitled to expect under the clause in question". Consequently, it has been suggested that what is required, "if injustice is not to be done to the one party or the other, is neither restrictive nor liberal interpretations of jurisdictional clauses, but strict proof of consent"[162].

4.17 With respect to the interests of the legal order within which the Court operates, some major points arise for consideration. First, there is the relevance of peaceful settlement of disputes in present day international law, as evidenced by Article 2, paragraph 3, of the United Nations Charter, whereby the Members of the United Nations have agreed to resolve disputes by peaceful means. Second, there is the position of the Court as the "principal judicial organ of the United Nations" according to Article 92 of the Charter. Third, there is the fact that all

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161 Ibid.

162 Ibid., pp. 87-88.

Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice, according to Article 93, paragraph 1, of the Charter.

4.18 In view of these commitments, the balance of interests shifts in favour of the applicant State. Consequently, it has been said that "The policies expressed by these provisions can be construed to support the view that the scope of consent to jurisdiction should be interpreted liberally or, perhaps, neutrally", and that in any case "They do not support the view that they should be interpreted narrowly or restrictively"[163]. In regard to declarations made under Article 36, paragraph 2, of the Statute, the general consent which a State party to the Statute has given to the existence and functioning of the Court, "a consent which lies behind the declaration itself[164]", has also to be taken into account as an element for the interpretation of such declarations. Thus, it has been submitted that "in those circumstances a theory which holds that a priori the declarations are given to restrictive interpretation is singularly unconvincing[165]".

4.19 It is worth noting the words of Sir Hersch Lauterpacht in commenting upon the theory of restrictive interpretation of jurisdictional clauses in the light of the jurisprudence of the Court up to 1958:

> "In fact, it is significant that notwithstanding the frequency of pleas to the jurisdiction - probably the majority of the Judgments given by the Court has been concerned with them in one way or another - there are, as has been shown, only two obiter observations of the Court which appear to give countenance to the argument of restrictive interpretation of jurisdictional clauses. As a rule, the Court limits itself to the statement that consent of the parties is the essential requisite of its jurisdiction and proceeds to inquire whether such consent has been given[166]."

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163 Jonathan I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice", American Journal of International Law, 1987, Vol. 81, No. 4, p. 864, footnote 22.

164 S. Rosenne, The Law and Practice of the International Court, Vol. I, Leyden, A. W. Sijthoff, 1965, p. 408.

165 Ibid.

166 Sir Hersch Lauterpacht, op. cit., p. 341 (footnote omitted). This conclusion is supported by Sir Gerald Fitzmaurice, op. cit., British Year Book of International Law, Vol. 34, 1958, pp. 90-91.

From that date until now, although recourse to restrictive interpretation has appeared in some dissenting opinions[167], no references whatsoever have been made to it, either directly or indirectly, in Judgments of the Court dealing with jurisdictional issues. This negative conclusion is reflected in the fact that the restrictive theory of interpretation did not find a place in Articles 31 and 32 of the Vienna Convention on the Law of Treaties even with regard to the presumed foundation of the theory, namely, a State's sovereignty.

2. The aim of the Court's interpretation in relation to questions of jurisdiction

4.20 In its Judgment of 1927 in the Factory at Chorzow, Jurisdiction case, the Permanent Court referred to the contention of the respondent State that "in case of doubt the Court should decline jurisdiction[168]". However, after admitting that "the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it" and that "consequently, the Court will, in the event of an objection... only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant", the Court went on to answer the respondent State's contention in the following terms:

> "The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it[169]."

This passage of the 1927 Judgment was quoted in the 1988 Judgment in the case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, where it was added that -

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167 See, the Dissenting Opinion of Judge Armand-Ugon in the Barcelona Traction, Light and Power Company, Limited, Preliminary Objections case, I.C.J. Reports 1964, pp. 147-148; and the Dissenting Opinion of Judge Nagendra Singh in the Appeal Relating to the Jurisdiction of the ICAO Council case, I.C.J. Reports 1972, p. 164.

168 Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 32.

169 Ibid.

"The Court will therefore in this case have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'[170]."

4.21 In respect of the above statement of the Court two points are worthy of note. First, in the Court's Judgments of 1927 and 1988, reference is made to the "force of the arguments" either "militating in favour of jurisdiction" or advanced in support of the contention that the Court has no jurisdiction; and second, it is stated that the question of the Court's jurisdiction will be decided in the affirmative only if the former are "preponderant". However, it would be too narrow an approach to limit the "arguments" to those advanced by the parties in support of their respective and opposite contentions. Indeed, the Court may examine proprio motu the question of its own jurisdiction even when the respondent State has appeared before the Court; and in the case of the respondent State's non-appearance "the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court[171]". On the other hand reference to "arguments" does not imply any particular onus probandi lying upon the applicant State, since as indicated above, the question of the Court's jurisdiction is "not a question of fact, but a question of law to be resolved in the light of the relevant facts[172]".

4.22 It may be concluded, therefore, that the word "arguments" as used in the 1927 and 1988 Judgments actually means "the legal reasons" to be considered by the Court with respect to the jurisdictional question; and that the Court will affirm its jurisdiction only if the force of the legal reasons militating in favour of it is preponderant.

3. Rules on interpretation of treaties and conventions under Article 36 of the Statute

4.23 When interpreting agreements under Article 36, paragraph 1, of the Statute, the Court's aim is to ascertain "whether an intention exists on the part of the Parties to confer jurisdiction upon it". The reference to the "intention" or the

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170 I.C.J. Reports 1988, p. 76.

171 Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 7.

172 Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 76.

will of the parties might seem to imply a choice by the Court in favour of the "subjective" approach or method of interpretation, excluding any others[173]. This would not, however, be an accurate conclusion as to the position of the Court in the matter. The "aim" of the interpretation and the "method" followed to achieve such an "aim" should not be confused. So far as the method of interpretation is concerned, ever since its early decisions the Court has evidenced an objective albeit flexible approach. Two points clearly bear out this conclusion.

4.24 First, the Court's reliance on the "intention" or the "will" of the parties is directly related to the "text" of the treaty or of the declaration. In determining its meaning, the text is presumed to be the expression of the intention of the parties. In the Advisory Opinion concerning the Polish Postal Service in Danzig, the Court referred to the text to be interpreted, stating that -

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd[174]."

Therefore, as declared by the Permanent Court, "some valid ground" is required in order to depart from a text which is "free from ambiguity or obscurity"[175]; and a statement has also been made by the present Court in the following terms: "To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established[176]". The Court again evidenced its reliance on the objective approach when it stated that -

> "... the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary

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173 See, Sir Hersch Lauterpacht, "De l'interprétation des traités", Annuaire de l'Institut de droit international, Vol. 43, I, 1950, pp. 366-434; F.G. Jacobs, "Varieties of approach to treaty interpretation with special reference to the draft Convention on the Law of Treaties before the Vienna diplomatic conference", International and Comparative Law Quarterly, Vol. 18, 1969, pp. 318-346.

174 1925, P.C.I.J., Series B, No. 11, p. 39.

175 Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50, p. 373.

176 Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 63.

> meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words[177]."

4.25 Second, in its Judgment of 12 November 1991 in the case of the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) the Court has considered that "The rule of interpretation according to the natural and ordinary meaning of the words employed 'is not an absolute one'[178]", quoting its statement in the case of South West Africa, Preliminary Objections on the incompatibility between the ordinary meaning of the words and "the spirit, purpose and context of the clause or instrument in which the words are contained[179]". Thus, not surprisingly, the Court has not excluded recourse to the object and purposes of a treaty when necessary, in order to decide whether consent has been given by the parties. Indeed, in the case of the Acquisition of Polish Nationality the Permanent Court affirmed that "an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible[180]". Statements in which reference is made to the practical effect of a provision in the light of the object and purpose of the treaty have also been made in other cases[181].

4.26 In particular, with regard to the interpretation of agreements referring a case to the Court or to an arbitral tribunal, two statements from the jurisprudence of the Court are relevant. First, in the Factory at Chorzow, Jurisdiction case, the Court declared that for the interpretation of a given provision of a treaty on arbitral settlement -

> "... account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but

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177 Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8.

178 Judgment of 12 November 1991, p. 21, para. 48.

179 Judgment, I.C.J. Reports 1962, p. 336.

180 Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 17.

181 Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10, p. 25; Competence of the ILO to Regulate Incidentally the Personal Work of the Employer, Advisory Opinion, 1926, P.C.I.J., Series B, No. 13, p. 19; Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927, P.C.I.J., Series B, No. 14, p. 27.

> also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision[182]."

4.27 Second, in the Corfu Channel, Merits case, the provisions of a special agreement were interpreted by the Court in the following terms, with reference to other decisions rendered on the matter by the Permanent Court:

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. In this connexion, the Court refers to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation. In Advisory Opinion No. 13 of July 23rd, 1926, that Court said (Series B., No. 13, p. 19): 'But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of the measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.' In its Order of August 19th, 1929, in the Free Zones case, the Court said (Series A., No. 22, p. 13): 'in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'[183]."

4.28 In fact, treaties and conventions in force within the meaning of Article 36, paragraph 1, of the Statute are agreements between States governed by international law, and they must be interpreted in accordance with the general rules on interpretation now embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In its Judgment of 12 November 1991 in the case of the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), the Court has expressly declared that an arbitration agreement is "an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties[184]". And after quoting passages on interpretation from its Advisory Opinion on the Competence of the

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182 Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 24.

183 Judgment, I.C.J. Reports 1949, p. 24.

184 Judgment of 12 November 1991, p. 20, para. 48.

General Assembly for the Admission of a State to the United Nations[185] and from its Judgment in the South West Africa, Preliminary Objections case[186], the Court stated that -

> "These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point[187]."

Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties states the general rule of interpretation as follows[188]:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

4.29 It follows from the above that the former discussions about the subjective versus objective approaches as methods of interpreting treaties or treaty clauses, as well as the former discussions concerning restrictive versus extensive interpretation, referred to above, now appear to be a matter of history. It was agreed at the Vienna Conference on the Law of Treaties that no differentiation should be made in that respect on the basis of any of the various possible classifications of treaties, with the single exception of the additional rules for "multilingual treaties".

4.30 Moreover, application of the rules of interpretation of treaties under the Vienna Convention, with the various elements of interpretation contained therein, was conceived as a single combined operation. As the International Law Commission stated in its commentary on draft Articles 27 and 28:

> "All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation[189]."

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185 I.C.J. Reports 1950, p. 8.

186 I.C.J. Reports 1962, p. 336.

187 Judgment of 12 November 1991, p. 21, para. 48.

188 Neither Qatar nor Bahrain is a party to the Vienna Convention on the Law of Treaties of 1969.

189 Yearbook of the International Law Commission, 1966, Vol. II, pp. 219-220, para. 8.

This applies, as indicated, to treaties referring a given dispute or disputes to the Court as in the case of any other kind of treaty. The various elements of interpretation adopted in the Vienna Convention are supposed to operate not only in the described combined manner but also with all its accepted implications. For example, as indicated in paragraph 6 of the International Law Commission's commentary, insofar as the maxim ut res magis valeat quam pereat reflects "a true general rule of interpretation[190]", it is reflected in Article 31, paragraph 1, of the Vienna Convention which requires, inter alia, that a treaty should be interpreted "in good faith" as well as "in the light of its object and purpose".

B. Form of Consent

4.31 The titles of jurisdiction invoked by Qatar are the December 1987 Agreement and the Doha Agreement with Bahrain. With respect to their form, the 1987 Agreement was entered into by the acceptance by Bahrain and Qatar of the proposals made by Saudi Arabia in its identical letters to them of 19 December 1987, as evidenced by Saudi Arabia's Announcement of 21 December 1987[191]. The Doha Agreement was entered into in the form of the Minutes of agreement signed in Doha on 25 December 1990 by the Ministers of Foreign Affairs of Bahrain, Qatar and Saudi Arabia.

4.32 The acceptance by the two States of the Court's jurisdiction to decide over the disputes covered by the Bahraini formula was not made subject to the observance of any particular or specific forms. Thus, the Parties acted in conformity with the Statute of the Court and other rules of international law. Both the jurisprudence of the Court interpreting Article 36 of the Statute and Articles 2, 3 and 11 of the Vienna Convention on the Law of Treaties fully justify this conclusion.

4.33 In the Mavrommatis Palestine Concessions case, it was stated in general terms that "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law[192]". Moreover, it is precisely in the domain of jurisdiction that the Court, without departing from the fundamental principle of consent as the basis

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190 Ibid., p. 219, para. 6.

191 See, Annex II.15, Vol. III, p. 101.

192 Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34.

of its jurisdiction, has been most ready to put aside objections relating to the form in which the consent is given or has been given. It could not have been otherwise in the light of the principle of freedom as to the form governing the expression of consent at the international level generally and the very wording of Article 36, paragraph 1, of the Statute of the Court. Some instances taken from the jurisprudence of the Court clearly evidence this conclusion.

4.34 First, at an early date the Permanent Court declared in its Judgment in the case of the Rights of Minorities in Upper Silesia (Minority Schools) that -

> "The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement[193]."

Thus, the Court held that the submission of arguments on the merits in the counter-memorial, without making any reservation in regard to the question of the Court's jurisdiction, must be considered "as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit[194]". This implies, according to Sir Hersch Lauterpacht, "that the consent of a State to the submission of a dispute may not only follow upon an express declaration, but may also be inferred from acts conclusively establishing it[195]". And the learned author added that "There is no rule of international law - and none can be found in the Statute of the Court - which requires compliance with definite forms in accepting the jurisdiction of the Court or which rules out the conduct of a State or of its representatives as a source of its obligations[196]".

4.35 Second, in the Corfu Channel, Preliminary Objection case, the Albanian Government, after the adoption by the Security Council of a recommendation to the effect that the dispute with the United Kingdom should be referred to the Court, by a letter of 2 July 1947 fully accepted this recommendation and "the

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193 Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 23.

194 Ibid., p. 24.

195 Sir Hersch Lauterpacht, The Development of International Law by the International Court, London, Stevens & Sons, 1958, pp. 202-203.

196 Ibid.

jurisdiction of the Court for this case"[197]. With respect to this unilateral act of the Albanian Government, the Court stated in its Judgment of 25 March 1948 that -

> "The letter of July 2nd, therefore, in the opinion of the Court, constitutes a voluntary and indisputable acceptance of the Court's jurisdiction.
>
> While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form[198]."

4.36 Third, the possibility that consent may be expressed in the most various forms is a factor which in concrete situations, where compliance with the principle of the consensual basis of jurisdiction is to be verified, excludes allegations based upon rigid representations as to the form in which the consent concerned has been given[199]. This is evidenced quite clearly in the position adopted by the Court in the Aegean Sea Continental Shelf case. The Communiqué of 31 May 1975 was issued directly to the press by the Prime Ministers of Greece and Turkey after the conclusion of their meeting of that date, and it did not bear any signature. For the Turkish Government, it was evident that "a joint communiqué does not amount to an agreement under international law[200]". However, the Court did not accept this contention, stating that -

> "On the question of form, the Court need only observe that 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 (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form - a communiqué - in which that act or transaction is embodied. On the contrary, in determining what was indeed the

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197 Judgment, 1948, I.C.J. Reports 1947-1948, p. 27.

198 Ibid.

199 See, S. Rosenne, op. cit., Vol. I, p. 319, considering at p. 320 that "The increasing informality required for the expression of consent to the adjudication is, on the whole, a welcome development".

200 Judgment, I.C.J. Reports 1978, p. 39.

> nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up[201]."

4.37 In the light of the above decisions, Qatar submits that the mere fact that the Doha Agreement took the form of Minutes does not deprive it of its character as a "treaty" or "convention" within the meaning of Article 36, paragraph 1, of the Statute of the Court. According to Article 2, paragraph 1, of the Vienna Convention on the Law of Treaties -

> "(a) '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."

4.38 In its commentary on draft Article 2, the International Law Commission mentioned the following:

> "... there are admittedly some important differences of a juridical character between certain classes or categories of international agreements. But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of the convention on the law of treaties merely because, in regard to the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements[202]."

With respect to the name given by the Parties to the Doha Agreement, the commentary of the International Law Commission is also worth noting:

> "... in addition to 'treaty', 'convention' and 'protocol', one not infrequently finds titles such as 'declaration', 'charter', 'covenant', 'pact', 'act', 'statute', 'agreement', 'concordat', whilst names like 'declaration', 'agreement' and 'modus vivendi' may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names

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201 Ibid.

202 Yearbook of the International Law Commission, 1966, Vol. II, p. 188, para. 3 (footnote omitted).

> such as 'agreement', 'exchange of notes', 'exchange of letters', 'memorandum of agreement', or 'agreed minute' may be more common than others[203]."

4.39 In addition, in the above-mentioned decision in the Aegean Sea Continental Shelf case, reference was also made to Article 11 of the Vienna Convention on the Law of Treaties. According to that provision:

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

The Minutes agreed in Doha on 25 December 1990 were signed by the Ministers of Foreign Affairs of Bahrain and of Qatar - as well as of Saudi Arabia - and no other means of expressing the consent was required in this Agreement. The Parties to the Doha Agreement chose the means of expressing consent that they deemed preferable in the circumstances, in accordance with the general freedom admitted in this respect by Article 11 of the Vienna Convention[204]. Such freedom is not restricted in any way by Article 36, paragraph 1, of the Statute of the Court.

C. Reciprocity of Consent

4.40 When two States conclude an ad hoc treaty or convention within the meaning of Article 36, paragraph 1, of the Statute, the essence of such an agreement is to refer a case to the Court for decision[205]. That is, it is a consent given in respect of an existing "legal dispute", according to the technical terms used in paragraph 2 of the same provision and in the jurisprudence of the

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203 Ibid. On the terminology, see, D.P. Myers, "The name and scope of treaties", American Journal of International Law, 1957, Vol. 51, pp. 574 et seq. and, on the practice of States, see, inter alia, the "Agreed Minutes Regarding the Restoration of Friendly Relations, Recognition and Related Matters", signed at Baghdad on 4 October 1963, referred to in Security Council Resolution 687, 3 April 1991, registered as an international agreement pursuant to Article 102 of the United Nations Charter and published in United Nations Treaty Series, No. 7063, 1964, pp. 325-329.

204 See, A. Bolintineanu, "Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention", American Journal of International Law, 1974, Vol. 68, No. 4, pp. 672 et seq.

205 See, para. 4.08 above.

Court[206]. Such an agreement, indeed, is purported to create legal rights and obligations between the parties in respect of its specific object, i.e., the Court's jurisdiction to decide the dispute. However, as has been indicated in doctrine, "it is not sufficient to establish the vesting in the Court of general jurisdiction to decide, between the parties, a dispute of the generic class that has been brought before it": it is necessary to go further and establish "that there is complete and individualized reciprocity of obligation" in respect of the concrete dispute which the Court is asked to decide[207].

4.41 It has been said that the independence or autonomy of this element of reciprocity asserts itself in the case of the Court's jurisdiction under declarations made in accordance with Article 36, paragraph 2, of the Statute, while in cases where the jurisdiction rests on a treaty in force according to Article 36, paragraph 1, it is largely absorbed by the treaty[208]. However, although absorbed in the ad hoc agreement referring the existing dispute to the Court, the general requirement of reciprocity should be met, and questions of reciprocity may arise particularly in connection with the interpretation of the ad hoc agreement concerned, as evidenced in the Court's jurisprudence. Thus, in the Corfu Channel, Merits case, the Court was to interpret the compromis concluded by Albania and the United Kingdom after the Judgment of the Court in the preliminary stage of the proceedings. Under the second part of the ad hoc agreement, competence was given to the Court to decide what kind of "satisfaction" was due to Albania, but that State denied the competence of the Court with respect to the amount of compensation due to the United Kingdom under the first part of the agreement, which referred to the international responsibility of Albania. In this context, the Court declared that -

> "The clauses used in the Special Agreement are parallel. It cannot be supposed that the Parties, while drafting these clauses in the same form, intended to give them opposite meanings - the one as giving the Court jurisdiction, the other as denying such jurisdiction[209]."

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206 S. Rosenne, op. cit., Vol. I, p. 332, stating that "the Court's jurisdiction is the product of the consent of the Parties to the dispute".

207 Ibid., p. 304.

208 Ibid., p. 305.

209 Judgment, I.C.J. Reports 1949, p. 26.

4.42 In the present case, however, the reciprocity element of consent given ad hoc by the Parties in the December 1987 and Doha Agreements may be clearly ascertained both in respect of the disputes submitted to the Court and the manner of seisin of the Court:

(i) In the Doha Agreement, it was agreed to submit "the matter to the International Court of Justice in accordance with the Bahraini formula", this expression incorporating by reference into the Agreement the content of the text transmitted to Qatar by Bahrain on 26 October 1988, which reads as follows:

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

Having regard to the reciprocity element in the consent given by both States, two points should be observed with respect to this definition of the legal disputes to be referred to the Court for decision under the Doha Agreement. First, when defining the disputes to be submitted to the Court, the Bahraini formula is worded in neutral language, both with respect to disputes concerning "territorial right or other title or interest" and with regard to disputes on maritime delimitation. Therefore, under the Bahraini formula, each of the Parties has the perfectly reciprocal right to file before the Court any claims, insofar as they are covered by this definition of the dispute. Second, the legal disputes submitted by Qatar to the Court for decision are covered by the terms of the Bahraini formula. This is the case, first, of the claim on sovereignty over the Hawar islands and of sovereign rights over the Dibal and Qit'at Jaradah shoals, since these questions are undoubtedly a "matter of territorial right". Second, the claim concerning maritime delimitation, as well as that concerning the status of Dibal and Qit'at Jaradah, are to be decided by the Court in respect of the "single maritime boundary between their respective maritime areas" to be drawn by the Court. Therefore, the concrete disputes referred to the Court by Qatar's Application filed on 8 July 1991 do not extend the jurisdiction which has been recognized by the Parties in the Doha Agreement and in this respect the reciprocity of the consent given is fully maintained[210].

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210 See, paras. 5.75-5.82 below.

(ii) In the present case, the Parties have also given each other perfectly reciprocal rights concerning seisin of the Court in the Minutes signed on 25 December 1990. In paragraph 2 of the Minutes they agreed, first, a period during which the efforts to settle the disputes on the merits through the Saudi Mediation would be continued up to 15 May 1991. Second, it was also agreed that "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".

4.43 The seisin of the Court, therefore, is a right granted by the Doha Agreement to each of the Parties. Bahrain was also entitled to institute proceedings before the Court after 15 May 1991, as Qatar did on 8 July 1991, after twice announcing its intention to do so to the Mediator, King Fahd of Saudi Arabia. In the Fisheries Jurisdiction (United Kingdom v. Iceland) case a situation of this kind was considered by the Court, stating that -

> "... the compromissory clause has a bilateral character, each of the parties being entitled to invoke the Court's jurisdiction; it is clear that in certain circumstances it could be to Iceland's advantage to apply to the Court[211]."

The Minutes signed on 25 December 1990 are also bilateral in character insofar as the seisin of the Court by each of the Parties is concerned, but they do not prescribe any particular procedure for such a seisin. Both Parties are, therefore, free to seise the Court, for example by means of an application, as Qatar has done.

D. Irrevocability of Consent

4.44 Consent given by the parties in an ad hoc agreement to refer a legal dispute to the Court implies, finally, a further consequence: the irrevocability by a party of the consent given. As put by Judge Sir Garfield Barwick in his dissenting opinion to the Judgment of the Court in the Nuclear Tests (Australia v. France) case -

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211 Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 16.

> "Whether it is given by a multilateral treaty or by a compromissory clause in a bilateral treaty the consent to jurisdiction is irrevocable and invariable except as provided by the treaty, so long as the treaty remains in force in accordance with the law of treaties[212]."

In connection with the question of the irrevocability of consent, the date of instituting proceedings before the Court is particularly important. As Rosenne has put it, "when consent has been given, it may not be withdrawn, at least if another State has acted on the basis thereof and has instituted proceedings before the Court[213]". The author was dealing with the matter with regard mainly to jurisdiction on the basis of Article 36, paragraph 2, of the Statute and the doctrine of forum prorogatum. In fact, however, the effect which the institution of proceedings has on the irrevocability of consent is general in character, the aim of the rule of irrevocability being, as Rosenne indicates, "to introduce an element of stability in recourse to the judicial process and to create a distance between the conduct of a case before the Court, and ephemeral considerations based upon immediate fluctuations in a political situation[214]".

4.45 In the present case, the Parties agreed in the December 1987 Agreement to refer "All the disputed matters... to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms", and this Agreement was reaffirmed in the Doha Agreement.

4.46 Qatar therefore submits that Bahrain gave its consent to refer to the Court the existing legal disputes between itself and Qatar in the 1987 and 1990 Agreements. Qatar on 8 July 1991 thus instituted proceedings before the Court to decide upon the disputes on the basis of the said Agreements. Accordingly, the consent given is irrevocable and, as was accurately affirmed by Sir Hersch Lauterpacht in his dissenting opinion to the Judgment of the Court in the Interhandel case, "Admittedly, once that consent has been given the Court will not allow the obligation thus undertaken, or the effectiveness of that obligation, to be defeated by technicalities or evasion[215]".

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212 I.C.J. Reports 1974, p. 402.

213 S. Rosenne, op. cit., Vol. I, p. 322.

214 Ibid., p. 323.

215 I.C.J. Reports 1959, p. 114.

SECTION 3. The Essential Aspects of Consent given under the December 1987 Agreement and the Doha Agreement

A. The Circumstance of the Saudi Mediation

4.47 In the present case, the Minutes signed on 25 December 1990 clearly evidence that the relevant circumstance[216] is the Mediation conducted by Saudi Arabia at least since 1976. It is worth noting, first, that under paragraph 2 the Parties agreed that the good offices of Saudi Arabia should continue until May 1991; and, second, that under paragraph 1 they agreed to reaffirm "what was agreed previously between the two parties". Therefore, the consent given by the Parties to refer the disputes to the Court is to be considered not only with regard to the "ordinary meaning to be given to the terms" of the Doha Agreement "in the light of its object and purpose" but also with regard to the various agreements entered into by the two States in the course of the Saudi Mediation.

4.48 The Mediation conducted by Saudi Arabia with regard to the existing and established disputes between Bahrain and Qatar has been examined in detail in Chapter III of this Memorial. It therefore suffices to indicate here very briefly the relevant dates and results of this Mediation:

(i) On 13 March 1978, a set of "Principles for the Framework for reaching a Settlement" was proposed by Saudi Arabia, and which, as amended, was subsequently accepted by Bahrain and Qatar in May 1983[217].

(ii) On 19 December 1987, King Fahd of Saudi Arabia addressed identical letters to the Amirs of Bahrain and Qatar in which it was proposed that "Firstly: All the disputed matters shall be referred to the International Court of Justice..." and that to this end, there would be "Thirdly: Formation of a committee... for the purpose of approaching the International Court of Justice, and satisfying the

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216 In its Judgment in the Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court case, the Court, in order to ascertain whether the intention of the parties existed to confer jurisdiction upon it, found it appropriate to refer to "the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties to be bound" (I.C.J. Reports 1973, p. 17). Similarly, in the Aegean Sea Continental Shelf case reference was made in the Court's Judgment of 1978 not only to the "actual terms" of the Brussels Communiqué of 31 May 1975 but also to "the particular circumstances in which it was drawn up" (I.C.J. Reports 1978, p. 39, para. 96).

217 See, paras. 3.09-3.20 above.

necessary requirements to have the dispute submitted to the Court". These two proposals for the judicial settlement of the disputes, like those included in the second and fourth items of the letter, were "sanctioned by the two countries", as stated by Saudi Arabia in the Announcement of the Agreement between Bahrain and Qatar, dated 21 December 1987[218]. An Agreement, reached through Saudi Arabia's Mediation, has therefore existed between the Parties since 1987, the principal object and purpose of which is to submit the disputes to the Court.

(iii) In the course of the work of the Tripartite Committee, Bahrain submitted proposals for a draft special agreement in March and June 1988[219]. However, given Qatar's objections to the provisions of those drafts defining the subject matter of the disputes to be decided by the Court, on 26 October 1988 the Heir Apparent of Bahrain transmitted to the Heir Apparent of Qatar a new text for the definition of the disputes[220], this text for the definition of the disputes being known as the Bahraini formula. During the 11th GCC summit meeting held in Doha from 23 to 25 December 1990, Qatar declared that in order to refer the disputes to the Court, it accepted the Bahraini formula defining the disputes to be submitted to the Court. As a consequence, Minutes of agreement were signed on 25 December 1990 by the Ministers of Foreign Affairs of Bahrain, Qatar and Saudi Arabia[221].

4.49 It may be concluded, first, that according to the very terms of the Doha Agreement, reference must be made, on the one hand, to the previous December 1987 Agreement where the Parties committed themselves to refer all matters in dispute to the Court; and on the other hand, to the definition of the subject matter of the disputes in accordance with the Bahraini formula, accepted by Qatar in December 1990. Second, the text of the Doha Agreement and the other texts accepted by the Parties and incorporated therein by reference (the December 1987 Agreement and the Bahraini formula), should be considered in the light of the circumstance of the Saudi Mediation.

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218 Annex II.15, Vol. III, p. 101.

219 Annexes II.22 and II.27, Vol. III, pp. 139 and 181. See, also Qatar's draft in Annex II.21, Vol. III, p. 133.

220 Annex II.29, Vol. III, p. 191. See, also, paras.3.48 and 3.49 above.

221 See, paras. 3.55-3.56 above.

B. Consent to refer the Disputes to the Court

4.50 Treaties and conventions in force within the meaning of Article 36, paragraph 1, of the Statute of the Court have a precise object and purpose: to refer the case or the existing dispute to the Court for decision. With regard to similar agreements, i.e., those submitting disputes to arbitration, this conclusion has been clearly stated by the Court in its Judgment in the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) in the following terms:

> "... when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the Tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal 'must conform to the terms by which the Parties have defined this task'(Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 266, para. 23)[222]."

4.51 In the present case, the Parties agreed in 1987 to entrust the Court with the task of settling the existing dispute, as they also did in the Minutes of Agreement signed on 25 December 1990 to implement the former. Thus, the first item of the proposal made by Saudi Arabia in 1987 and accepted by both Bahrain and Qatar states 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."

Qatar submits that these terms are clear and unequivocal, and are in fact very close to the language used in Articles 36, paragraph 1, 59 and 60 of the Statute of the Court. And the third item of the proposal agreed by the Parties in December 1987 once more made reference to the International Court of Justice, its constitutive instruments (i.e., the Statute and Rules of Court) and the final character of its judgments. In implementing the Agreement of December 1987, the Doha Agreement, incorporating by reference the Bahraini formula, also clearly expressed the specific object and purpose of the Parties' agreement. Thus, it was agreed, in paragraph 2), that "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

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222 Judgment of 12 November 1991, p. 21, para. 49.

therefrom". Qatar submits that the terms of this provision are clear and unambiguous; and that their precise object and purpose are directly linked with Article 36, paragraph 1, of the Statute of the Court.

C. Consent to the Subject and Scope of the Disputes

4.52 In the passage of its Judgment in the case of the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) quoted above, the Court stated that when the arbitration agreement of the parties entrusts an arbitral tribunal with the task of settling a dispute, the parties "define in the agreement the jurisdiction of the tribunal and determine its limits[223]". With respect to the Court's jurisdiction, the same statement would be fully applicable when a dispute is referred to the Court by the parties in an ad hoc agreement under Article 36.1 of the Statute. Thus, in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, the Chamber of the Court affirmed that -

> "The Court, and consequently the Chamber, having been seised by means of a special agreement, no preliminary question arises in regard to its jurisdiction to deal with the case[224]."

If the agreement of the parties gives jurisdiction to the Court and "determines its limits", the reason is that "the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it[225]". One of those limits is the definition of the concrete legal disputes to be decided by the Court, such definition determining the scope of the Court's jurisdiction ratione materiae.

4.53 In the present case, a first reference to the subject of the existing disputes between Bahrain and Qatar was made in the "Principles for the Framework for reaching a Settlement" proposed in 1978 by Saudi Arabia and accepted by the Parties. The First Principle stated 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[226]."

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223 Judgment of 12 November 1991, p. 21, para. 49.

224 Judgment, I.C.J. Reports 1984, p. 265, para. 19.

225 Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 32.

226 Annex II.1, Vol. III, p. 3.

The second reference is contained in the identical letters addressed by King Fahd of Saudi Arabia to the Amirs of Bahrain and Qatar on 19 December 1987, which mentioned "the long standing dispute between the sisterly states of Qatar and Bahrain over the sovereignty over Hawar Islands, the maritime boundaries of the two brotherly countries, and any other matters[227]". This reference was certainly connected with the first item of the proposals accepted by the Parties according to which "All the disputed matters" were to be referred to the Court. Finally, the proposals tabled by Bahrain and Qatar in the Tripartite Committee during 1988 certainly all included definitions of the subject and scope of the disputes to be submitted to the Court.

4.54 Nevertheless, among those proposals, the one transmitted to the Heir Apparent of Qatar by the Heir Apparent of Bahrain on 26 October 1988 is of particular significance. That proposal, entitled "Question", is as follows:

> "The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters[228]."

It is worth noting, first, that this text refers only to the issue of the subject and scope of the disputes to be submitted to the Court, and that it was never included in any of Bahrain's proposals for a draft special agreement tabled in the Tripartite Committee[229]. Second, although it was discussed in the last meeting of the Tripartite Committee, held on 6 December 1988, it was not agreed upon by Qatar at that time. Finally, the real significance of the Bahraini formula does not relate to the work of the Tripartite Committee but to subsequent events. As has been shown above[230], the work of the Tripartite Committee was brought to an end in December 1988. During all of 1989 and 1990, Saudi Arabia was attempting to reach a solution on the substance of the dispute, but in spite of its renewed brotherly efforts it failed in its attempt. Therefore, at the time of the opening of the 11th Summit of the GCC, held in Doha from 23 to 25 December 1990, Qatar

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227 Annex II.15, Vol. III, p. 103.

228 Annex II.29, Vol. III, p. 191.

229 See, paras. 3.48-3.49 above.

230 See, paras. 3.50-3.52 above.

took steps to find a way out of the stalemate existing with respect to the implementation of the December 1987 Agreement. In the opening session of the GCC summit and after an exchange of views amongst its Members on the reference of the existing disputes between Bahrain and Qatar to the Court, the Amir of Qatar declared that he accepted the Bahraini formula, so that there was no longer any obstacle to the reference of the disputes to the Court.

4.55 The Minutes of 25 December 1990 were subsequently signed. It was agreed in the second sentence of paragraph 2 that after 15 May 1991 "the Parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar". The Doha Agreement, therefore, incorporated by reference in paragraph 2 the terms of the Bahraini formula.

4.56 In the Annex to its letter addressed to the Registrar of the Court on 18 August 1991, Bahrain did not dispute either the existence or the contents of the Bahraini formula. Qatar maintains, therefore, that consent was given by Qatar and Bahrain in the Doha Agreement in respect of the subject and scope of the disputes to be decided by the Court.

D. The Seisin of the Court in the Doha Agreement

4.57 It will be recalled that in December 1987 the Parties agreed to refer all disputed matters to the International Court of Justice and to form a committee for the purpose of approaching the Court and satisfying the necessary requirements to have the disputes submitted to the Court[231]. In the course of the negotiations in the Tripartite Committee in 1988, the draft special agreements tabled by Bahrain and Qatar, respectively, differed on the way of instituting proceedings before the Court. In fact, the Bahraini draft of March 1988 was silent as to the notification to the Court of the special agreement, while Article V of the Qatari draft, on the contrary, provided at first for the special agreement's notification by a "joint letter" (paragraph 2) and, failing such joint notification that, one month from its entry into force, "it may be notified to the Registrar by either Party" (paragraph 3)[232].

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231 See, also, paras. 3.29-3.35 above.

232 Annex II.21, Vol. III, p. 137.

4.58 In the Minutes agreed by the Parties on 25 December 1990, paragraph 2, after referring to the continuation of the Saudi Mediation until 15 May 1991, contains the following provision:

> "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."

In respect of this provision, the main element is the agreement that "the parties may submit the matter to the International Court of Justice". However, by using the expression "in accordance with", two other elements are made conditions of the submission of the case to the Court. Those two elements are differentiated by the word "and": the first is the reference to "the Bahraini formula"; the second is the expression "the proceedings arising therefrom". Given the context of this provision, the ordinary meaning of these expressions is that the Parties may submit the case to the Court in accordance with the Bahraini formula which defines the subject and scope of the disputes, and in accordance with the "proceedings arising therefrom", i.e., in accordance with the "proceedings", a term including all questions of procedure, arising out of the Statute and Rules of Court, including seisin under Article 40, paragraph 1, of the Statute as applied in the jurisprudence of the Court[233].

4.59 As indicated above, including the expression "and the proceedings arising therefrom" in the Doha Agreement allowed seisin of the Court in accordance with Article 40, paragraph 1, of the Statute, as applied by the Court. Furthermore, Qatar submits that, even if the Parties had failed to include that provision in the Doha Agreement, the seisin of the Court by either Party by means of an application or a separate notification of the Agreement would be in full conformity with Article 40, paragraph 1, of the Statute, as may be seen in the jurisprudence of the Court.

4.60 With respect to proceedings instituted by an application, Rosenne has said with reference to the Corfu Channel, Preliminary Objection case, that the Court "explained that the procedural step is governed by Article 40 of the Statute, and

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233 See, paras. 5.60-5.61 below, and the Opinion of Prof. A.S. El-Kosheri, Annex III.1, Vol. III, pp. 273-278.

that the question of jurisdiction is regulated 'exclusively' by Article 36[234]". Indeed, according to the statement of the Court in that case -

> "The Albanian contention that the Application cannot be entertained because it has been filed contrary to the provisions of Article 40, paragraph 1, and of Article 36, paragraph 1, of the Court's Statute, is essentially founded on the assumption that the institution of proceedings by application is only possible where compulsory jurisdiction exists and that, where it does not, proceedings can only be instituted by special agreement.
>
> This is a mere assertion which is not justified by either of the texts cited. Article 32, paragraph 2, of the Rules does not require the Applicant, as an absolute necessity, but only 'as far as possible', to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction[235]."

4.61 With respect to separate notifications of an agreement referring a dispute to the Court, the Court's Order of 26 October 1990 in the case of the Territorial Dispute (Libyan Arab Jamahiriya/Chad) is worthy of consideration as to the distinction between "seisin" and "jurisdiction". The Court's Order states that the Libyan Arab Jamahiriya filed with the Registry of the Court on 31 August 1990 a separate "notification" of an agreement, entitled "Accord-Cadre sur le règlement pacifique du différend territorial entre la Grande Jamahiriya arabe libyenne populaire et socialiste et la République du Tchad", concluded at Algiers on 31 August 1989, in which the territorial dispute between the two States was referred to the Court for decision. But on 1 September 1990, an "application" was also filed with the Registry of the Court on behalf of Chad, instituting proceedings against Libya on the basis of the same "Accord-Cadre" of 1989 and, subsidiarily, on the basis of a prior treaty. At a later date, however, Chad considered that its application constituted a separate notification of the agreements invoked as titles

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234 S. Rosenne, op. cit., Vol. I, p. 311. In its reply to the objection of the Albanian Government, the United Kingdom Government went on to state that "Article 40 of the Statute merely defines the formal basis for action by the Court in a case where jurisdiction is established by Article 36(1) There is nothing in the Statute or the Rules of Court which prevents the proceedings being formally instituted by application, even though the jurisdiction of the Court is established by a 'reference' by the parties or by a 'special agreement'. Accordingly the Government of the United Kingdom, in bringing this matter before the Court by application, has, it is submitted, proceeded correctly." I.C.J. Pleadings, Corfu Channel, Vol. II, p. 18.

235 Judgment, 1948, I.C.J. Reports 1947-1948, p. 27.

of jurisdiction, and the Court accordingly decided that the procedure in the case should be determined by the Court on the basis of Article 46, paragraph 2, of the Rules.

4.62 From the procedural facts indicated in the Court's Order in the Territorial Dispute case, three points clearly emerge which are relevant for the present case. It should be observed, first, that two different ways (separate notification and application) were initially used by the parties for the institution of proceedings, both of them through unilateral acts, despite the fact that both parties invoked as the basis of the Court's jurisdiction the same agreement, the "Accord-Cadre" of 1989, although Chad also invoked, subsidiarily, another title to jurisdiction. Second, the common title of jurisdiction invoked by the parties, the "Accord-Cadre" of 1989, did not contain a particular provision as to the seisin of the Court. In accordance with the French text of this Agreement registered with the United Nations Secretariat, the dispute is defined in Article 1, while under Article 2 it was agreed that -

> "... à défaut d'un règlement politique à leur différend territorial, les deux parties s'engagent:
>
> a) à soumettre le différend au jugement de la Cour Internationale de Justice."

Finally, the "Accord-Cadre" of 1989 provides that "the two parties" ("les deux parties") refer the dispute to the Court, while the seisin of the Court was performed, as indicated above, by acts which were unilateral in character.

4.63 The question of the seisin of the Court was also dealt with in the Judgment of 25 March 1948 in the Corfu Channel, Preliminary Objection case. With regard to the Security Council resolution of 9 April 1947 in which it was recommended that "the United Kingdom and Albanian Governments should immediately refer this dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court[236]", the Court affirmed, in the first place, that although the bringing of the case before the Court "requires action on the part of the parties", the Security Council resolution "does not specify that this action must be taken jointly"[237]. And the Court stated that -

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236 Judgment, 1948, I.C.J. Reports 1947-1948, p. 26.

237 Ibid., p. 28.

> "... in the second place, the method of submitting the case to the Court is regulated by the texts governing the working of the Court as was pointed out by the Security Council in its recommendation.
>
> The Court cannot therefore hold to be irregular a proceeding which is not precluded by any provision in these texts[238]."

4.64 It may be concluded, therefore, in the light of the foregoing considerations, that when the parties agree to refer a dispute to the Court's decision, the jurisdiction of the Court is to be determined in accordance with the intention expressed in the terms of that agreement, in the light of its object and purpose. That is, in the present case, in accordance with the terms, object and purpose of the December 1987 Agreement and the Doha Agreement. On the other hand, the seisin of the Court is governed by Article 40, paragraph 1, of the Statute and the jurisprudence of the Court if no special provision on this matter has been agreed by the parties. In the present case, as indicated above, the manner of instituting proceedings was agreed in the Minutes signed on 25 December 1990 by the terms "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". Thus, as the Parties have not included such a special provision in the Doha Agreement, but have provided that the Parties may submit the matter to the Court, seisin of the Court is governed by Article 40, paragraph 1, of the Statute. Therefore, the Court has been duly seised by Qatar's Application filed with the Registry of the Court on 8 July 1991.

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238 Ibid.

CHAPTER V
OBSERVATIONS ON BAHRAIN'S CONTENTIONS

Introduction

5.01 In the preceding Chapter, Qatar has demonstrated that its Application is admissible and that the legal requirements have been satisfied to secure a basis of jurisdiction for the Court to entertain the disputes submitted by the Application.

5.02 In two communications to the Registrar of the Court, referred to in the Court's Order of 11 October 1991, Bahrain has stated that it contests the jurisdiction of the Court. Those communications are:

- a letter dated 14 July 1991 from Mohammed bin Mubarak Al-Khalifa, Minister of Foreign Affairs of Bahrain, to the Registrar;

- a letter dated 18 August 1991 from Mohammed bin Mubarak Al-Khalifa, Minister of Foreign Affairs of Bahrain, to the Registrar, to which were appended an Annex and several Attachments[239].

These documents raise the following arguments to show Bahrain's alleged lack of consent to the jurisdiction of the Court:

- that the Doha Agreement is not an international agreement;

- that the Doha Agreement is not a binding agreement because it does not comply with the requirements of Bahrain's Constitution; and

- that the Doha Agreement does not contain any consent by Bahrain that the Court could be seised unilaterally by Qatar.

These arguments will be dealt with in the order set out above in the following Sections. Incidentally, it may be noted that Bahrain has not contested either the existence of or the commitments made in the December 1987 Agreement.

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239 A further irregular communication (in a letter dated 16 September 1991 from the Minister of Foreign Affairs of Bahrain to the Registrar) has also been made but is not referred to in the Order of the Court.

5.03 As stated in the Court's Order of 11 October 1991, the Parties have agreed that the questions of jurisdiction and of admissibility should be separately determined before any proceedings on the merits. Qatar notes that some of the above-mentioned arguments might have the character of an issue concerning admissibility, although they were not expressly presented as such by Bahrain. Therefore, without entering into any issue of classification, they will be examined in this Chapter in connection with the question of jurisdiction to which they might relate.

SECTION 1. Bahrain's Denial that the Doha Agreement is an International Agreement

5.04 In order to contest the legal character of the Doha Agreement Bahrain has presented two arguments: first, that this Agreement has a political character; and second, that it is not in force.

A. The Alleged "Political Character" of the Doha Agreement

5.05 This first argument has been couched in the following terms:

> "The Minutes were not intended to reflect legal undertakings by the two sides but rather their political willingness to continue their efforts to achieve a brotherly mediated solution over the ensuing five months and, thereafter, if necessary, to revive their efforts to agree upon a joint submission to the Court[240]."

The argument is repeated further on:

> "In the circumstances, the Minutes of 25 December 1990 cannot be regarded as anything more than a political declaration. They certainly do not possess the quality of a legally binding international agreement sufficient to found the jurisdiction of the Court under Article 36(1) of the Statute[241]."

As can be seen, the allegation that the Doha Agreement is a "political" agreement, instead of a "legal" one, is merely asserted; it is not substantiated.

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240 See, Annex to Bahrain's letter of 18 August 1991, p. 3, para. 4.

241 See, Annex to Bahrain's letter of 18 August 1991, p. 5, para. 7.

5.06 The mere fact that the Doha Agreement took the form of "Minutes" does not deprive it of its quality as an international agreement under customary international law as reflected in the Vienna Convention on the Law of Treaties[242]. According to Article 2 of the Vienna 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."

In support of this view, the International Law Commission, in its commentary on that Article dealing with "less formal types of agreements", notes that -

> "... some names such as 'agreement', 'exchange of notes', 'exchange of letters', 'memorandum of agreement', or 'agreed minute' may be more common than others[243]."

5.07 The concept of political agreement or political declaration put forward by Bahrain is rather puzzling. Most international agreements have both a political and a legal character. To be relevant therefore, Bahrain's argument would have to be supported by proof that the Doha Agreement embodied only purely political undertakings. This concept of "political agreements" was studied in a thorough report by the late Professor Virally presented in 1983 at the Cambridge session of the Institut de droit international. In the final conclusions of the Rapporteur appended to the Institut's resolution this same point was made and was contested by no one:

> "7. - Commitments set forth in the text of an international treaty within the meaning of the Vienna Convention of 23 May 1969 are legal commitments unless it follows unquestionably from that text that the intention was to the contrary[244]."

5.08 The Doha Agreement unquestionably contains legal commitments. The language used could not be clearer in this regard:

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242 See, paras. 4.23-4.30 above.

243 Yearbook of the International Law Commission, 1966, Vol. II, p. 188, para. 3 (footnote omitted).

244 Annuaire de l'Institut de droit international, Vol. 60, II, 1984, p. 291.

"The following was agreed:

1) To reaffirm what was agreed previously between the two parties;

2) To continue the good offices ... between the two countries... . 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... Saudi Arabia's good offices will continue...

3) Should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration." (Emphases added.)

This text contains a reaffirmation of previous legal commitments, in particular those contained in the December 1987 Agreement, which is implicitly incorporated by reference, inter alia 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"; and that

- the status quo be respected.

The Doha Agreement also determined the scope of the disputes through the incorporation by reference of the Bahraini formula. It also provided that the International Court of Justice may be seised by the Parties. Finally, it gives precise indications as to the interrelationship of the two modes of settlement of the existing dispute (mediation and judicial settlement) and the way they are to coexist. There is no indication that these undertakings have a purely political character excluding their obvious legal nature.

5.09 As explained in Professor El-Kosheri's Opinion, the above approach to the interpretation of this text is fully consistent with that of the Arabo-Islamic legal tradition. In particular, the use of the past tense in an Arabic text of this kind shows that it contains obligatory undertakings[245].

5.10 In view of the above, Qatar maintains that the Doha Agreement constitutes an international agreement governed by international law.

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245 See, Professor El-Kosheri's Opinion, Annex III.1, Vol. III, pp. 266-267.

B. The Allegation that the Doha Agreement is not "In Force"

5.11 Bahrain has also alleged that the Doha Agreement has never come into force:

> "Notwithstanding the claim by Qatar that the Minutes entered into force on the date of their signature, 25 December 1990, any so-called 'agreement' could not have, and therefore has not, so entered into effect[246]."

Bahrain alleges that the Doha Agreement is not in force because Article 37 of its Constitution, providing for the enactment of a law for treaties concerning the territory of the State, has not been complied with[247]. Qatar maintains that the question of entry into force must be addressed according to public international law.

5.12 The position in customary international law is reflected in Article 24 of the Vienna Convention on the Law of Treaties which reads in part as follows:

> "1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
>
> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States."

5.13 In the present case, it is clear from the text of the Doha Agreement itself and from the surrounding circumstances that there is no provision concerning the entry into force of the Agreement. Paragraph 2 of Article 24 of the Vienna Convention is thus applicable and it must be examined whether the consent to be bound is established for the negotiating States.

5.14 The position of Qatar is that the Minutes signed on 25 December 1990 constitute an agreement in simplified form which entered into force upon signature. This position is supported by provisions of the Vienna Convention on the Law of Treaties which may be considered as declaratory of customary international law.

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246 This contention is made in the letter from the Permanent Representative of the State of Bahrain to the United Nations, dated 9 August 1991. (See, Attachment 8 of the Annex to Bahrain's letter dated 18 August 1991.)

247 See, Section 2 below for a more detailed discussion of this issue.

5.15 The Minutes were signed by the Ministers of Foreign Affairs of the three States concerned. According to Article 7 of the Vienna Convention:

> "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
>
> (a) ...
>
> (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
>
> 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;... ".

It follows from the above that Bahrain's Minister of Foreign Affairs was fully empowered to express the State of Bahrain's consent to be bound by the Doha Agreement.

5.16 Article 12, paragraph 1, of the Vienna Convention, which deals with consent to be bound by a treaty expressed by signature, reads as follows:

> "1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
>
> (a) the treaty provides that signature shall have that effect;
>
> (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
>
> (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation."

The commentary of the International Law Commission on the draft of this paragraph (which was adopted by the Vienna Conference with no change of substance) gives the following explanations:

> "Paragraph 1 of the article admits the signature of a treaty by a representative as an expression of his State's consent to be bound by the treaty in three cases. The first is when the treaty itself provides that such is to be the effect of signature as is common in

> the case of many types of bilateral treaties. The second is when it is otherwise established that the negotiating States were agreed that signature should have that effect. In this case it is simply a question of demonstrating the intention from the evidence. The third case, which the Commission included in the light of the comments of Governments, is when the intention of an individual State to give its signature that effect appears from the full powers issued to its representative or was expressed during the negotiation[248]."

5.17 Consent to be bound by ratification is treated as follows in Article 14 of the Vienna Convention:

> "1. The consent of a State to be bound by a treaty is expressed by ratification when:
>
> (a) the treaty provides for such consent to be expressed by means of ratification;
>
> (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
>
> (c) the representative of the State has signed the treaty subject to ratification; or
>
> (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation."

5.18 In the present case, the Doha Agreement contains no provision with regard to the consent to be bound. However, the Minutes were not signed with any condition express or implied that they were subject to ratification; and there was no limitation of the full powers of the signatories involved. In such circumstances, as aptly explained by Sir Ian Sinclair -

> "... the Convention, as adopted, makes no attempt to resolve the doctrinal dispute as to whether there is a presumption in favour of signature or ratification as a means of expressing a State's consent to be bound when the treaty is silent on the matter... In this respect, it may be said to have respected the principle of the procedural autonomy of the negotiating States[249]."

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248 Yearbook of the International Law Commission, 1966, Vol. II, p. 196, para. 3 (emphasis added).

249 Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd. ed., Manchester University Press, 1984, p. 41.

5.19 Therefore, either subparagraph (b) or (c) of Article 12, paragraph 1, of the Vienna Convention applies in the present case. If the latter applies, it must be taken into consideration that the Minutes were signed by Bahrain's Minister of Foreign Affairs who, under Article 7, paragraph 2, subparagraph (a), of the Convention, enjoys full powers ex officio. If Article 12, paragraph 1, subparagraph (b) applies, the text of the Doha Agreement itself provides clear evidence that ratification was not envisaged by the Parties. There can be no doubt that the Doha Agreement was to enter into force immediately. Before the Parties were allowed to seise the Court, a limited period of time was left to Saudi Arabia to exercise its good offices in an attempt to reach a settlement of the substance of the disputes. The fact that the Agreement was to be implemented immediately, and was in fact so implemented[250], confirms that the Agreement came into force upon signature.

5.20 In view of the above, and leaving aside for the moment any observations on that part of Bahrain's argument concerning Article 37 of Bahrain's Constitution (providing for the enactment of a law for territorial treaties), which will be dealt with in the next Section, Qatar submits that the Doha Agreement is an international agreement in simplified form which entered into force upon signature on 25 December 1990.

5.21 This is by no means an unusual conclusion. Every State enters into numerous agreements which come into effect from the date of their signature. This practice has also become common in the Arabo-Islamic legal tradition[251].

SECTION 2. Bahrain's Denial that the Doha Agreement is a Binding Agreement because of Lack of Compliance with the Requirements of Bahrain's Constitution

5.22 Bahrain has made reference to Article 37 of its Constitution of 1973 which reads in part as follows:

> "The Amir shall conclude treaties by decree and shall transmit them immediately to the National Council with the appropriate statement. A treaty shall have the force of a law after it has been signed, ratified and published in the Official Gazette.

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250 See, paras. 3.59-3.65 above.

251 See, Professor El-Kosheri's Opinion, Annex III.1, Vol. III, pp. 255-260.

> However, treaties... concerning the territory of the State, its natural resources or sovereign rights... shall come into effect only when made by a law[252]."

Bahrain recognizes that in 1975 the National Council was dissolved by Amiri Decree, but states that the legislative power of the National Council was transferred to the Amir and the Council of Ministers by Amiri Order No. 4 of 1975.

5.23 Bahrain alleges that these constitutional requirements have not been satisfied in the present case and that this would have been well-known to Qatar. Bahrain also alleges that Bahrain's Minister of Foreign Affairs was well aware of such constitutional requirements, which were provided for in the draft special agreement submitted by Bahrain on 19 March 1988, arguing that -

> "... it is scarcely to be imagined that he would have entered into a binding agreement with Qatar on such matters without ensuring that Bahrain's constitutional requirements had been or would be met[253]."

According to Bahrain, therefore -

> "The non-satisfaction of these requirements brings the situation within the terms of Article 46 of the Vienna Convention on the Law of Treaties[254]."

5.24 The whole reasoning of Bahrain is based on a confusion between the procedure relating to the conclusion of a treaty, which is governed by international law, and the effect of a treaty in internal law, which is regulated by constitutional law. The Vienna Conference on the Law of Treaties treated the problems of the interrelationship between international law and internal law in treaty-making in depth and adopted a general framework for solution of such problems.

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252 See, Annex to Bahrain's letter of 18 August 1991, pp. 13-14, para. 16.

253 Ibid., p. 15, para. 18.

254 Ibid.

A. The General Framework of the Vienna Convention

5.25 According to the customary principles on the law of treaties, as reflected in the Vienna Convention, a clear distinction is made between the conclusion of treaties and their effect in internal law. The requirements for the conclusion of treaties are set out in Part II - "Conclusion and entry into force of treaties". In Part III - "Observance, application and interpretation of treaties" - Article 27, dealing with "Internal law and observance of treaties", reads as follows:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

Finally, in Part V - "Invalidity, termination and suspension of the operation of treaties" - Article 46 provides as follows with regard to the "Provisions of internal law regarding competence to conclude treaties":

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

5.26 It is clear from this general framework that internal law is taken into account only in exceptional circumstances ("A State may not invoke... unless" (emphases added)) and in extremely precise conditions:

- as a means to invalidate the treaty;
- where a provision of internal law regarding competence to conclude the treaty was violated;
- where that violation is manifest;
- and where it concerned a rule of its internal law of fundamental importance.

B. The Conclusion of a Treaty is governed by International Law

5.27 The principle that conclusion of a treaty is governed by international law and procedures was adopted by the International Law Commission, which gave its preference to the group of jurists which -

> "... considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law[255]."

5.28 As shown in the preceding Section, the Doha Agreement was concluded in simplified form. The Minutes were signed by the Ministers of Foreign Affairs of the three States involved. According to the rules set out in Article 7, paragraph 2, subparagraph (a), together with either Article 12, paragraph 1, subparagraph (b) or subparagraph (c), of the Vienna Convention, the Ministers represented their respective States ex officio and needed no special powers to give the consent of their respective States to be bound immediately by signature of the said Agreement.

5.29 The International Law Commission was particularly attentive to international agreements which are binding upon signature:

> "Admittedly, in the case of treaties binding upon signature and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked. But even in those cases the Government had the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any

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255 Yearbook of the International Law Commission, 1966, Vol. II, p. 241, para. 5.

failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned[256]."

C. The Requirements of Bahrain's Constitution

5.30 The text of Article 37 of Bahrain's Constitution states that "The Amir shall conclude treaties by decree...[257]". Bahrain's Constitution is not unusual in that, as is the case with most constitutions, it does not include any special provision relating to agreements in simplified form, in spite of their growing frequency of usage.

5.31 The text of Article 37 deals only with the procedures for introduction of treaties into internal law and, in consequence, their internal effect. Two procedures are envisaged. The first procedure is a decree transmitted to the National Council. The treaty shall have the force of law after it has been signed, ratified and published in the Official Gazette. The second procedure requires a law in order to give internal effect to the treaty.

5.32 The difference between these procedures for introduction of treaties into internal law seems to have been rendered rather minimal, in view of the fact that in 1975 the National Council was dissolved by Amiri Decree No. 14 of 1975 and its legislative power was transferred to the Amir and the Council of Ministers by Amiri Order No. 4 of the same year[258].

5.33 Whatever constitutional procedure should have been followed by Bahrain in relation to the Doha Agreement, it must be emphasized that Bahrain's Constitution deals only with problems relating to the procedures for introduction of the treaty into internal law and the internal effect of such treaties. As far as Qatar is aware, the Constitution does not deal with the procedure for the conclusion of treaties on the international plane. Moreover, the Constitution does not divide the treaty-making power between two organs. Nowhere is it provided, as in some other constitutions, that another organ (usually the Parliament) has to authorize the Head of State to conclude certain categories of treaties, with the effect that these treaties cannot be concluded without the enabling consent given

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256 Yearbook of the International Law Commission, 1966, Vol. II, p. 242, para. 8.

257 See, para. 5.22 above.

258 See, Annex to Bahrain's letter of 18 August 1991, p. 14, para. 16.

by that organ. Bahrain's Constitution is only concerned with the internal effect of treaties, where treaty-making power is concentrated in the executive, the sole organ qualified to bind internationally the State. Thus, it is not a question here of a procedure opposing two distinct political organs of the State, where one is a counter-balance to the other. With the 1975 modification of the Constitution the executive organ in Bahrain also exercises legislative power. It would thus appear that the constitutional difficulty alleged by Bahrain is self-generated. Such a situation was envisaged in the 1966 report of the International Law Commission:

> "The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. Confronted with a challenge under national law of the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere[259]."

D. Article 46 of the Vienna Convention is not Relevant in the Present Case

5.34 Article 46 of the Vienna Convention is presented by Bahrain as a bar to the effectiveness of the Doha Agreement. Article 46, paragraph 1, reads in part as follows:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law...". (Emphasis added.)

As shown above, Bahrain's contention is without substance. The present case does not raise any problem about the consent to be bound, which was correctly expressed by the internationally competent organ, or any problem of conclusion on the international plane of a treaty, a subject over which Bahrain's Constitution is silent. Rather, Bahrain has raised a problem of the introduction into internal law of an international agreement already properly concluded which is not relevant in the present case. Thus, Article 46 of the Vienna Convention is just not applicable.

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259 Yearbook of the International Law Commission, 1966, Vol. II, p. 242, para. 9.

5.35 Therefore, Qatar submits that there is no reason to examine the other conditions provided in Article 46 of the Convention which, in any case, are not met. However, it must be pointed out that the allegation by Bahrain that Qatar should have known about these constitutional procedures because they were published in the Official Gazette of the State of Bahrain, fails to appreciate the very reason why Article 46 was adopted in its present wording. It is extremely difficult for any State to know exactly how another State interprets its own Constitution. In his second report to the International Law Commission on the law of treaties, Sir Humphrey Waldock, the Special Rapporteur, stated as follows in this regard:

> "... neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that 'political' treaties or treaties of 'special importance' should be submitted to the legislature; some constitutions do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the constitutional provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive, as in the case of the United States Constitution. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in the constitution; and this use of the treaty-making power is only reconciled with the letter of the constitution either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgement of the executive, whose decision may afterwards be challenged in the legislature or in the courts[260]."

5.36 The fact that the issue raised by Bahrain concerns only the internal effect of treaties has further consequences. First, Article 27 of the Vienna Convention applies without restriction:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...".

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260 Yearbook of the International Law Commission, 1963, Vol. II, p. 43, para. 7.

Second, in the event that it is alleged that there is a conflict between international commitments and internal procedures, the former must prevail. As was said by the Permanent Court of International Justice in the case concerning the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory:

> "... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force[261]."

Finally, it is also most improbable that the Doha Agreement was signed without the consent of the highest authorities in Bahrain as the Prime Minister, representing the Head of State, the Minister of Foreign Affairs and the Minister for Legal Affairs were all in attendance at the GCC summit.

5.37 In conclusion, Qatar submits that the denial by Bahrain that the Doha Agreement is a binding agreement because of an alleged lack of compliance with the requirements of Bahrain's Constitution is without any foundation.

SECTION 3. Bahrain's Denial that the Text of the Doha Agreement contains Consent by Bahrain to the Unilateral Seisin of the Court by Qatar

5.38 Bahrain has presented its position in two arguments. First, it alleges that it would never have accepted that the Court could be seised except by a special agreement. Second, it disputes, on various grounds, that the Bahraini formula embodied an agreement as to the subject and scope of the disputes. These two arguments will be examined in turn below.

A. Bahrain's Allegation that it never accepted that the Court could be seised except by a Special Agreement

1. Bahrain's contention that the Mediation could only lead to a special agreement

5.39 In several instances Bahrain insists on the alleged fact that it has never agreed to anything except to try to reach a special agreement between the Parties

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261 Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24.

to submit their differences to the Court. Thus, in the Annex to Bahrain's letter to the Court of 18 August 1991, Bahrain asserts that -

> "The Minutes were not intended to reflect legal undertakings by the two sides but rather their political willingness to continue their efforts to achieve a brotherly mediated solution over the ensuing five months and, thereafter, if necessary, to revive their efforts to agree upon a joint submission to the Court[262]."

Bahrain also asserts that -

> "The discussions that have been taking place within this framework [the Saudi Mediation] have envisaged the submission of these differences to the Court jointly by the Parties[263]."

In its irregular communication to the Registrar dated 16 September 1991, Bahrain reiterated this argument -

> "It must again be emphasised that in all the long negotiations between the Parties, and in the positions they had assumed vis-à-vis the Mediator, the need to reach agreement on a joint submission to the Court, under a Special Agreement, had been accepted. The unilateral application by Qatar thus rejects this common understanding, and as a matter of principle it is unacceptable to Bahrain."

5.40 Bahain fails to mention a basic element of the Mediation, that is - to use the wording of the Doha Agreement - the reaffirmation of "what was agreed previously between the two parties". It is necessary, therefore, to repeat the proposals set out in the identical letters dated 19 December 1987 from King Fahd, which were accepted by Bahrain and Qatar, a fact which Bahrain does not deny:

> "Firstly: 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.
>
> ...
>
> Thirdly: Formation of a committee comprising representatives of the States of Qatar and Bahrain and of the Kingdom of Saudi Arabia for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the

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262 See, Annex to Bahrain's letter of 18 August 1991, p. 3, para. 4.

263 See, Annex to Bahrain's letter of 18 August 1991, p. 1, para. 1.

> dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued.
>
> Fourthly: The Kingdom of Saudi Arabia will continue its good offices to guarantee the implementation of these terms[264]."

This text sets out two obligations with regard to submitting the case to the Court. The first one (contained in the first item) describes the ultimate stage to be reached as a final and unqualified obligation, which might be called an obligation de résultat. Such an obligation is couched in mandatory language which leaves no doubt as to the ultimate stage which the Parties agreed to reach: a final ruling of the Court.

5.41 The second obligation contained in the third item of the Saudi proposal is of another nature. It leaves to the Parties the choice of the means to achieve the commitment set out in the first item of the proposal. To this end a Tripartite Committee was to be established to approach the Court and to satisfy the necessary requirements to have the dispute submitted to the Court. The choice of procedural means or method by which the case would be submitted to the Court - unilateral application, separate applications, special agreement or otherwise - was left open. The Parties were thus only submitting themselves to an obligation to negotiate in good faith in order to achieve the seisin of the Court in conformity with Article 40 of the Statute of the Court as applied in the Court's jurisprudence[265].

5.42 Bahrain's contention that the Parties only committed themselves to negotiate a special agreement is therefore a misrepresentation of what had been agreed. The choice of method to seise the Court was entirely open. It is true that Qatar took the initiative and tried, although ultimately in vain, throughout the whole of 1988 to reach a special agreement with Bahrain. However, in view of the deadlock which was reached, Qatar was entitled to expect that Bahrain would comply with its undertaking to go to the Court, by means other than a special agreement. That was to be achieved by the Doha Agreement, in which no reference is made to the conclusion of a special agreement, thus leaving the Parties free to seise the Court by the means allowed in Article 40, paragraph 1, of the Statute of the Court.

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264 Annex II.15, Vol. III, pp. 104.

265 See, paras. 3.31-3.32 above.

2. Bahrain's contention that the Doha Agreement only contemplates a joint submission to the Court on the basis of the Arabic expression "al-tarafan"

5.43 Another contention of Bahrain is that the translation given by Qatar of the Doha Agreement misrepresents the Arabic original. The Qatari translation reads as follows:

> "After the end of this period, the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula...".

Bahrain contends that the words in Arabic "al-tarafan" should be translated properly by "the two parties"[266]. Bahrain alleges that, consequently, any reference of the disputes to the Court should be made by both States acting jointly. Such a contention is without foundation for the reasons given below.

a) Linguistic reasons

5.44 As will be seen from the expert opinions produced by Qatar with this Memorial, this view is, to say the least, highly controversial. In his linguistic opinion dated 4 January 1992, Professor Ayyad has shown, with reference to the Koran itself, that the use of the dual noun in the Arabic language does not necessarily mean joint action but can equally mean action by one party or separate action by each of the two parties concerned[267].

5.45 Additionally, Professor El-Kosheri shows that the combined effect of the use in the Doha Agreement of the word "may" and of the verb "submit" used in the singular rather than in the plural indicates clearly, from a linguistic point of view, that each party was at liberty individually to submit to the Court its claims falling within the scope of the Bahraini formula if, by the end of the specified time limit, there had been no amicable solution reached as a result of the Saudi Mediation[268].

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266 See, Annex to Bahrain's letter of 18 August 1991, pp. 6-9, paras. 8-10.

267 See, Professor Ayyad's Opinion, Annex III.2, Vol. III, p. 326-330.

268 See, Professor El-Kosheri's Opinion, Annex III.1, Vol. III, p. 286 and pp. 297-298.

5.46 The artificial character of Bahrain's contention is demonstrated by the fact that Bahrain itself has translated the words "al-tarafan" by "Parties" and not "the two Parties", for example in 17 places in what is referred to as the English version of the "original draft Bahraini Special Agreement of 19th March, 1988, as amended in October 1988" attached to the Annex of Bahrain's letter of 18 August 1991 and in the Bahraini formula[269]. This proves that a dual noun in Arabic can correctly be translated by a mere plural.

5.47 In Arabic legal language the use of the dual to indicate the presence of two persons does not mean that they have to take action together, since the context may equally well indicate that each one of the two persons may or has to act separately. This is particularly true when one of the two persons adopts a position different from the other, as in the present case, where Qatar's claims to the Court are necessarily different from Bahrain's claims. In such circumstances, a single conjunctive action is impossible. The only possibility is for each party to seise the Court with a separate set of claims.

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

b) Reasons taken from the general context of the Agreement

5.49 More significant is the fact that, in the context of the Agreement as a whole, Bahrain's interpretation of paragraph 2 of the Doha Agreement does not make sense at all:

- What would be the point of proclaiming that if after a further five months the Mediation failed to reach a settlement of the disputes on the merits the Parties may seise the Court jointly after negotiating a special agreement ? Such an interpretation makes no sense in view of the fact that the Mediator's lasting efforts to bring the two Parties to an agreed text of a special agreement had failed and that to put an end to the deadlock reached over this method of referring the disputes to the Court, Qatar,

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269 As noted in paras. 3.48-3.49 above, this document was never received by Qatar.

albeit reluctantly, eventually accepted the Bahraini formula, and signed the Doha Agreement to refer the disputes to the Court.

- Moreover, if the sole commitment of the Parties under the Doha Agreement was to agree to meet again to resume negotiations to try to reach a special agreement, the use of the words "may submit" does not make sense. This provision clearly allows each of the Parties to seise the Court after the expiration of the relevant period.

- Again, why provide that if the Saudi good offices succeed, the case shall be "withdrawn from arbitration", if the sole commitment of the Parties in the Doha Agreement is to resume negotiations to make a special agreement ?

- After the acceptance by Qatar of the Bahraini formula, the only point of substance remaining in conflict between the Parties was - according to Bahrain - the problem of a debatable article which would have reduced the Parties' freedom to submit certain evidence to the Court[270]. If Bahrain's (re)construction of the facts were right, and if the purpose of the Minutes were to induce the Parties to resume negotiations to finalize a special agreement, it is certain that the Minutes would have been phrased totally differently.

5.50 It cannot but be concluded from the above that the general interpretation proposed by Bahrain effectively renders meaningless three-quarters of the Doha Agreement. As stated by Charles De Visscher in his book Problèmes d'interprétation judiciaire en droit international public:

> "Une interprétation qui conduit à enlever à un traité toute signification juridique quelconque ne sera jamais accueillie, en l'absence d'une raison absolument décisive militant en ce sens[271]."

The Great Britain-United States Mixed Claims Commission, in its decision of 22 January 1926 in the Cayuga Indians case, made the same point:

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270 See, paras. 5.83 et seq. below.

271 Paris, Pedone, 1963, p. 84.

> "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do[272]."

c) General rule of interpretation of a treaty

5.51 According to Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties -

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

5.52 The first paragraph of the Doha Agreement contains a clear reaffirmation of "what was agreed previously between the two parties". As explained above, that provision refers to the formal commitment to seise the Court embodied in the December 1987 Agreement.

5.53 In the second paragraph it is stated that the good offices of Saudi Arabia will continue until 15 May 1991 and that "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...". This can only mean that if the last effort by the Mediator to solve the substance of the disputes should prove unsuccessful, the Parties, each on their side and with their own claims under the Bahraini formula, are allowed, after 15 May 1991, to seise the Court.

5.54 At the end of the second paragraph and in the third paragraph it is provided that "Saudi Arabia's good offices will continue during the submission of the matter to arbitration" and that "Should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration". Such wording clearly envisages that, after 15 May 1991, the Court can be seised by either Party, each with its own claims under the Bahraini formula, but that a settlement out of Court, under the auspices of Saudi Arabia, is always possible, and that, should a solution acceptable to the two Parties be reached, the case would be withdrawn from the Court at their request. Such procedure of settlement out of Court is not without precedent.

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272 United Nations, Reports of International Arbitral Awards, Vol. 6, p. 184.

5.55 The International Court itself has, on various occasions, indicated that several methods of peaceful settlement can be pursued at the same time. In its Judgment of 19 December 1978 in the Aegean Sea Continental Shelf case, the Court said:

> "Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued pari passu. Several cases, the most recent being that concerning the Trial of Pakistani Prisoners of War (I.C.J Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function[273]."

In the United States Diplomatic and Consular Staff in Tehran case, the Court repeated its Judgment of 19 December 1978:

> "... the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued pari passu[274]."

5.56 The wording of the second and third paragraphs of the Doha Agreement make fanciful the contention of Bahrain that the "differences between Bahrain and Qatar... still remain the subject of a mediation process which does not permit any unilateral application to the Court by the State of Qatar[275]". The Doha Agreement, far from imposing an obligation to exhaust the mediation process - otherwise than up to May 1991 - establishes, on the contrary, a system with two parallel lanes of settlement of the dispute and provides for the conditions in which the one can affect the other. Instead of providing that the continuation of the mediation process after 15 May 1981 prohibits the seisin of the Court, the text provides that the success of the Mediation after reference to the Court will lead to termination of the Court's proceedings.

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273 Judgment, I.C.J. Reports 1978, p. 12, para. 29.

274 Judgment, I.C.J. Reports 1980, p. 23 para. 43.

275 See, Bahrain's letter to the Registrar of 14 July 1991, p. 1.

d) Preparatory works

5.57 Article 32 of the Vienna Convention on the Law of Treaties provides as follows with respect to supplementary means of interpretation:

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

As the Court considered it necessary to say:

> "... the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words[276]."

Qatar submits therefore that it is not necessary to have recourse to such supplementary means of interpretation, as the conditions laid down by Article 32 of the Vienna Convention and by the Court are not fulfilled in the present case. The Arabo-Islamic legal tradition is in conformity with this approach[277].

5.58 An account of the circumstances of the conclusion of the Doha Agreement has been given above[278] and it is unnecessary to repeat it again here. It should be noted, however, that the so-called Saudi Arabian draft, referred to by Bahrain,

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276 Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8.

277 See, Professor El-Kosheri's Opinion, Annex III.1, Vol. III, pp. 264-269.

278 See, paras 3.53-3.56 above.

was never shown to Qatar[279]. As to the Omani draft[280], which was eventually amended to become the Doha Agreement, its text makes abundantly clear that it never envisaged any further negotiations to bring the Parties to finalize a special agreement or any "joint submission" by the Parties. Rather it clearly envisaged seisin of the Court, and the amendments ultimately adopted neither modified that aim nor introduced any hint of the necessity of a special agreement. Qatar submits therefore that, contrary to Bahrain's contention, the preparatory works do not alter "the meaning resulting from the application of article 31" of the Vienna Convention, that is the interpretation given by Qatar.

3. Bahrain's contention as to the meaning of the words "the proceedings (or the procedures) arising therefrom"

5.59 Bahrain contends that:

> "The phrase 'and the proceedings arising therefrom', which should more accurately have been translated as 'the procedures arising therefrom', was inserted in the Minutes at the initiative of Bahrain in the final stages of the drafting of the Minutes, and was intended to refer precisely to the further steps that would need to be taken by the two parties jointly to bring the case to the Court[281]."

According to this argument, the "procedures" referred to in the Minutes refer to a new round of negotiations between the Parties with a view to reaching a special agreement to bring the case to the Court jointly.

5.60 This argumentation, whether the right translation of the Arabic word be "proceedings" or "procedures", does not fit the context. In context, it is clear that this phrase refers to the steps which are required for a case to be brought before the Court. Paragraph 2 of the Doha Agreement reads in part as follows:

> "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" [Qatar's translation] or "... the procedures arising

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279 See, Annex to Bahrain's letter of 18 August 1991, pp. 7-8, para. 10, and Attachment 2 thereto.

280 See, Attachment 3 to the Annex to Bahrain's letter of 18 August 1991.

281 See, Annex to Bahrain's letter of 18 August 1991, p. 13, para. 15.

> therefrom" [Bahrain's translation[282]] or "and with the procedures consequent on it" [Dr. Holes' translation[283]].

The procedures arising therefrom were thus those relating to and arising from the seisin of the Court in accordance with its Statute and Rules. This interpretation is also that which is adopted by a reading made from an Arabo-Islamic legal approach[284]. Should the Parties have agreed to have recourse to a further round of negotiations in order to arrive at a special agreement, the Doha Agreement would not have failed to spell out such a major requirement.

B. Bahrain's Denial that the Bahraini Formula is an Agreement on the Subject of the Disputes to be submitted to the Court

5.61 Bahrain contests the statement made by Qatar in paragraph 40 of its Application that "By virtue of Qatar's acceptance of the Bahraini formula... the Parties are now also agreed upon the subject and scope of the disputes to be referred to the Court". According to Bahrain -

> "Qatar thereby recognises that its attempt to establish the jurisdiction of the Court must include a demonstration that the two sides have agreed upon the subject and scope of the dispute to be referred to the Court. However, Qatar completely fails to provide this demonstration. For Qatar to establish that it 'accepted' the 'Bahraini Formula' it must first show that there was a Bahraini 'offer' which was still open for Qatar to accept and, second, that the 'offer' which Qatar 'accepted' was the 'offer' which Bahrain had made. Qatar cannot meet either condition[285]."

Bahrain then asserts that when the Bahraini formula was proposed at the November 1988 meeting of the Tripartite Committee[286], it was not agreed to by Qatar, noting that at the December Meeting of the Tripartite Committee Qatar had proposed an amended version of the formula to be accompanied by two annexes, in which each State would set out its own claims. Since then, Bahrain

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282 Ibid.

283 See, Attachment 1(b) to the Annex to Bahrain's letter of 18 August 1991.

284 See, Professor El-Kosheri's Opinion, Annex III, Vol. III, pp. 273-278.

285 See, Annex to Bahrain's letter of 18 August 1991, p. 10, para. 11.

286 Qatar has shown that this assertion is not correct. The truth is that the Bahraini formula ("Question") was transmitted by the Heir Apparent of Bahrain to the Heir Apparent of Qatar on 26 October 1988. See, paras. 3.48-3.49 above.

notes, the Tripartite Committee did not meet again, and the Mediator resumed negotiations on the substance of the disputes[287].

5.62 In view of the above, according to Bahrain -

> "... it is certainly impossible to see in these developments the survival of the Bahraini Formula for nearly three years as an 'offer' capable of 'acceptance', without intervening negotiation, as an essential element in the presentation of a unilateral application[288]."

Finally, Bahrain argues that -

> "... the wording of the Bahraini Formula... does not lend itself to a unilateral application. The text begins with the words 'The parties request the Court'... the Bahraini question was presented as part of a draft agreement for the joint submission of the case to the Court. It did not foresee, and therefore could not apply to, a unilateral submission by way of application[289]."

5.63 Bahrain's argument may be divided into three propositions:

- that the Bahraini formula had lapsed as an offer;

- that its acceptance by Qatar is not sufficient to establish acceptance of the subject and scope of the dispute to be submitted to the Court; and

- that its text was devised for a special agreement and does not fit a unilateral application.

These three contentions will be examined in turn below (subsections 1, 2 and 3). Thereafter, Qatar will examine Bahrain's contentions that Qatar's unilateral application prevents Bahrain from seising the Court and that it would allow Qatar to submit certain evidence in an inadmissible manner (subsections 4 and 5).

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287 See, para. 3.52 above.

288 Annex to Bahrain's letter of 18 August 1991, p. 12, para. 13.

289 Ibid., p. 12, para. 14.

1. Bahrain's contention that the Bahraini formula had lapsed as an offer

5.64 This argument is quite surprising for two reasons. First, there is no evidence that Bahrain's "offer" of the text of the Bahraini Formula was ever withdrawn. It will be recalled that the Bahraini formula was first transmitted, on a separate sheet, during a meeting in Doha on 26 October 1988 between the two Heirs Apparent of Qatar and Bahrain. It is true that Qatar made a counter-proposal at the meeting of the Tripartite Committee on 6 December 1988 proposing amendments to the formula and suggesting that each State should specify in a separate annex to the formula the matters of difference which it wished to submit to the Court. The text of the signed minutes of this Meeting states:

> "The Bahraini delegation stated that the Qatari proposal that there be two separate annexes would be studied along with the Qatari amendment of the general formula of the proposed Bahraini question. Therefore, the Bahraini delegation asked for enough time to study the proposed amendment[290]."

Hence, it is Bahrain who requested time to study Qatar's proposal. It can indeed be considered that two years was quite sufficient for Bahrain to make up its mind. However, Bahrain made no reply to Qatar's proposal. Nor on the other hand did it ever notify Qatar that the formula no longer represented its own position. In view of this, and in spite of its reservations on the wording of the Bahraini formula, but in order to allow reference of the disputes to the Court, Qatar decided to accept the formula and informed Bahrain of this at the GCC summit meeting in Doha in December 1990. There is nothing in this sequence of events which would lead to the slightest suspicion that the Bahraini formula had lapsed as an offer.

5.65 The second reason why Bahrain's position about the alleged lapse of the offer is untenable, is that the Doha Agreement that was signed by Bahrain makes a formal reference to the Bahraini formula and its acceptance by Qatar. Bahrain was obviously fully aware of the content of the Bahraini formula and if the formula had lapsed or if Bahrain had had reservations about the possibility of Qatar accepting the formula, Bahrain should have raised such major objections at the time. On the contrary, Bahrain says that the addition of the reference to the

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290 See, Annex II.31, Vol. III, p. 202.

Bahraini formula in the Omani draft was made at the request of Bahrain[291]! There is thus no logic whatsoever in Bahrain's contention on this matter.

2. Bahrain's contention that the acceptance by Qatar of the Bahraini formula is not sufficient to establish acceptance of the subject and scope of the disputes to be submitted to the Court

5.66 To understand Qatar's initial reservations about the Bahraini formula, it suffices to recall what has been narrated in paragraphs 3.48-3.50 above. In spite of these reservations, Qatar decided to accept the Bahraini formula so that the existing disputes between the two States could finally be solved by the Court. Qatar made no reservations whatsoever in accepting the formula. It is certain that the formula is wide; it is a broad framework, certainly broad enough to allow each State to present to the Court its own claims. It will then be for the Court to decide on their admissibility and merit.

5.67 In view of the above, Bahrain can hardly claim that Qatar has not proved that the "offer" which Qatar "accepted" was the offer which Bahrain had made[292]. It is clear, therefore, that the offer contained in the Bahraini formula, which represented Bahrain's views, has been accepted by Qatar and is thus now binding on both States.

3. Bahrain's contention that the text of the Bahraini formula was devised for a special agreement and does not fit a unilateral application

5.68 This further contention again fails to take account of the true nature of the Doha Agreement. It is not disputed that the Bahraini formula was first devised to be inserted in a special agreement. But what has been achieved by the Doha Agreement is an independent agreement to allow the seisin of the Court on the basis of that text ("The Parties request the Court to decide..." (Emphasis added.)). The difference between the Doha Agreement and a special agreement or a compromissory clause is accordingly slight.

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291 See, p. 12 of the Opinion of Dr. Holes dated 7 August 1991, Attachment 5 to the Annex to Bahrain's letter of 18 August 1991.

292 See, Annex to Bahrain's letter of 18 August 1991, p. 10, para. 11.

5.69 The Doha Agreement incorporates the Bahraini formula in the same way as if it had been included in a special agreement. By virtue of their agreement on the Bahraini formula, the Parties have agreed upon the subject and scope of the disputes to be referred to the Court. What is left to be determined in such a broad framework - and would have been left in any event had the Parties agreed on a special agreement containing that formula - is the formulation by each Party of its own claims. Such claims cannot be formulated except by a unilateral presentation by each Party.

5.70 This is by no means the first time that the Court has been faced with situations similar to the present one. Thus, in the case concerning the Legal Status of the South-Eastern Territory of Greenland, both Norway and Denmark transmitted to the Court separate applications instituting proceedings. For each State the basis for jurisdiction was the optional clause to which it had subscribed. The Court was thus simultaneously seised by two applications. The Court noted the following in its Order of 2 August 1932:

> "Whereas it follows that both the Norwegian and Danish applications are directed to the same object;
>
> Whereas the situation with which the Court has to deal closely approximates, so far as concerns the procedure, to that which would arise if a special agreement had been submitted to it by the two Governments, parties to the dispute, indicating the subject of the dispute and the differing claims of the Parties;
>
> Whereas, in any case, the two applications should be joined and the two applicant Governments held to be simultaneously in the position of Applicant and Respondent[293]."

5.71 In the Asylum case the parties were faced with the following situation. By an agreement entitled the Act of Lima, the Colombian and Peruvian governments had agreed as follows:

> "First:
>
> They have examined in a spirit of understanding the existing dispute which they agree to refer for decision to the International Court of Justice, in accordance with the agreement concluded by the two Governments.

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293 P.C.I.J., Series A/B, No. 48, p. 270.

Second:

> The Plenipotentiaries of Peru and Colombia having been unable to reach an agreement on the terms in which they might refer the dispute jointly to the International Court of Justice, agree that proceedings before the recognized jurisdiction of the Court may be instituted on the application of either of the Parties without this being regarded as an unfriendly act toward the other...[294]".

In its application, the Colombian Government requested the Court to answer two questions. In its rejoinder, Peru presented a counter-claim which Colombia asserted was not admissible because of its lack of direct connexion with the application of the Colombian Government. Eventually the Court found the counter-claim admissible, the direct connexion being clearly established[295]. In that case, the Act of Lima was thus considered less as a "special agreement" than as a framework within which to allow either party to seise the Court unilaterally, the precise subject of the dispute being thus defined by the application of Colombia and by the counter-claim of Peru.

5.72 Another case in point is the case concerning the Arbitral Award Made by the King of Spain on 23 December 1906. In this case Honduras and Nicaragua reached an agreement at Washington by virtue of which they undertook to submit -

> "... 'to the International Court of Justice, in accordance with its Statute and Rules of Court, the disagreement existing between them with respect to the Arbitral Award handed down by His Majesty the King of Spain on 23 December 1906, with the understanding that each, in the exercise of its sovereignty and in accordance with the procedures outlined in this instrument, shall present such facets of the matter in disagreement as it deems pertinent'[296]."

Both States attached to the agreement as appendices A and B statements about their respective positions in resorting to the Court. No problem arose subsequently.

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294 Judgment, I.C.J. Reports 1950, p. 268.

295 Ibid., pp. 280-281.

296 Judgment, I.C.J. Reports 1960, p. 203.

5.73 Although none of the three cases just quoted is a precise precedent for the present situation, they illustrate the flexibility of practice where determination of the precise scope of the dispute has been made in various documents: either in two separate applications which are subsequently joined by the Court, or by an agreement, insufficient by itself, which is completed by the subsequent applications of the parties or by one application and a counter-claim.

5.74 In conclusion, it is submitted that the Bahraini formula, in spite of its wide champ d'application, is perfectly adequate as far as the definition of the scope and the subject of the disputes is concerned. It is indeed rather extraordinary that Bahrain, having drafted and proposed that formula, now finds it inadequate. Whether the formula is inserted in a special agreement or in an agreement which is the basis of unilateral applications makes no difference. In both cases the Court can exercise its jurisdiction on the basis of the agreement of the parties on the scope and subject of the disputes.

4. Bahrain's contention that Qatar's unilateral application prevents Bahrain from seising the Court with its own claims

5.75 On several occasions Bahrain has accused Qatar of attempting -

> "... through a unilateral application, to shape the case as it wished, notwithstanding the evident differences on the matter between the two parties",

instead of trying to find -

> "... a formula that would have given to each party the opportunity to present its own case within the framework of a joint submission[297]."

The same point is made again as follows:

> "The terms of the question - described by Qatar as the 'Bahraini Formula' ...- were formulated by Bahrain in 1988 so as to permit each side to bring to the Court, within the framework of a joint submission, the issues on which it considered itself to be in dispute with the other. Qatar, in its Application, has identified only those issues which suit it[298]."

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297 See, Annex to Bahrain's letter of 18 August 1991, p. 3, para. 4.

298 Ibid., p. 4, para. 5.

Thus, Bahrain claims that "the limits of the proceedings are set by the unilateral application of Qatar and, in particular, the Conclusion thereto[299]". Bahrain alleges it has been precluded from presenting its own claims such as "the rights of Bahrain in the area of Zubarah[300]" "since an item of this kind does not naturally fall within the concept of counter-claim as covered by Article 80 of the Rules[301]."

5.76 In spite of the explanation given by Qatar in the letter of the Agent of Qatar to the Registrar of 31 August 1991, Bahrain still maintains in the letter to the Registrar of 16 September 1991 that "it is by no means clear that Bahrain would be free to raise the question of Zubarah by way of counter-claim[302]".

5.77 These statements have already been dealt with in the preceding subsection. In particular, there is no round reason why the Bahraini formula, if it had been inserted in a special agreement, "would have given to each party the opportunity to present its own case[303]", but would not have the same effect when inserted in the Doha Agreement. It is also surprising that Bahrain should now allege that the formula which it itself proposed is now regarded as unsuitable to cover its own claims.

5.78 In any event, being incorporated by reference in the Doha Agreement and specifically "accepted by Qatar", the formula binds Qatar as well as Bahrain. It has been shown in the preceding Chapter that there is an inherent aspect of reciprocity in the Doha Agreement in that each Party may submit its claims to the Court[304]. Neither Party can now object to a claim made by the other if it comes within the formula. Of course, if a claim is put forward which one Party alleges is an admissible claim coming within the formula, and if the other maintains that it is not, it is then for the Court to decide, after having considered the arguments of the Parties, whether it is an admissible claim.

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299 Ibid.

300 Ibid.

301 Ibid., p. 5, para. 6.

302 See, Bahrain's letter of 16 September 1991, p. 1.

303 See, Annex to Bahrain's letter of 18 August 1991, p. 3, para. 4.

304 See, paras. 4.40-4.43 above.

5.79 Obviously it was not up to Qatar to present the claims of Bahrain. Bahrain is entitled by the Doha Agreement, on the same footing as Qatar, to seise the Court with its own claims:

> "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." (Emphases added.)

In other words, if Bahrain's claims are not presented to the Court, it is not because this has become impossible as a consequence of Qatar's action, but because of Bahrain's inaction, which is, for whatever reason, a pure matter of will on the part of Bahrain.

5.80 This is particularly obvious after Bahrain's reaction to the letter from the Agent of Qatar to the Registrar of the Court dated 31 August 1991. Referring to the Doha Agreement and to the Bahraini formula, the Agent of Qatar clearly stated:

> "It is Qatar's view that this formula gives each Party an equal right to present its own claims to the Court and that therefore neither State can obtain an advantage over the other in the formulation of its claims. Consequently, Bahrain is not precluded from raising what it refers to as the 'question of Zubarah', - for example by an application to the Court."

5.81 It is undisputed that the consent of the States parties to a dispute, whatever the form this consent may take, is the basis of the Court's jurisdiction in contentious cases. A statement made by the Agent of Qatar binds the State of Qatar. It is therefore not understandable for what reasons Bahrain persists in stating that "it is by no means clear that Bahrain would be free to raise the question of Zubarah by way of counter-claim[305]".

5.82 Qatar submits that the Doha Agreement which incorporates the Bahraini formula entitles Bahrain to raise its own claims, for example by way of an application, which the Court could decide to join to the original proceedings instituted by Qatar. It is therefore submitted that Qatar has neither tried to shape the case as it wished nor attempted to preclude Bahrain from presenting its own claims. For whatever reason, Bahrain has chosen of its own accord to refrain from seising the Court with its claims.

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305 See, Bahrain's letter of 16 September 1991, p. 1.

5. Bahrain's contention that Qatar's unilateral application would allow Qatar to submit evidence in an inadmissible manner

5.83 In the Annex to its letter of 18 August 1990, Bahrain refers to the fact that -

> "One of the points of disagreement between Bahrain and Qatar in the negotiations that have been taking place for a compromis leading to a joint submission has been a proposal by Bahrain that neither party shall introduce into evidence or argument the nature or content of proposals directed to a settlement of the substantive issues in the course of discussions prior to the date of the compromis. Although this proposal is essentially declaratory of customary international law.... the Government of Qatar has not accepted it. ... This attitude leads the Government of Bahrain to believe that it is likely that the Government of Qatar will allude, in its Memorial on the merits, to the course of the negotiations on the substance of the differences between the two States in an inadmissible manner[306]."

5.84 In his letter of 16 September 1991 to the Registrar, the Minister of Foreign Affairs of Bahrain referred again to this subject, recalling that Article V of the draft special agreement proposed by Bahrain was, for Bahrain, an important element of any agreement:

> "Its purpose was to bind both Parties not to divulge to the Court the terms of any proposals or counter-proposals as to settlement of the dispute, made during the negotiations either directly or through the Mediator."

5.85 Bahrain's contention calls for some brief comments. The exact terms of the Article in question were as follows:

> "Article V
>
> 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 referred to in Article II of this Agreement, 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[307]."

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306 See, Annex to Bahrain's letter of 18 August 1991, pp. 18-19, para. 20(c).

307 See, Annex II.22, Vol. III, p. 143.

5.86 As can be seen from this text, the language of Article V was much wider in scope than is reported by Bahrain in its letter to the Registrar of 16 September 1991. The text of Article V submitted by Bahrain in March 1988 during the work of the Tripartite Committee was not limited only to proposals made during the Mediation with Saudi Arabia. Nor was it limited only to proposals to settle the substance of the disputes made by the Mediator, but it could have covered any proposal, even on procedural matters. In this context, this text could have applied to any proposal and response thereto (which therefore could even include agreements) made between the Parties before the date of the finalization of the special agreement, under discussion at that time. The dies ad quem is indicated but not the dies a quo. As the Court is now aware, this provision could have covered:

- any proposals and responses thereto (which therefore could even include agreements) made in any "negotiations or discussions" whether directly between the Parties or in "any mediation" - which means that evidence on mediations and their results undertaken during the past by the British Government on the main issues of the case would also have been excluded;

- any proposals and responses thereto (which therefore could even include agreements) "directed to a settlement" could concern not only substance but also procedural matters - this text could thus apply to the very commitments of the Parties under the December 1987 Agreement to refer their existing and established disputes to the Court and to other principles proposed by Saudi Arabia and accepted by both Parties, such as the principle that the status quo be maintained.

5.87 That Qatar understood the proposed Article V in the way discussed above, and not in the much more limited - but still partly ambiguous - way now presented by Bahrain, was made known to Bahrain during the sessions of the Tripartite Committee[308]. It is worth noting that after Qatar's strong objections to the proposed Article V, Bahrain did nothing to raise the matter again.

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308 It will be noted that Bahrain itself has produced excerpts of a paper presented by Qatar and discussed at the Second Meeting of the Tripartite Committee on 3 April 1988, setting out Qatar's reservations in this regard. See, Attachment 9 to the Annex to Bahrain's letter of 18 August 1991.

5.88 In any event, during the Doha meeting in December 1990, Bahrain insisted - according to its own report of the facts - only on an insertion in the Omani draft of a reference to the Bahraini formula. Qatar was therefore confident that Bahrain had been convinced of the inappropriate character of the proposed Article V relating to the use of certain evidence in an inadmissible manner.

5.89 In view of the above, Qatar submits that, in the circumstances, its position is sound and reasonable. Qatar is confident that the basic customary rules drawn from the Court's practice in the matter of evidence are sufficient and appropriate in the present case. First, there is an obligation for both Parties to contribute to the evidence of the facts of the case, and second, the Court enjoys full freedom in evaluating the probative value of any evidence adduced by the Parties.

PART III

SUMMARY

6.01 The present Memorial on questions of jurisdiction and admissibility submitted by the State of Qatar in the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) may be summarized as follows:

SECTION 1. There are Existing Disputes between Qatar and Bahrain, and Qatar's Application is Admissible

6.02 The history of the disputes outlined by Qatar has clearly shown that Qatar and Bahrain had emerged as distinct political and legal entities in the 19th century. In the 1930s, the development of oil led Bahrain to make claims to sovereignty over the territory of Qatar itself and also claims to certain rights over the maritime territory and areas lying between itself and the Qatar peninsula.

6.03 On 11 July 1939, Qatar and Bahrain were informed that the British Government had decided that the Hawar islands belonged to Bahrain and not to Qatar. Qatar strongly opposed this decision at the time and has continued to oppose it and to maintain that it is invalid. On 23 December 1947 Qatar and Bahrain were informed of the decision of the British Government with regard to the delimitation of the seabed between the two States, and with regard to Dibal and Qit'at Jaradah shoals and a line enclaving the Hawar islands. Qatar has maintained and continues to maintain that such sovereign rights as exist over Dibal and Qit'at Jaradah as shoals belong to Qatar and not to Bahrain and has rejected and continues to reject that part of the line which enclaves the Hawar islands. Bahrain has claimed that it does not accept the delimitation made by the British Government.

6.04 The disputes which thus arose concerned sovereignty over the Hawar islands, the extent and delimitation of the respective maritime areas of the two States and sovereign rights over the shoals of Dibal and Qit'at Jaradah. It is these disputes which are the subject of Qatar's Application. In spite of efforts at settlement by negotiation and other means in the 1960s, including an attempt to arbitrate under the auspices of the British Government, the disputes continued after the end of the British presence in the area in 1971 and remain outstanding

today. The events related by Qatar show that each of the disputes is a legal dispute and that the subject of each dispute is indisputably an issue governed by international law. The views of the Parties on each subject conflict in matters of fact as well as in matters of law.

6.05 In view of the above, it is submitted that the three subjects on which Qatar's Application requested the International Court of Justice to pronounce are existing disputes of a legal character and are governed by international law; they fulfil, in Qatar's submission, the requirements of admissibility in terms of the Court's Statute and Rules.

SECTION 2. The Jurisdiction of the Court has been established by Agreement between the Parties

6.06 The Mediation of Saudi Arabia in respect of these disputes was initiated in 1976 by agreement and is still continuing. The First Principle of the Framework proposed by Saudi Arabia in 1978 demonstrated the understanding of the Parties that the subject matter of the dispute between Qatar and Bahrain was the question of sovereignty over certain islands and of maritime boundaries. The proposed Framework was under discussion for a number of years until May 1983, when it was accepted by Bahrain and Qatar with the amended Fifth Principle proposed by Qatar. It will be noted that the Parties agreed in 1983 that in the event of failure to resolve the disputes through negotiation, they would consult Saudi Arabia to determine the best possible means to resolve the matter in accordance with the provisions of international law. All concerned were anxious to achieve the final resolution of the disputes and it was provided in the Fifth Principle that "The ruling of the authority agreed upon for this purpose shall be final and binding".

6.07 No material progress in negotiations was made between 1983 and 1986. The crisis which arose in 1986 between the two States due to the apparent breach by Bahrain of the status quo principle embodied in the Framework led Saudi Arabia to take further initiatives finally to solve the dispute. This eventually led to the December 1987 Agreement.

6.08 On 19 December 1987 King Fahd of Saudi Arabia wrote a letter in identical terms to the two Parties containing proposals which were accepted by both of them and were made the subject of a public announcement by Saudi

Arabia on 21 December 1987 in terms of a previously agreed draft. The Fifth Principle of the Framework was expressly invoked in the December 1987 Agreement. The most important provisions of the December 1987 Agreement for the present case are contained in the first and third items. The first item stated expressly 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."

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

SECTION 3. The Failure of the Tripartite Committee's Approach to seise the Court by the Method of a Special Agreement

6.09 It will be recalled that the third item of the December 1987 Agreement reads as follows:

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

Qatar submits that this third item did not impose or select any particular method or procedure to be followed by the Tripartite Committee for the purpose of seising the Court in accordance with the commitment set out in the first item. It will be noted that the terms of the third item are procedural in nature and do not in any sense detract from the consent and commitment of the Parties to refer their disputes to the International Court of Justice in accordance with the first item. The only object of the work of the Tripartite Committee, as foreseen in the 1987 Agreement, was to ascertain the procedures necessary to obtain from the International Court of Justice a final ruling binding upon both Parties; and Saudi Arabia undertook to continue its good offices to guarantee the implementation of this Agreement to seise the Court as embodied in the first item.

6.10 The Tripartite Committee held several meetings. At the meeting of 17 January 1988 the participants discussed their respective proposals for the purpose of communicating to the Court their agreement in December 1987 to refer their pending disputes to the Court in accordance with the conditions and procedures of the Court. No agreement on these draft proposals was reached at this meeting and it was then decided that the Parties should exchange and discuss drafts of a special agreement for referring the disputes to the Court. However, the Tripartite Committee failed to reach an agreement on the text of a special agreement as a method to seise the Court.

6.11 Eventually, as a result of an initiative by Saudi Arabia, the Heir Apparent of Bahrain, during a visit to Qatar, transmitted to the Heir Apparent of Qatar a general formula for reference of the disputes to the Court. This Bahraini formula was not accepted by Qatar during the work of the Tripartite Committee. The meetings of the Tripartite Committee were not successful in reducing the wide divergence of views regarding the definition, scope and extent of the disputes to be submitted to the Court for a final and binding ruling. Thus, Saudi Arabia indicated at the Fifth meeting of the Tripartite Committee on 5 November 1988 that the GCC summit to be held in Bahrain in December 1988 would be the last date of the Committee's mission whether or not it had succeeded in achieving what was requested of it, i.e., to have the Parties agree on a method of referring their disputes to the Court in accordance with the Statute of the Court. Since no agreement had been reached by that time, it was therefore agreed at the GCC summit that Saudi Arabia be given further time to achieve an agreement on the substance of the disputes through its Mediation. Thus, the first item of the 1987 Agreement to refer the disputes to the Court was deferred for that period.

SECTION 4. The Doha Agreement allowed the Seisin of the Court by Qatar

6.12 At the opening session of the GCC summit in Doha, the Amir of Qatar reminded the heads of the delegations that Qatar and Bahrain had agreed in December 1987 to put an end to their disputes and to refer their disputes to the International Court of Justice for a final and binding ruling. The Amir announced that Qatar had decided to accept the Bahraini formula which enabled each State to raise before the Court whatever claims it wished falling within that formula. A final round of consultations to give effect to this decision took place during 23-25 December 1990. An agreement in the form of "Minutes" was reached and signed. The Minutes, after reaffirming what was previously agreed, provided -

- that the good offices of Saudi Arabia would continue until 15 May 1991;

  In pursuance of this, and prior to the filing by Qatar of its Application to the Court on 8 July 1991, Saudi Arabia, Qatar and Bahrain studied proposals for the settlement of the merits of the dispute.

- that after 15 May 1991 the Parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula which had been accepted by Qatar, and the proceedings arising therefrom.

  In pursuance of this, Qatar filed its Application to the Court on 8 July 1991 under Article 40, paragraph 1, of the Statute of the Court. Qatar maintains that it was entitled to take this action. The Doha Agreement was reached on the basis that each Party had different claims to make and the Bahraini formula would enable each of them to frame and pursue its own separate claims. Qatar maintains that the Doha Agreement amounted to a final compliance with the requirements to be fulfilled so as to enable the Court to exercise jurisdiction in relation to the existing disputes between the Parties.

6.13 Qatar maintains that the Application of the State of Qatar is admissible; that the Court has jurisdiction to entertain the disputes which are referred to in the Application; and that Bahrain's contentions are unfounded.

SUBMISSIONS

In view of the above 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.

(*Signed*) Najeeb ibn Mohammed Al-Nauimi
Legal Adviser,
Agent of the State of Qatar

LIST OF DOCUMENTARY ANNEXES

(Volume II)

Documents relevant to the disputes submitted by Qatar to the Court

(Volume III)

Documents relating to the Period of the Mediation

LIST OF OPINIONS

(Volume III)

LIST OF ILLUSTRATIVE MAPS