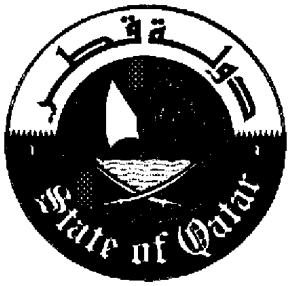
IN THE NAME OF GOD
THE MERCIFUL, THE BENEVOLENT



INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING MARITIME DELIMITATION

AND TERRITORIAL QUESTIONS

BETWEEN

QATAR AND BAHRAIN

(QATAR V. BAHRAIN)

REPLY

SUBMITTED BY

THE STATE OF QATAR

(Questions of Jurisdiction and Admissibility)

VOLUME I

28 September 1992

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CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN
(Qatar v. Bahrain)

QUESTIONS OF JURISDICTION AND ADMISSIBILITY

REPLY OF THE STATE OF QATAR

This Memorial is filed in accordance with the Order of the Court dated 26 June 1992 which fixed 28 September 1992 as the time-limit for the Reply of the State of Qatar.

CHAPTER I
INTRODUCTION

SECTION 1. The Orders of the Court in these Proceedings

1.01 On 8 July 1991, the State of Qatar ("Qatar") filed in the Registry of the Court an 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. In that Application Qatar founded the jurisdiction of the Court upon certain Agreements between the Parties concluded in December 1987 ("the 1987 Agreement") and December 1990 ("the Doha Agreement"), the subject and scope of the commitment to jurisdiction being determined by a formula proposed by Bahrain on 26 October 1988 and accepted by Qatar in December 1990 ("the Bahraini formula"). By letters dated 14 July and 18 August 1991, Bahrain contested the basis of jurisdiction invoked by Qatar.

1.02 At a meeting between the President of the Court and the representatives of the Parties held on 2 October 1991 it was agreed that questions of jurisdiction and admissibility should be separately determined before any proceedings on the merits. An Order, made by the President of the Court on 11 October 1991,

decided that the written proceedings should first be addressed to "the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application" and, with reference to this decision, indicated 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".

1.03 In accordance with the Order, Qatar filed its Memorial on questions of jurisdiction and admissibility on 10 February 1992 and Bahrain its Counter-Memorial on 11 June 1992. In its Memorial Qatar has formally submitted that the Court has jurisdiction to entertain the dispute referred to in its Application and that the Application is admissible. In its Counter-Memorial Bahrain has formally submitted only that the Court is without jurisdiction over the dispute brought before it by Qatar's Application.

1.04 A second Order was made by the Court on 26 June 1992. Referring to the Order of 11 October 1991, it states that "in the present case the filing of further pleadings by the Parties is necessary" and directs that "a Reply by the Applicant and a Rejoinder by the Respondent shall be filed on the questions of jurisdiction and admissibility".

1.05 From this Order, and in view of the previous Order of 11 October 1991, it is Qatar's understanding that the Court finds it necessary to be further informed of all the contentions and evidence of fact and law on which the Parties rely in connection with the questions of jurisdiction and admissibility, and this Reply accordingly addresses such considerations of fact and law which may assist the Court in deciding on those questions.

SECTION 2. General Comments on Bahrain's Conduct in the Present Proceedings

1.06 Qatar would like to remark briefly in this Introduction upon the unusual character of the proceedings in this phase of the case where, although it is Bahrain which has raised objections to the jurisdiction of the Court, Qatar appears to be in the position of a claimant. This situation has arisen because of Bahrain's attitude before the Court, in particular its failure to file preliminary objections under Article 79 of the Rules of Court.

1.07 The impropriety of this action, especially by a State which is party to the Statute of the Court and has indicated its "willingness to come to the Court[1]" for the adjudication of a dispute, will not go unnoticed. The result is that Qatar, the natural defendant to any preliminary objections, has apparently been put in the position of a claimant; that for the first time in the history of the Court two rounds of written pleadings have become necessary in a preliminary phase[2]; and that the adjudication of the questions of jurisdiction and admissibility has been abnormally delayed.

1.08 Qatar is also impelled to comment briefly here on the grave accusation that, in violation of the Arabo-Islamic tradition, it has affronted the honour of Bahrain by filing its Application before the Court[3]. Naturally, Qatar has never had the slightest intention of affronting the honour of Bahrain, and it cannot accept that this accusation is justified. In general, engaging in peaceful means of settling a dispute can never be considered as a dishonour under any tradition[4]. In particular, it cannot create a situation where Bahrain is "impliedly pilloried as a State being dragged reluctantly before the Court by a virtuous plaintiff[5]". Moreover, in the particular circumstances of this case, by filing its Application with the Court Qatar was acting in conformity with the two Agreements entered into between itself and Bahrain and with the Statute and Rules of the Court; and it gave due warning of its intention by repeated messages to the Mediator prior to the filing[6].

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1 See, Bahraini Counter-Memorial, para. 1.13, p. 6.

2 The normal proceedings envisaged under Article 79 of the Rules of Court are designed, inter alia, to deal fairly and properly with situations where the Court's jurisdiction is disputed. As the Court has stated in general terms, "The provisions of the Statute and Rules of the Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions". (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, para. 26 and, in general, paras. 26-31.)

3 Bahraini Counter-Memorial, para. 9.1, p. 115.

4 See, in this regard, the Manila Declaration on the Peaceful Settlement of International Disputes, adopted without a vote as Resolution A/37/590 of the General Assembly of the United Nations on 15 November 1982, which states that "Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States".

5 Bahraini Counter-Memorial, para. 8.15, p. 113.

6 See, Qatari Memorial, Annexes II.34 and II.35, Vol. III, pp. 213 and 217.

1.09 Another aspect of Bahrain's conduct should be briefly remarked upon here. As the Court will recall, Bahrain improperly announced in its Counter-Memorial that -

> "To the end ... that a suitable joint submission should be made to the Court, Bahrain will within the very near future forward to Qatar a fresh draft joint agreement coupled with an invitation that the two Parties should meet under the auspices of the Mediator with a view to discussing and resolving any remaining points of difficulty[7]."

Following this announcement, Bahrain unilaterally submitted to Qatar a new draft special agreement, under cover of a note dated 20 June 1992. In that note Bahrain requested Qatar to stop the present proceedings and sign the text of the attached draft as it stood, imposing a time-limit after which the offer would lapse if not accepted by Qatar[8].

1.10 Bahrain's unilateral submission of a draft special agreement three and a half years after the failure of the Tripartite Committee's efforts to reach a special agreement, and a year after Qatar's filing of its Application on the basis of two Agreements which clearly establish the Parties' consent to the Court's jurisdiction, is no more than a diversionary measure. In any event, Qatar understands that the Court considers that the date of an application is the date at which the Court has to determine whether it has jurisdiction and whether the application is admissible. Consequently, this step, taken after the filing of Qatar's Application on 8 July 1991, can have no relevance to the present case[9]. For these reasons Qatar does not propose to burden the Court with the text of this new draft.

1.11 In summary, Qatar can only take the view that Bahrain's conduct is designed to confuse the issue before the Court. This effort to confuse even extends to Bahrain's Counter-Memorial. Thus, for example, the very order in

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7 Bahraini Counter-Memorial, para. 9.5, p. 116.

8 A copy of Bahrain's note is attached hereto as Annex I.1, Vol. II, p. 1.

9 See, also, Bahraini Counter-Memorial, para. 7.22, p. 105, where Bahrain makes reference to a similar irrelevant proposal made in September 1991, nearly three months after Qatar had filed its Application. In late September, Qatar did receive a bare draft special agreement, the text of which is reproduced in the Bahraini Counter-Memorial, Annex I.24, Vol. II, p. 143, at pp. 153-155. However, Qatar did not receive the "Explanatory Memorandum" relating to the draft until it appeared in Bahrain's Annex I.24, at pp. 151-152. It will be noted that this Memorandum bears no date.

which Bahrain presents its argument is illogical[10]; and Bahrain's novel definition and interpretation of the term "joint submission"[11] not only confuses jurisdiction and seisin, but even puts emphasis on seisin, which is not the issue in this case.

SECTION 3. Structure of the Reply

1.12 In its Memorial Qatar provided a clear statement of its case on the questions of jurisdiction and admissibility, and it confirms here the facts and arguments contained therein and in its Application. Nevertheless, Qatar welcomes the opportunity to respond to Bahrain's Counter-Memorial in writing.

1.13 The structure of the Reply of Qatar follows the directive of the Court in its Order of 26 June 1992, bearing in mind Article 49, paragraph 3, of the Rules of Court which requires that a Reply be directed to bringing out the issues that still divide the Parties. In addition, Qatar has sought to present its Reply in such a way as to eradicate any confusion which may have been created by Bahrain. However, any failure by Qatar to answer specific allegations by Bahrain should not of course be construed as an implicit admission of such allegations.

1.14 The Reply is divided into three parts:

Part I. The Factual Perspective of the Present Case
Part II. Jurisdiction and Admissibility
Part III. Summary

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10 For example, para. 6.5 of Bahrain's Counter-Memorial (p. 52) reads as follows:

"There are two principal points to be developed in connection with the 1990 Minutes. The first in logical order is Bahrain's contention that the Minutes do not have the status of a binding agreement and cannot, therefore, serve as a basis for the Court's jurisdiction. The second is that, even if they possess such a status, their content does not support the Qatari submission that the text accords each Party the right unilaterally to commence proceedings. It will be convenient to begin this consideration of the 1990 Minutes with the second of these arguments ... ." (Emphases added.)

It is difficult to understand why it is "convenient" to turn on its head what Bahrain admits is the logical order of argument, unless it is to confuse the issue.

11 Bahraini Counter-Memorial, para. 1.4, p. 3.

1.15 Part I addresses the issues of fact in the present case. Chapter II contains observations regarding the historical perspective of the disputes and Chapter III provides further information regarding efforts to settle the disputes. Part II deals with the legal arguments of the Parties put forward in the pleadings at this stage of the proceedings as to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of Qatar's Application. Chapter IV will show that the jurisdiction of the Court under Article 36, paragraph 1, of the Statute is established by two international agreements: the 1987 Agreement and the Doha Agreement which confirm the consent of the Parties to the jurisdiction of the Court in the present case. Chapter V deals with the admissibility of Qatar's Application. The Reply concludes with a Summary in Part III, and the Submissions of Qatar.

1.16 Attached to this Reply is one volume of Annexes which contains documentary annexes, a technical annex concerning the "Statements" annexed to Bahrain's Counter-Memorial[12], and Supplementary Opinions by Professor Ahmed El-Kosheri and Professor Shukry Ayyad.

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12 See, Bahraini Counter-Memorial, Annexes I.25 and I.26, Vol. II, pp. 157 and 177.

PART I
THE FACTUAL ASPECTS OF THE PRESENT CASE

CHAPTER II
OBSERVATIONS REGARDING THE HISTORICAL PERSPECTIVE OF THE DISPUTES

2.01 In Qatar's Memorial, a brief presentation was made of the origin and history of the disputes involved in this case[13]. The purpose of that presentation was to show the Court that the disputes submitted in Qatar's Application were existing disputes and that they were governed by international law within the meaning of Article 38 of the Statute of the Court. The presentation was directly related to the Order of the Court of 11 October 1991 and the questions of jurisdiction and admissibility which the Parties were asked to address by the Court in that Order.

2.02 Bahrain's presentation of the history of the disputes, on the other hand, makes no attempt to discuss the relevant questions of jurisdiction and admissibility[14]. Bahrain raises no issue whatsoever concerning the existence of the disputes submitted by Qatar in its Application, nor does it deny that these disputes are governed by international law. Indeed, Bahrain admits that Qatar's claims as framed in its Application are admissible[15]. Having made this admission, any presentation of historical facts by Bahrain is irrelevant and inappropriate at the present stage of proceedings as it is not directed at responding to the Order of the Court dated 11 October 1991.

2.03 Nevertheless, as Bahrain has chosen to enter into the merits of the disputes, Qatar cannot leave its contentions wholly unanswered. In what follows, Qatar will not seek to rebut every statement made by Bahrain but will restrict itself to correcting some of the more self-seeking distortions in Bahrain's version of the historical perspective of the disputes. To the extent that any statements made by Bahrain are not specifically rebutted by Qatar, this does not of course

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13 See, Qatari Memorial, Chapter II, pp. 9 et seq.

14 See, Bahraini Counter-Memorial, Chapter II, pp. 12 et seq.

15 Ibid., para. 1.16, p. 11.

imply an admission by Qatar of the accuracy of such statements, and Qatar reserves the right to present a full rebuttal in due course. For the above reasons Qatar has not annexed to its Reply any documents relating to the historical facts.

2.04 Bahrain acknowledges that "many of the individual statements of fact" in Qatar's presentation of the history are accurate. On the other hand, it accuses Qatar of painting an overall picture of the history which is "far from accurate", yet does not produce any relevant evidence to support this sweeping statement[16].

2.05 It was clearly shown in Qatar's Memorial, with ample supporting evidence, that the separate identities of Qatar and Bahrain were recognized during the second half of the 19th century[17]. The territorial integrity of Qatar, including the whole of the peninsula as well as islands and other features close to the peninsula, was reflected in the exercise of authority and control over this area by the ruling Al-Thani family.

2.06 Bahrain alleges that from 1868 onwards the ruling Al-Thani family only "intermittently displayed ... a degree of local authority either on their own account or as delegates of Turkey during the period 1871-1915" in the limited area around Doha on the eastern side of the Qatar peninsula[18]. Bahrain goes on to assert that "This authority did not, however, extend to the administration or control of the other areas of the peninsula[19]".

2.07 In support of this statement, which Qatar strongly disputes, Bahrain relies on the most implausible evidence. Thus, Bahrain alleges that because the terrain in the central and western parts of the Qatar peninsula presented physical obstacles, the Al-Thanis were unable to exercise control over the western coast[20]. This is neither a convincing legal argument nor a geographically accurate one. Of course, travel in the Gulf region can always be difficult, but this never prevented the exercise of authority and control over vast areas of land during this period.

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16 See, Bahraini Counter-Memorial, paras. 2.1-2.2, p. 12.

17 See, Qatari Memorial, paras. 2.08-2.27, pp. 11-17, and the Annexes referred to therein.

18 Bahraini Counter-Memorial, para. 2.4, p. 13.

19 Ibid.

20 Ibid., paras. 2.5-2.6, pp. 14-15.

Moreover, Bahrain contradicts itself by arguing that the Al-Thani family's activity was directed towards the area around Khor Al-Odaid[21]. This area is further from Doha than the west coast of Qatar and is separated from Doha by far rougher terrain than the relatively fertile areas in the centre of the peninsula lying between Doha and the west coast.

2.08 Bahrain also seeks to show the alleged limited extent of Al-Thani authority and to stake the basis of its claim to the Hawar islands by stating that a part of the Dawasir tribe from Zellaq and Budeyah in Bahrain "migrated annually with its flocks ... to their villages on Hawar[22]". This statement is not only unsubstantiated, it is also inaccurate. The Hawar islands are incapable of sustaining human habitation and economic life. In any event, such visits would hardly be of significance. It was common practice for fishermen from many areas of the Gulf to visit islands throughout the region, including the Hawar islands, for fishing purposes during the fishing season.

2.09 Bahrain seeks to support its allegations by reference to the works of J.G. Lorimer, a distinguished British civil servant working with the Government of India[23]. However, the same author contradicts many of the points made by Bahrain, such as the false and wholly unsustainable statement that the Hawar islands "have for long been in the possession of Bahrain and have never been in the possession of Qatar[24]". In fact, in setting out the extent of the territory of Qatar, Lorimer included the whole of the western coast of the peninsula of Qatar, including the Hawar islands, as an integral part of the territory of Qatar[25].

2.10 Bahrain's allegation that Qatari authority did not extend to the west coast of the peninsula until the late 1930s[26] is also rebutted by evidence that Qatar has already provided to the Court. For example, annexed to the Qatari Memorial are two maps demonstrating the recognition by Britain and Turkey, the two great

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21 Bahraini Counter-Memorial, para. 2.5, p. 14.

22 Ibid.

23 Ibid., para. 2.4, p. 13.

24 Ibid., para. 1.2, p. 1.

25 See, Qatari Memorial, Annex I.17, Vol. II, p. 91, at p. 95.

26 Bahraini Counter-Memorial, para. 2.6, p. 15.

powers in the area at that time, of the separate identities and territorial integrity of Qatar and Bahrain. The extent of Bahrain's territory is shown on a Turkish map dated October 1867[27]. That map does not include the Hawar islands as part of Bahrain. Another Turkish map made in November 1884 shows the extent of Qatar's territory[28]. This map shows the Qatar peninsula, and demonstrates that the territorial integrity of Qatar included the Hawar islands and the shoals of Dibal and Qit'at Jaradah. Subsequently, the 1913 Convention between the United Kingdom and Turkey reconfirmed the separate identity of the Qatar peninsula under Al-Thani rule, and its separation from Bahrain[29].

2.11 Further historical evidence of the extent of Al-Thani authority over Qatar will be provided at an appropriate stage. It should perhaps be noted here, however, that the display of authority in the Gulf region entailed particular legal and factual questions, and it would be wrong to compare such displays of authority with the authority exercised by modern-day States, a point recognized by this Court and other tribunals in previous cases[30].

2.12 Finally, Qatar must call attention to the fact that there are many inaccuracies in Bahrain's Counter-Memorial concerning tribal allegiances and their relationship with sovereignty, particularly concerning the Dawasir and Al-Naim tribes. For example, Bahrain's statement that the Dawasir were Bahraini subjects is a gross over-simplification[31]. In fact, the Dawasir were dispersed over many areas in the region, with parts of the tribe forming independent groups, and they shifted their allegiance periodically. Similar inaccuracies appear in Bahrain's

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27 See, Qatari Memorial, Annex I.6, Vol. II, p. 27. This map, entitled "Map of Bahrain, its boundaries", was prepared by the Turkish authorities on the basis of a survey which they had performed, and was confirmed by the British Government, as may be seen from the British stamp at the bottom of the map.

28 See, ibid., Annex I.11, Vol. II, p. 49. This map was also made by the Turkish authorities on the basis of a survey by the Turkish Marine and was similarly confirmed by the British Government.

29 See, Qatari Memorial, paras. 2.20 et seq., pp. 15 et seq., and Annex I.14, Vol. II, p. 63.

30 See, for example, the Advisory Opinion of the Court in the Western Sahara case, I.C.J. Reports 1975, p. 42. The same point was also recognized and discussed in some detail in the Award of 19 October 1981 in the Dubai/Sharjah case; see, pp. 79-84.

31 Bahraini Counter-Memorial, para. 2.5, p. 14.

discussion of the Al-Naim tribe. However, since these matters are irrelevant to the questions at issue in the present phase of the proceedings, Qatar will respond to them only at the appropriate time.

2.13 For the purposes of the present proceedings, it is Qatar's belief that the Court need only concern itself with the fact, shown by Qatar in its Memorial, and acknowledged by Bahrain, that the Application submits existing disputes between the two States and that they are governed by international law. Those disputes relate to sovereignty over the Hawar islands, sovereign rights over the Dibal and Qit'at Jaradah shoals, and the delimitation of the maritime areas of the two States. Claims relating to these disputes are presently before the Court by virtue of Qatar's Application. Any other claims which Bahrain might wish to raise under the Bahraini formula have not yet been put before the Court.

CHAPTER III
FURTHER INFORMATION ON EFFORTS TO SETTLE THE DISPUTES

3.01 In its Memorial Qatar has clearly demonstrated that, within the terms of Saudi Arabia's Principles for the Framework for Reaching a Settlement ("the Framework") as agreed in 1978 and modified in 1983[32] and on the basis of the 1987 Agreement and the Doha Agreement, Qatar and Bahrain have agreed to refer their long-standing disputes to the Court to secure adjudication of their respective claims. Regrettably, Bahrain has sought to answer Qatar's presentation of its case by distorting it and obscuring the real issues before the Court, rather than attempting to deal with them in a straightforward manner. Moreover, Bahrain's Counter-Memorial contains numerous inaccuracies in its presentation of the facts relating to efforts to settle the disputes.

3.02 Bahrain does however make certain important admissions. It admits that by the Framework of 1983 the Parties accepted that their disputes should be settled in accordance with international law. Furthermore, Bahrain does not take issue with the fact that 1987 Agreement is a binding agreement under which the disputes should be referred to the International Court of Justice[33]. However, Bahrain alleges that the reference of the dispute to the Court was conditional upon the conclusion of a special agreement[34]. The account set out hereafter will show that the means to achieve the commitment to go to the Court in the 1987 Agreement was left to the Parties and that a special agreement was not the only means contemplated. Finally, the Doha Agreement confirmed what had been previously agreed by Qatar and Bahrain, and more particularly their consent to refer their existing disputes to the Court.

SECTION 1. The Principles of the Framework

3.03 The 1978 Framework marked the beginning of the most serious effort to resolve the disputes between Qatar and Bahrain, through a process of Mediation by Saudi Arabia. The First Principle of the Framework referred to the pending

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32 See, Qatari Memorial, para. 3.19, p. 39 and Annex II.10, Vol. III, p. 49. The Framework has been expressly accepted by Bahrain as "the 'relevant circumstance'". See, Bahraini Counter-Memorial, para. 5.2, p. 28.

33 See, Bahraini Counter-Memorial, para. 1.6, p. 3, and para. 5.7, p. 31.

34 Ibid., para. 1.6, p. 3.

disputes as "relating to sovereignty over the islands, maritime boundaries and territorial waters ...". The Fifth Principle, as amended in 1983, provided that in case the negotiations in the course of the Saudi Mediation did not succeed -

> "... 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[35]."

3.04 This Framework, therefore, not only clearly indicated the nature of the pending disputes but also provided that in the event of failure to reach a settlement through negotiations the disputed matters should be resolved "on the basis of the provisions of international law" and that the "ruling of the authority agreed upon for this purpose shall be final and binding". Bahrain accepts that in recent years, i.e., since 1987, the specific reference has been to "settlement by the International Court of Justice[36]". As will be shown below, it was on the basis of and with reference to the Saudi Framework that the 1987 Agreement and the Doha Agreement were achieved. These agreements were secured upon the initiative or with the involvement of the King of Saudi Arabia himself.

SECTION 2. The 1987 Agreement

3.05 Invoking the Fifth Principle of the Framework, in December 1987 the King of Saudi Arabia proposed, and Qatar and Bahrain accepted, the 1987 Agreement according to which:

> "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[37]."

As can be seen from the text of the 1987 Agreement, this paragraph is followed by a substantial paragraph providing for the maintenance of the status quo between the Parties.

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35 Qatari Memorial, Annex II.10, Vol. III, p. 49 (emphasis added).

36 Bahraini Counter-Memorial, para. 1.4, pp. 2-3.

37 Qatari Memorial, Annex II.15, Vol. III, p. 101. See, also, Qatari Memorial, para. 3.28, p. 44, and Bahraini Counter-Memorial, para. 1.6, p. 3.

3.06 The third item, which follows the provision relating to maintenance of the status quo, is not expressed either in form or in substance as a condition attached to the first item. The third and fourth items read 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.
>
> Fourthly: The Kingdom of Saudi Arabia will continue its good offices to guarantee the implementation of these terms."

By virtue of this Agreement Saudi Arabia's role became primarily that of assisting the Parties in approaching the Court so that a final ruling binding upon both Parties could be rendered, and guaranteeing the implementation of the Agreement.

3.07 Bahrain admits that the 1987 Agreement is a binding agreement. However, Bahrain seeks to distort the true significance of this Agreement by referring to Saudi Arabia's Announcement of 21 December 1987[38]. Using that Announcement, it argues that the sole purpose of the establishment of the committee was to "negotiate the terms of a joint submission". However, there is nothing in the terms of either the 1987 Agreement or the Announcement to support such a contention. Even under the United Nations translation of the 1987 Agreement, which Bahrain apparently prefers to Qatar's translation, the third item simply stated the Committee's role to be that of -

> "... communicating with the International Court of Justice and completing the requirements for referral of the dispute thereto in accordance with the Court's regulations and instructions, in preparation for the issuance of a final judgement which shall be binding on both parties[39]."

3.08 It will be noted that the third item of the 1987 Agreement states simply that reference of the dispute to the Court is to be "in accordance with the Court's regulations and instructions". Since Article 40 of the Statute of the Court allows

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38 Bahraini Counter-Memorial, para. 5.19, p. 37. See, for the text of the Announcement, Qatari Memorial, Annex II.15, Vol. III, p. 101, at p. 105.

39 See, Bahraini Counter-Memorial, Annex I.3, Vol. II, p. 13, at p. 21.

reference of cases to the Court "either by the notification of a special agreement or by a written application", it is beyond comprehension how Bahrain can construe the above provision of the 1987 Agreement as meaning that reference may be made only by notification of a special agreement under Article 39 of the Rules of Court and as excluding reference by an application under Article 38.

3.09 Furthermore, Bahrain ignores the existence and importance of the fourth item in the 1987 Agreement which clearly stated that Saudi Arabia was to guarantee implementation of the Agreement. As is clear, the principal purpose of this Agreement was to refer the dispute to the Court, and Saudi Arabia was to take whatever action was necessary if the Tripartite Committee did not succeed in its task or if there were any developments which came in the way of implementation of the 1987 Agreement.

3.10 The nature of the basic agreement to go to the Court is clear also from the letters of the Amir of Qatar[40] and of the Amir of Bahrain to King Fahd of Saudi Arabia. In his letter of 26 December 1987 the Amir of Bahrain wrote:

> "It was with thanks and appreciation that I received your letter of 28 Rabi al-Akhar 1408, corresponding to 19 December 1987. We were pleased with the terms contained in your letter, and which will enable the matters which are differed upon to be referred to the ICJ, as well as what was contained in the letter concerning the composition of the committee which will be entrusted with contacting the International Court of Justice in order to consider this matter. I am glad that these conditions received the approval of the State of Qatar[41]."

This letter did not refer to any need for a joint submission but left the door open to any means of referring the dispute to the Court, either by the filing of an application or the notification of a special agreement.

3.11 From the above, it is clear that Bahrain's contention that under the 1987 Agreement "the eventual submission of the dispute to the Court, was clearly conditional upon the successful negotiation of a special agreement[42]" is wholly unfounded.

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40 Letter from the Amir of Qatar to King Fahd of Saudi Arabia dated 21 December 1987, Qatari Memorial, Annex II.16, Vol. III, p. 107.

41 Bahraini Counter-Memorial, Annex I.4, Vol. II, p. 23, at p. 27 (emphasis added).

42 Bahraini Counter-Memorial, para. 1.6, p. 3.

3.12 The 1987 Agreement for reference of the disputes to the Court was regarded in the Arab world as a most welcome development. This is reflected in the following article which appeared in the Gulf Times of 29 December 1987, reporting upon an announcement by the Official Spokesman of the Gulf Cooperation Council ("GCC") Summit Meeting in Riyadh, Prince Saud Al-Faisal, the Saudi Foreign Minister:

> "Saudi Foreign Minister Prince Saud al-Faisal has said that the GCC was very happy that the two sisterly states of Qatar and Bahrain had decided to settle their territorial dispute by referring it to the International Court of Justice.
>
> Prince Saud, who was answering a question from an Egyptian journalist at Sunday night's Press conference at the close of the day's sessions of the GCC Summit, said the submission of the issue to the court was something natural, since the GCC members were members of the United Nations.
>
> 'Therefore they were supposed to make use of that framework, specially as the case is of a legal nature and deals with borders,' he added.
>
> It was announced in Riyadh last week that the two states had agreed to international arbitration following the endeavours of the Custodian of the Two Holy Mosques King Fahd Ibn Abdul Aziz of Saudi Arabia to mediate between the two parties.
>
> A statement after the weekly Saudi Cabinet meeting said Qatar and Bahrain had agreed with a Saudi proposal to take their dispute over the ownership of offshore islands and reefs to the World Court[43]."

SECTION 3. The Proceedings of the Tripartite Committee

3.13 Bahrain's contention that the purpose of the Tripartite Committee was limited only to securing a special agreement and that the Committee confined its deliberations to that task alone is inaccurate and makes it necessary to outline the Committee's proceedings in some detail.

A. The Preliminary Meeting

3.14 Soon after the Announcement issued by the Kingdom of Saudi Arabia following the conclusion of the 1987 Agreement, there was a preliminary informal meeting of representatives of Saudi Arabia, Qatar and Bahrain during the GCC

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43 A copy of the full report is attached hereto as Annex I.2, Vol. II, p. 11.

Summit Meeting held in Riyadh on 26-29 December 1987. At this meeting Qatar presented a draft joint letter which it suggested the Parties could address to the Registrar of the Court[44]. At the same meeting Bahrain presented a draft procedural agreement for the purpose of "contacting" the Court. The opening recital of Bahrain's draft was as follows:

> "The State of Bahrain and the State of Qatar extend to the Custodian of the Two Holy Shrines their profound appreciation for continuing his personal good offices to help the two Parties reach a final and just solution for the disputed matters between them by submitting these matters to the International Court of Justice[45]."

There was no suggestion in the Bahraini draft that the reference of the disputed matters to the Court was conditional upon the signing of a special agreement[46].

B. The First Meeting: Discussion of "Ways and Means" of Reference to the Court

3.15 At the formal First Meeting of the Tripartite Committee in Riyadh on 17 January 1988, Prince Saud Al-Faisal, Saudi Arabia's Foreign Minister, defined "the main purpose of this meeting" as follows:

> "a) Sign the Agreement to form the Committee and set its terms of reference.
>
> b) Consider ways and means for referring the issue to the International Court of Justice in accordance with the conditions and procedures of the Court[47]."

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44 Qatari Memorial, Annex II.18, Vol. III, p. 119.

45 Ibid., Annex II.17, Vol. III, p. 113 (emphasis added).

46 Whether inadvertently or in an attempt to confuse the issue, Bahrain has annexed to its Counter-Memorial a text which it describes as a "Draft Procedural Agreement to form the Joint Committee, December 1987; translation into English by Qatar" (Bahraini Counter-Memorial, Annex I.5, Vol. II, p. 29). Article 1(1) of that text does indeed provide for the formation of a Committee "with the aim of reaching a special agreement". However, this is not Bahrain's December draft, but the draft it produced on 17 January 1988, as can be seen from Volume III of Qatar's Memorial, which contains both the December and January drafts as Annexes II.17 and II.19, respectively. The December draft made no mention of a special agreement.

47 Documents relating to the Meetings of the Tripartite Committee, deposited by Qatar with the Registry of the Court on 10 February 1992 (hereinafter referred to as "Tripartite Committee Documents"), Document No. 1, p. 1, at p. 4 (emphasis added).

3.16 The Tripartite Committee did not, therefore, commence its work on any assumption that reference of the case to the Court could only be by a special agreement. In fact Dr. Hassan Kamel, Minister Adviser to the Amir of Qatar and a member of Qatar's delegation, specifically referred to Article 40 of the Court's Statute and pointed out that there are two ways of approaching the Court[48].

3.17 It was at this meeting that Bahrain sought to amend its first draft procedural agreement by deleting from paragraph (1) in Article 1 the words "for the purpose of contacting the International Court of Justice" and substituting the words "for the purpose of reaching a special agreement on submitting the disputed issues to the International Court of Justice"[49]. Qatar rejected the proposed amendment and Prince Saud pointed out that the Amir of Qatar had accepted the draft procedural agreement in its original form as presented by Bahrain in December 1987. He therefore asked whether there was any objection to maintaining the agreement in its original form[50]. However, as Bahrain's representatives insisted that they would sign the procedural agreement only if the amendment was accepted, the matter remained unresolved and no procedural agreement was signed. Nevertheless, the members of the Tripartite Committee eventually decided that Qatar and Bahrain should each submit, by 19 March 1988, a draft agreement for referring the dispute to the International Court of Justice[51].

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48 Tripartite Committee Documents, Document No. 1, p. 1, at p. 10. Bahrain distorts Dr. Kamel's statement made at the same Meeting that "Commitment to submit the case to the Court is a moral rather than a legal commitment" (see, Bahraini Counter-Memorial, para. 5.24, p. 40). This is one of a number of instances of Bahrain taking a statement out of context and twisting it to suit its own case. In context it is clear that Dr. Kamel's concern was to make the Court aware of the Parties' commitment to refer the case to the Court as soon as possible. (See, Tripartite Committee Documents, Document No. 1, p. 1, at pp. 21-23.) See, also, the statement immediately following that of Dr. Kamel by Prince Saud indicating that what was required to be done was "... to transform these commitments which I consider legal and moral to a certain draft to be submitted to the Court. I don't want even to think that there is a doubt of the possibility of submitting the subject to the Court. If that happens this would mean the committee does not honour its commitments". (Tripartite Committee Documents, Document No. 1, p. 1, at p. 22.)

49 See, Tripartite Committee Documents, Document No. 1, p. 1, at p. 8.

50 Ibid., at p. 16.

51 Ibid., Document No. 2, p. 49.

3.18 The proceedings of this First Meeting therefore clearly demonstrated that the Committee was well aware that there was more than one possibility for referring the dispute to the Court, and that a special agreement was not the only method. They also reflect Qatar's refusal to accept that the work of the Tripartite Committee was to be exclusively devoted to reaching a special agreement.

C. The Second, Third and Fourth Meetings: Inconclusive Discussions on Drafts of a Special Agreement

3.19 After the First Meeting, draft special agreements were duly submitted by Qatar and Bahrain. It was only from this point that the Committee began its efforts to see if a special agreement could be reached. However, it was immediately apparent from the contents of the drafts and the discussion at the Second Meeting of the Tripartite Committee on 3 April 1988 that Qatar and Bahrain had very different ideas on how the disputes to be referred to the Court were to be defined.

3.20 In Qatar's Memorial it has already been shown that in its first draft Bahrain sought to define the disputes in such a way as to secure in advance from Qatar a recognition of its sovereignty over the Hawar islands and the Dibal and Qit'at Jaradah shoals - the very issues which had been the subject of disputes for over forty years - and thus effectively to prejudge those issues[52]. Bahrain also sought to include among the matters to be referred to the Court a request for determination of its so-called rights "in and around Zubara"[53]. After receiving Bahrain's draft special agreement, the Amir of Qatar wrote to King Fahd of Saudi Arabia on 25 March 1988, recording his strong protest at the terms of that draft and stating that it was quite obvious that Bahrain's object was to block the reference of the disputes to the Court[54]. He also described Bahrain's reference to its so-called rights in and around Zubarah as "astounding" because -

> "... in addition to the fact that all legal and historical facts establish decisive and clear cut evidence of the invalidity of Bahrain's claims to rights in Zubara, this claim has never been raised by Bahrain at any stage of the Saudi mediation ...[55]."

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52 See, Qatari Memorial, para. 3.37, p. 47.

53 See, ibid., Annex II.22, Vol. III, p. 139.

54 See, ibid., Annex II.23, Vol. III, p. 145, at p. 154.

55 Ibid., at p. 151.

3.21 The draft special agreements were then discussed at the Second Meeting of the Tripartite Committee, where it became clear that the principal differences related to the contents of Article II of Bahrain's draft (which contained requests to the Court) and Article V which in Qatar's view sought to exclude many discussions during the Saudi Mediation relevant to a proper understanding of the issues in dispute. Qatar, for obvious reasons, rejected both these Articles. As noted above, Article II sought to prejudge the issues in favour of Bahrain; and in connection with Article V, Dr. Hassan Kamel observed:

> "There is no way for the Court to know about the case at issue between the two countries unless the Saudi mediation was studied[56]."

3.22 In the light of the difficulties that the Committee was having in formulating a definition of the disputes that could be included in a special agreement, Prince Saud Al-Faisal made an important suggestion at the Second Meeting:

> "There are two possible attitudes representing two different perspectives. Would it 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 ? Or, could we agree on points to be put before the Court[57] ?"

3.23 This suggestion appears to be the origin of the idea that the only way the claims could be adjudicated would be for each State to put its own separate claims before the Court. Nevertheless, at the end of the Second Meeting Prince Saud Al-Faisal asked whether -

> "... all the points evoked by the two countries [could] be included in a common document to be put before the Court[58] ?"

Both Bahrain and Qatar sought time to consider this question.

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56 Tripartite Committee Documents, Document No. 4, p. 67, at p. 76.

57 Ibid., at p. 84.

58 Ibid., at p. 87.

3.24 At the Third Meeting of the Tripartite Committee on 17 April 1988, Prince Saud spoke of the -

> "... work of this Committee which is responsible for formulating the way the matter in dispute is to be laid before the International Court of Justice. In this regard, therefore, we have a task which has its bounds, for we are not discussing the case in its entirety but investigating the format in which it is to be brought before the Court.
>
> ...
>
> At the last meeting we ended on a question. We are now meeting again, and the matter before you is whether you wish to begin by discussing this question in any other way[59]."

3.25 In the event, the specific question posed by Prince Saud was not directly dealt with at the Third Meeting and there was an inconclusive discussion on the specific issues of dispute proposed to be referred to the Court. Both Parties, however, reiterated their faith in Saudi Arabia's Mediation and their commitment to go to the Court.

3.26 Dr. Hassan Kamel, on behalf of Qatar, made the following observation:

> "What is agreed with total conviction is that Saudi Arabia should go on with its mediation until the decision of the International Court of Justice is issued and properly enforced[60]."

3.27 Similarly Sheikh Mohammed bin Mubarak Al-Khalifa, the Foreign Minister of Bahrain, observed:

> "Bahrain insists that the laudable efforts of Saudi Arabia must continue as shown in the letter of 19/12/1987 from the Custodian of the Two Holy Mosques, until such time as a judgment is given by the International Court of Justice[61]."

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59 Tripartite Committee Documents, Document No. 5, p. 109, at pp. 111-112 (emphases added).

60 Ibid., at p. 134.

61 Ibid., at p. 126.

He also declared that -

> "... to preserve the interests of both States, and mindful of our peoples, and to maintain solidarity in our region, and in support of Arab unity, it is essential that neither party retain demands once the International Court of Justice had issued its judgment, otherwise either of them could allege that there are matters in dispute which have not been settled[62]."

3.28 Despite the common concern of both Qatar and Bahrain to resolve all outstanding disputes, there were strong differences of opinion on the subject and scope of the disputes that could be referred to the Court. This was the real dilemma of the Tripartite Committee, making it impossible for it to agree on a definition of the disputes that could be incorporated into a special agreement. In the words of Dr. Husain Al-Baharna, now the distinguished Agent of the State of Bahrain before the Court, it was still necessary to agree on the matters in dispute:

> "The State of Bahrain considers that there has not been a legal agreement on the matters in dispute, and consequently the task of the committee is to define the subjects of dispute irrespective of any proposals or exchange occurring during the mediation period. Sadly, we have not yet reached that stage[63]."

On the other hand, Dr. Hassan Kamel insisted on behalf of Qatar that the matters in dispute had already been specified:

> "We have come here to formulate a special agreement for the referral of the matters in dispute and not to come to an agreement on these matters, for they are specified in advance by agreement between the parties. Therefore Qatar's position is defined, namely that this committee has no brief to discuss or identify the matters differed upon, since the matters in dispute are defined within the framework of the mediation[64]."

3.29 Finally, it may be noted that there was a further brief discussion at the Third Meeting of Bahrain's draft Article V. That discussion was inconclusive, and the matter was never raised again within the Tripartite Committee.

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62 Tripartite Committee Documents, Document No. 5, p. 109, at pp. 127-128.

63 Ibid., at p. 131.

64 Ibid., at pp. 132-133.

3.30 The Tripartite Committee held its Fourth Meeting on 28 June 1988 in Jeddah. That meeting discussed new drafts submitted by Qatar and Bahrain containing proposed definitions of the disputes to be referred to the Court. As already explained in Qatar's Memorial, Bahrain's new draft still sought to obtain concessions on the merits[65]. Qatar also found it impossible to accept any reference to any purported dispute regarding Zubarah. As Dr. Hassan Kamel pointed out on behalf of Qatar at the Meeting -

> "... throughout the ten years of this mediation there has never been any reference to the question of Zubara[66]."

3.31 As there was no narrowing of the extremely wide divergence of views of the two Parties on the definition of the disputes, the proceedings of this Meeting were also inconclusive.

D. The Fifth Meeting: First Discussion of the Bahraini Formula

3.32 Between the Fourth and Fifth Meetings, the Heir Apparent of Bahrain visited Qatar. During that visit, in view of the dilemma in which the Committee was placed and as a result of a Saudi Arabian initiative at the highest level, Sheikh Hamad bin Isa Al-Khalifah, the Heir Apparent of Bahrain, 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 (the Bahraini formula). The text of the Bahraini formula, in its original English version as presented by Bahrain, was 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[67]."

3.33 Qatar's immediate reaction was that the formula might be too wide to include in a special agreement. At the Fifth Meeting of the Tripartite Committee held in Riyadh on 15 November 1988, Dr. Hassan Kamel expressed his doubts in the following words:

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65 See, Qatari Memorial, paras. 3.46-3.47, pp. 52-53.

66 Tripartite Committee Documents, Document No. 6, p. 163, at p. 169.

67 Qatari Memorial, Annex II.29, Vol. III, p. 191.

> "It is well known that the general traditional rule which has been followed by States in submitting their disputes to the I.C.J. - in all but two cases - is that the special agreement should include a clear definition of the matters of those disputes. It was, therefore, natural that the special agreement under which we will refer our dispute to the Court should include a clear complete presentation of the matters of our dispute which were agreed under the first principle of the framework for mediation. But we are now faced with a proposal which refers to matters of dispute in a broad formula. Qatar was and still prefer [sic] a special agreement prepared in the normal and traditional way, and not according to the exceptional way adopted in two cases only. However, in order to implement our agreement to refer our dispute to the I.C.J. which is the best and fairest method to solve this dispute, we welcome the new draft as a basis for the discussions aiming at reaching our common goal[68]."

3.34 In the light of these reservations and Qatar's concern about accepting a formula that would permit Bahrain to raise any new disputes, Qatar posed various questions in a note submitted to Bahrain as to the implications of the Bahraini formula.

3.35 Prince Saud informed the Meeting that he had been directed by King Fahd that the date of the next GCC Summit Meeting in December 1988 -

> "... is the date for terminating the Committee's mission whether or not it succeeded to achieve what was requested from it[69]."

Sheikh Mohammed bin Mubarak Al-Khalifa, on behalf of Bahrain, pointed out that "we have formulated a new framework[70]", and requested adequate time to reply to Qatar's questions.

3.36 It was then agreed that prior to the next Tripartite Committee Meeting it would be desirable for the legal experts first to discuss the implications of the new Bahraini formula[71].

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68 Tripartite Committee Documents, Document No. 8, p. 193, at pp. 204-205.

69 Ibid., at p. 208.

70 Ibid., at p. 210.

71 Ibid., at p. 211.

E. The Legal Experts' Meeting

3.37 The meeting of the legal experts took place at Riyadh on 6 December 1988. Dr. Hassan Kamel noted at the beginning of the meeting that Qatar "hoped that a joint formula be found for Article II of the agreement which will be submitted to the International Court of Justice[72]", but that he had various questions on how the formula would work. Dr. Husain Al-Baharna began his response by recalling Dr. Hassan Kamel's statement at the Fifth Meeting that Qatar considered the Bahraini formula to be -

> "... a good step forward as, unlike the two previous drafts, it submits to the Court the points at issue between the two States without any prejudgment. It is understood from the draft that it leaves to the Court, as it should, to decide on the claims of both Parties according to the evidence and arguments presented by them[73]."

3.38 With respect to Qatar's remark that the general traditional rule was that a special agreement should contain a clear definition of the subjects of the dispute, Dr. Husain Al-Baharna made the following comments:

> "... I would like to make clear that in consulting the Statute and Rules of the I.C.J. (Article 40, Article 38) I did not find any provision requiring the two parties to a dispute to submit it to the Court according to the general traditional rule referred to by the Qatari note. Moreover, the Statute gives the two parties the full right and freedom in selecting the formula they consent to. All that is required is that the formula should contain two basic foundations: the subject of, and parties to the dispute. I conclude from this that rules and practice allow the parties to submit any formula agreeable to them as long as it contains the said two foundations.
>
> ...
>
> ... I would like to state that the reason which prompted Bahrain to formulate the question in this way is that, as is known, there has been, so far, no general agreement on the subjects of the dispute between the two parties, which made it very difficult for us to define these subjects, particularly following Qatar's objection to the Zubarah subject being mentioned. Therefore, we saw this as a compromise formula since we are formulating a general formula and it is left for each Party to submit whatever claims it wants concerning the disputed matters[74]."

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72 Tripartite Committee Documents, Document No. 9, p. 231, at p. 233.

73 Ibid., at p. 234 (emphasis added).

74 Ibid., at pp. 234-235 (emphases added).

3.39 Dr. Al-Baharna further stated:

> "With respect to the specific formula contained in the Bahraini question, I would like to say that the legal concept of the phrase 'territorial rights' is that the two parties be left to submit whatever legal arguments or evidence they have concerning their claims whether they relate to the land or the sea. The phrase 'legal rights' or 'other interests' is intended to open the way for both parties to submit whatever arguments they have concerning claims related to sovereignty or rights and interests which could be less than sovereignty and which would be left to the Court to decide upon[75]."

3.40 The following dialogue ensued:

> "**Dr. Hassan Kamel:**
>
> Dr. Hussain Baharna started with a general remark saying that there is nothing in the Statute and Rules of the Court to indicate the necessity of having anything more than general terms. To emphasise this, he mentioned ...
>
> **Dr. Hussain Baharna:**
>
> Excuse me, Dr. Hassan, I did not say that. I said that the Statute and Rules of the Court do not impose any particular formula for the question. All that is required is that the application submitted to the Court contained two things: the subject of, and parties to the dispute.
>
> **Dr. Hassan Kamel:**
>
> I would like to answer your general observations by remarking that when we last met on 15/11/1988, Bahrain asked for a period exceeding two weeks to respond to enquiries about a draft prepared by it. Dr. Hussain Baharna has dealt with many issues, in a long note he described as brief, each of which needs to be studied and answered. Furthermore, you referred to Article 40 of the Court's Statute and Article 38 of the Court's Rules, but you dealt with Article 40 only, and did not in fact deal with Article 38 ...[76]."

From the above, it is apparent that both Qatar and Bahrain were discussing not only a special agreement but also the possibility of submitting the dispute to the Court by means of application.

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75 Tripartite Committee Documents, Document No. 9, p. 231, at pp. 235-236 (emphases added).

76 Ibid., at p. 237 (emphasis added).

3.41 In the course of further discussion, Sheikh Abdul Rahman Mansuri of Saudi Arabia stated:

> "Bahrain proceeds from the view that there is no agreement to define particular points for presentation to the Court. It, therefore, proposes that a particular formula satisfying both Parties be reached, which will give the Court the jurisdiction to consider any claims by them whether they relate to sovereignty, rights or interests. Thus, the Parties go to the Court not with defined disagreements but by giving the Court jurisdiction and power and the disagreements will be defined there[77]."

3.42 The above statement, as well as the discussion which followed, shows that the Bahraini formula was designed as a compromise to allow each Party to bring its own claims before the Court. Thus, in the same discussion, Dr. Husain Al-Baharna stated:

> "If the two Parties agree as to the subjects of dispute, and put the question in the formula they choose, it is impossible that either Party would to all practical purposes present claims that have no legal ground. Each Party would, rather, present the subjects agreed upon as those of dispute. I have already said that the formulation of the question in this general way was because of the refusal by the State of Qatar of our express mentioning of Zubarah in the question[78]."

Dr. Hassan Kamel responded:

> "This is not the only reason. You, too, have said that the sovereignty over Hawar is not a matter for discussion, and that you do not accept that it be submitted to the Court[79]."

3.43 The dilemma was expressed by Dr. Husain Al-Baharna as follows:

> "I agree with you on the following grounds: that the question, whether put in general terms or a specific form, in both cases the Parties should go to Court knowing exactly what each one of them will claim. We are faced with a delicate problem which hindered the two Parties from reaching an accepted formula for the Special Agreement for a whole year. That is Qatar's objection to the

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77 Tripartite Committee Documents, Document No. 9, p. 231, at p. 238 (emphasis added).

78 Ibid., at p. 241.

79 Ibid.

> reference to Zubara, and the attitude of Bahrain regarding Hawar. It is the sensitivity of this matter which has, undoubtedly, made us propose this general formula[80]."

He went on to say:

> "I think we have similar concepts regarding the subjects of dispute. Would you like me to explain ours ? I would do that by way of explanation as well as to help the two Parties reach a general formula for the question. In our view, the general formula gives both Parties the chance to submit to the Court all the claims they have, including those regarding sovereignty and maritime delimitation[81]."

Consequently, in response to a question raised by Qatar about how Bahrain would present its claim on Zubarah, Dr. Al-Baharna observed:

> "I can say that I would present claims supported with legal arguments and let the Court look into them and decide[82]."

F. The Sixth (and Final) Meeting of the Tripartite Committee

3.44 At its Sixth and final Meeting, the Tripartite Committee continued the discussion of the issues raised during the earlier legal experts' meeting as to whether the Bahraini formula was too wide. It also took up two suggestions that had been made by Qatar at the end of the legal experts' meeting in response to Dr. Al-Baharna's proposal that each Party should submit its own claims. The first suggestion was that certain amendments should be made to the Bahraini formula. The second was that there should be two annexes setting out the respective claims of Qatar and Bahrain. In this connection Dr. Hassan Kamel clarified Qatar's suggestion as follows:

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80 Tripartite Committee Documents, Document No. 9, p. 231, at p. 242 (emphasis added).

81 Ibid., at p. 243 (emphasis added). The Arabic word corresponding to "both Parties" is "al-tarafan" - the same word introduced by Bahrain in the Doha Agreement. Clearly the word is used here by Dr. Al-Baharna in a disjunctive sense giving each Party the right to submit its own claims to the Court. See, also, para. 3.38, above, where Dr. Al-Baharna gave the same interpretation of the Bahraini formula.

82 Tripartite Committee Documents, Document No. 9, p. 231, at p. 244.

> "Each party will sign its own annex. It is unreasonable that we sign the annex containing Bahrain claims[83]."

Bahrain took the same position, stating:

> "Similarly, we will not sign the annex containing Qatar's claims[84]."

This attitude seemed to confirm the idea that each State would have to seek adjudication of its own claims[85].

3.45 Minutes of the proceedings of the Sixth and final Meeting of the Tripartite Committee were signed on 7 December 1988. Bahrain contends that these signed minutes record "the agreement of the parties on the subjects to be submitted to the Court within the framework of a joint submission" and are "no less an agreement" than the 1987 or Doha Agreements[86].

3.46 This contention is inaccurate and unfounded. The signed minutes in fact record the inconclusive outcome of the final Meeting of the Tripartite Committee. Thus, with regard to the Bahraini formula the minutes record Qatar's proposed amendment of this formula and Bahrain's request for time to study Qatar's proposal. With respect to the definition of the disputes, the Minutes do not, contrary to what Bahrain contends, record an "agreement ... on the subjects to be submitted to the Court". Rather, they record Qatar's proposal that there be two annexes and that each State "would define in its annex the subjects of dispute it wants to refer to the Court[87]", a proposal which Bahrain also requested time to study.

3.47 In addition, it is clear from the minutes of the proceedings of the earlier legal experts' meeting that there was no agreement on the subjects of the dispute. Thus Dr. Al-Baharna, referring to the list of subjects later recorded in the signed Minutes, stated that this was Bahrain's own "concept of the subjects of dispute[88]".

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83 Tripartite Committee Documents, Document No. 9, p. 231, at p. 265.

84 Ibid.

85 See, paras. 3.22-3.23, and 3.37 et seq., above.

86 Bahraini Counter-Memorial, para. 6.29, p. 63.

87 Tripartite Committee Documents, Document No. 10, p. 279, at p. 282.

88 Ibid., Document No. 9, p. 231, at p. 243.

Dr. Hassan Kamel agreed that these were subjects "you would like to submit to the Court[89]". It was also clear from the minutes of the Sixth Meeting that neither State was willing to agree to the subjects of dispute specified by the other. Thus, Dr. Al-Baharna stated:

> "In the legal experts' committee we agreed to draft a single annex containing the disputed subjects which will be submitted to the Court. When we do that it does not mean that Qatar agrees to Bahrain's claims and vice versa[90]."

Dr. Hassan Kamel replied:

> "We agreed on two annexes not one. We are following precedents in this connection[91]."

3.48 The disagreement on defining the subjects of the dispute in a joint document was therefore not resolved, and each side refused to sign an annex containing the list of subjects the other side wished to refer to the Court.

SECTION 4. Failure of the Tripartite Committee to Reach a Draft Special Agreement

3.49 Bahrain failed to react or respond to the amendments proposed by Qatar and recorded in the signed minutes of 7 December 1988 during the two weeks preceding the GCC Summit Meeting held on 19-22 December 1988. Pursuant to Prince Saud Al-Faisal's statement at the Fifth Tripartite Committee Meeting, this was the date when the work of the Tripartite Committee was to be regarded as terminated[92]. It was thus clear, given Bahrain's lack of response, that the efforts of the Tripartite Committee had ended in failure as it had been unable to resolve the dilemma of defining the subjects of dispute which could be incorporated in a special agreement.

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89 Tripartite Committee Documents, Document No. 9, p. 231, at p. 243 (emphasis added).

90 Ibid., at p. 266.

91 Ibid.

92 See, para. 3.35, above.

3.50 It is important to appreciate that the basic reason for the failure of the Tripartite Committee was that the approaches adopted to identify the subjects of dispute which each State wished to refer to the Court were so divergent that they could not be grouped together to form a precise enough definition suitable for incorporation in a special agreement. It was becoming apparent that the claims of each Party were such that they would have to be resolved either by give-and-take in the course of the Saudi Mediation or by separate presentation to the Court by each Party[93]. This certainly was the theme which began to develop from the time that Prince Saud asked the question at the Second Meeting as to whether it would be possible simply to go to Court with each Party claiming whatever it wanted, leaving it to the Court to adjudicate the claim[94]. The general formula proposed by Bahrain developed out of the difficulties of the Tripartite Committee in defining the subjects of dispute in a manner which would not prejudice or compromise the position of the other. It became clear that the adoption of a general formula such as that proposed by Bahrain would allow each Party to submit its own claims. The observations of Dr. Husain Al-Baharna at the legal experts' meeting on 6 December 1988 demonstrate that Bahrain understood the Bahraini formula in this way.

3.51 In its Counter-Memorial Bahrain has failed to address the fact that the work of the Tripartite Committee had terminated in failure in December 1988. Bahrain does acknowledge, however, that between the Sixth Meeting in December 1988 and the Doha Agreement of 25 December 1990 two years went by without a Tripartite Committee meeting[95].

SECTION 5. Lack of Progress during 1989-1990

3.52 In the light of the Tripartite Committee's failure, at the GCC Summit Meeting of December 1988 King Fahd of Saudi Arabia offered to make further efforts to see if he could help reach a negotiated settlement on the merits. He therefore requested a period of six months for this purpose rather than

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93 See, for example, observations of Dr. Husain Al-Baharna, reproduced in paras. 3.38-3.40, above.

94 See, para. 3.22, above.

95 See, Bahraini Counter-Memorial, para. 5.38, p. 47.

immediately considering other means of implementing the 1987 Agreement by reference to the Court in accordance with Saudi Arabia's obligation under the fourth item of that Agreement.

3.53 Regrettably, the proposals of King Fahd to try to achieve a mediated settlement between the Parties did not make any progress during 1989. The matter was therefore taken up again at the GCC Summit Meeting held in Muscat in December 1989, where King Fahd once again requested a further period of two months to try to secure a settlement of the disputes. Accordingly the implementation of the 1987 Agreement for reference of the disputes to the Court was again delayed for that period. Unfortunately, even during this period of two months and, for that matter, during the entire remaining period of ten months up to the time of the GCC Meeting in Doha in December 1990, proposals made by King Fahd did not lead to a settlement of the pending disputes.

SECTION 6. The Doha Agreement of 1990

A. Background to the Conclusion of the Doha Agreement

3.54 By the time of the GCC Summit Meeting held in Doha in December 1990, Qatar had been seeking resolution of its disputes with Bahrain for over forty years. It had been extremely grateful for the initiatives taken by King Khalid and later by King Fahd of Saudi Arabia from 1978 onwards to attempt to settle the disputes through Mediation, as well as for King Fahd's assistance in concluding the 1987 Agreement. Qatar was however frustrated by the failure of the Tripartite Committee to secure a special agreement acceptable to both Parties, as well as by the fact that in the two years since the termination of the work of the Tripartite Committee in December 1988 Saudi Arabia had found it impossible to secure the agreement of both Parties to an amicable settlement. Qatar was therefore left with no alternative but to raise the question yet again at the GCC Summit Meeting in Doha in December 1990 and seek implementation of the 1987 Agreement.

3.55 Bahrain tries to give the impression that it was surprised when Qatar brought up the issue at the GCC Summit Meeting in Doha. However, as is now confirmed in the Statement of 21 May 1992 of Sheikh Mohammed bin

Mubarak Al-Khalifa, Bahrain's Foreign Minister[96], when the GCC Foreign Ministers met on 8-10 December 1990 to discuss the agenda for the Summit Meeting, Qatar's Foreign Minister raised the issue of the dispute between Qatar and Bahrain and asked that it be added to the agenda. Bahrain's Foreign Minister states that -

> "I disagreed with this suggestion saying that the matter had always been outside the formal agenda for GCC meetings and should therefore not be included[97]."

3.56 Despite the fact that the matter had always been outside the formal agenda for GCC Summit Meetings, it had been raised on the occasion of every such Meeting since 1988. It was in accordance with this practice that the Amir of Qatar raised the matter at the opening of the first formal session of the Summit Meeting in Doha on Sunday, 23 December 1990. There could therefore be no

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96 Bahraini Counter-Memorial, Annex I.25, Vol. II, p. 157. Bahrain's Counter-Memorial contains two "Statements": Annex I.25, the Statement by Bahrain's Foreign Minister, and Annex I.26, a Statement by Dr. Husain Al Baharna, Bahrain's Minister of State for Legal Affairs and the Agent of the State of Bahrain in the present case. Qatar leaves to the appreciation of the Court whether these Statements were properly filed and comply with the general principles and rules applicable to the admissibility of evidence. In any event, Qatar submits that, except for the admissions contained therein, no evidentiary weight should be given to these Statements. Both Statements have been made by Ministers of the Government of Bahrain, one of whom is the Agent of Bahrain, who cannot be heard as a witness. As the Court has stated:

> "... while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve." (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 43.)

> Moreover, in the circumstances of the present case no credence can be given to the Statements. In the view of Qatar, statements by Ministers of a Government who have taken part in negotiations cannot affect in any way the legal consequences of the signature on behalf of the Government of a document which on its face appears to be an agreement. Such testimony is "highly subjective" and "cannot take the place of evidence" (ibid., p. 42). In fact the Statements annexed to the Bahraini Counter-Memorial are merely pleading, self-serving Bahrain's thesis.

97 Bahraini Counter-Memorial, Annex I.25, Vol. II, p. 157, at pp. 159-160.

question of Bahrain being taken by surprise because Qatar raised the matter "without any warning whatsoever[98]".

3.57 In accordance with Saudi Arabia's guarantee under the fourth item of the 1987 Agreement to ensure implementation of that Agreement, King Fahd of Saudi Arabia stated at the Meeting that the time had come for the dispute to be referred to the International Court of Justice. He went so far as to indicate that he wished he had not asked for more time in December 1988 and December 1989, as otherwise the disputes would already have been before the Court[99]. As the Bahraini Foreign Minister's Statement correctly notes, after the King's statement -

> "It was ... suggested by His Majesty Sultan Qaboos of Oman that a further period should be agreed, say to the end of Shawal, during which time the parties should try once again to reach a political solution of all their differences. If not, then the matter might proceed to the ICJ[100]."

3.58 To facilitate such reference to the Court and to overcome the difficulties faced in agreeing on the subject and scope of the dispute, the Amir of Qatar stated that he now accepted the Bahraini formula in accordance with which Qatar and Bahrain would be able to present their respective claims to the Court[101]. Bahrain's Prime Minister, who represented the Amir of Bahrain at the meeting, questioned the fact that Bahrain had committed itself to go to the Court, but this immediately led to angry remarks from King Fahd, who declared that if Bahrain

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98 Bahraini Counter-Memorial, para. 1.9, p. 4, and para. 6.63, p. 80. It is also worth noting that despite its criticisms of Qatar for having raised the subject at the 1990 GCC Summit Meeting although it was not on the agenda, Bahrain admits that "the dispute was adverted to at the Gulf Cooperation Council Summit Conference in December 1988 and again at the corresponding meeting in December 1989" (Bahraini Counter-Memorial, para. 5.38, p. 47) - although it was similarly not on the agenda for either of those meetings.

99 See, Qatari Memorial, para. 3.55, p. 56.

100 Bahraini Counter-Memorial, Annex 1.25, Vol. II, p. 157, at p. 160. Bahrain's Foreign Minister thus admits that this initiative was taken by the Sultan of Oman, and it is incorrect for Bahrain to state elsewhere in its Counter-Memorial that "Qatar began by insisting that the period for the continuance of the Saudi Arabian efforts to achieve an amicable solution should terminate soon after the end of the next Ramadan and that after May 1991 the Parties should be free to take the matter to the Court". (Bahraini Counter-Memorial, para. 1.9, p. 4 (emphasis added).) See, also, Qatari Memorial, para. 3.55, p. 56.

101 See, Qatari Memorial, para. 3.55, p. 56.

sought to go back on the agreement already reached for the reference of the case to the Court, he would have nothing further to do with the resolution of the disputes. King Fahd further observed that now that Qatar had accepted the Bahraini formula there was no excuse for Bahrain not to refer the dispute to the Court[102].

3.59 As a result of the discussion on 23 December 1990 an agreement was reached that, subject to a further period of time for the Saudi Mediation until Shawwal, the disputes covered by the Bahraini formula, which Qatar had accepted, could be submitted to the Court. Efforts therefore began to prepare and finalize a written document incorporating this agreement.

3.60 As will be apparent from the above and as will be discussed further below, the Doha Agreement was reached at the initative of Saudi Arabia, with the assistance of Oman and with the full accord of Qatar and Bahrain. It is wrong to say that the agreement was signed only to "avoid conveying the impression to the other GCC Heads of State that the Amir of Qatar had entirely failed to secure his objective[103]" and to get Qatar "off the hook[104]". If anyone in this case is dishonoured it is Qatar, and particularly the Amir of Qatar, by such disparaging remarks. Qatar does not propose to make an issue of this matter, however, and would simply say that disparagement is no substitute for effective answers to Qatar's case.

B. The Sequence of Events concerning the Drafting of the Doha Agreement

3.61 The sequence of events that occurred after the discussion at the Summit Meeting, as known to Qatar's representatives, was as follows. The Omani Foreign Minister took the initiative to mediate between Qatar and Bahrain in order to secure an agreed and signed document. On 24 December he came to meet H.H. The Heir Apparent of Qatar with a handwritten draft containing three points. In view of the attempt by Bahrain's Prime Minister to deny Bahrain's commitment in the 1987 Agreement to refer the disputes to the Court, Qatar was particularly gratified to see the first point, i.e., the reaffirmation of "what was

102 Qatari Memorial, para. 3.55, p. 56.

103 Bahraini Counter-Memorial, Annex I.25, Vol. II, p. 157, at p. 165.

104 Bahraini Counter-Memorial, para. 6.70, p. 82.

previously agreed between the two parties". It was quite obvious that the reference was to the 1987 Agreement to submit the disputes to the Court. Secondly, the draft text brought by the Omani Foreign Minister correctly expressed the decision to give King Fahd until Shawwal to seek an amicable settlement of the disputes, whereafter the disputes could be submitted to the Court. Thirdly, it provided that King Fahd's good offices would continue even after such reference to the Court and that the case would be withdrawn if a solution acceptable to the Parties was reached.

3.62 After consideration of the Omani draft, Mr. Adel Sherbini, Legal Adviser to the Qatari delegation, added in his handwriting the words in Arabic which, translated, reads "in accordance with the Bahraini formula, which has been accepted by Qatar". A copy of the Arabic text including Mr. Sherbini's addition, together with its English translation, is annexed hereto[105]. Bahrain's Foreign Minister asserts in his Statement that he added the words mentioned above[106]. This is wrong, yet the same error is made again in the Statement of Dr. Husain Al-Baharna[107].

3.63 In case there should be any doubt about this point, Annex II.1 hereto is a graphological report which analyses the handwritten addition of the words "in accordance with the Bahraini formula, which has been accepted by Qatar" as they appear on Attachment B to each of the two Statements annexed to Bahrain's Counter-Memorial. That report confirms that this phrase was indeed added by Mr. Sherbini.

3.64 Bahrain's own Counter-Memorial, signed by Dr. Al-Baharna in his capacity as Agent of the State of Bahrain, contradicts not only Bahrain's Foreign Minister's Statement but also Dr. Al-Baharna's own Statement. Bahrain's Counter-Memorial correctly states that the draft presented by the Omani

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105 A photocopy of the Omani draft discussed in paras. 3-61-3.62, together with Mr. Sherbini's addition, was taken by Qatar before the draft was handed back to the Omani Foreign Minister. See, Annex I.3 A, Vol. II, p. 15.

106 Bahraini Counter-Memorial, Annex I.25, Vol. II, p. 157, at p. 163.

107 Ibid., Annex I.26, Vol. II, p. 177, at pp. 180-181.

Minister for Foreign Affairs already "referr[ed] to Qatari acceptance of the Bahraini formula[108]".

3.65 Because of the errors in Bahrain's record of these discussions, it is necessary to recount the chain of events in some detail. After the addition made by Mr. Sherbini, the draft was taken by the Omani Foreign Minister and shown to Bahrain's Foreign Minister. The Foreign Minister of Oman then again visited the Qatari delegation in the evening of 24 December and advised them that Bahrain would like to study the draft and that it had been sent by fax to Bahrain's Minister of State for Legal Affairs, Dr. Al-Baharna, who would arrive in Doha early the next morning with his comments.

3.66 At about 11 a.m. on 25 December, the Omani Foreign Minister came and showed the Qatari delegation what he termed the final version of the text (handwritten)[109]. This version incorporated the addition made by Mr. Sherbini and two further amendments which, the Omani Foreign Minister advised, had been made by Bahrain: the words "either of the two parties" (which were in the first Omani draft seen by the Qatari delegation) had been substituted by "the parties" ("al-tarafan"); and the words "and the proceedings arising therefrom" had been added. Qatar found the word "al-tarafan" (the parties) and the words "and the proceedings arising therefrom" perfectly acceptable because both Parties had distinct claims to make before the Court, and because this language would enable each Party to present its own claims to the Court. There was no suggestion in the amendments proposed by Bahrain either that Bahrain was thinking of further negotiations or that it was considering a special agreement. Qatar therefore agreed to Bahrain's amendments and the Omani draft was thereafter typed and signed by the Foreign Ministers of Qatar, Bahrain and Saudi Arabia.

3.67 The Statement of Bahrain's Foreign Minister indicates that he received two drafts of the proposed Minutes to record the agreement of the Parties, one from Prince Saud Al-Faisal of Saudi Arabia and one from the Omani Foreign Minister. This Statement (like the Statement of Dr. Husain Al-Baharna) seeks to

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108 Bahraini Counter-Memorial, para. 1.11, p. 5. The fact that the Statements annexed to the Bahraini Counter-Memorial contain a certain number of mistakes is an additional ground for giving no weight to those Statements. As stated by Judge Azevedo in his Dissenting Opinion in the Corfu Channel case, "We are bound in any case to recognize the inadequacy of a proof based almost entirely on one witness whose statements were inadequate on many points". (Corfu Channel, Merits, I.C.J. Reports 1949, p. 89.)

109 Annex I.3 B, Vol. II, p. 15.

give the impression that the final text of the Minutes was negotiated only between the Omani Foreign Minister and the Bahraini Ministers and gives no indication that Qatar made any contribution to the formulation of the text. Qatar confirms that it was unaware of the Saudi Arabian draft and therefore of any changes proposed in that draft by Bahrain. However, as will have been apparent from the above description of the sequence of events, Qatar played a significant part in the finalization of the text of the Doha Agreement. It made an amendment to the Omani Foreign Minister's first draft, and it gave its approval to the amendments made by Bahrain before the Agreement was typed for signature.

3.68 The question of the interpretation of the Doha Agreement is examined in Chapter IV below. Suffice it to say that it was recognized both at the Summit Meeting and during discussions on the draft that a new agreement was being negotiated in order finally to resolve a long outstanding problem. The approach of Saudi Arabia and Oman during the negotiations clearly reveals that they did not think of these negotiations as merely leading to an agreement to make a further effort to reach a special agreement but as expressly allowing reference of the case to the Court if the Mediation had not succeeded by the time of the expiry of the May 1991 deadline. Moreover, Bahrain's suggestion that the Doha Agreement was intended to do no more than record Qatar's acceptance of the Bahraini formula[110] and that "this was the limit of the agreement[111]" is erroneous on its face. It is clear from the text of the Doha Agreement that many more commitments were recorded: it reaffirmed the Parties' consent to the jurisdiction of the Court, provided for the continuation of the good offices of Saudi Arabia, contained a deadline after which the matter could be submitted to the Court, and provided that the case would be withdrawn if in the meantime a settlement was reached on the substance of the disputes. These commitments cannot magically disappear now by virtue of a simple denial by Bahrain.

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110 Bahraini Counter-Memorial, para. 6.74, p. 84. Although Bahrain acknowledges that under the Doha Agreement Qatar accepted the Bahraini formula, it now even attempts to change the actual wording of the formula. It will be remembered that the formula was originally submitted to Qatar in English with an Arabic translation, and that the English text began with the words "The parties request the Court ...". Yet Bahrain now states that "this formula ... spoke of a request by the two Parties". See, Bahraini Counter-Memorial, para. 1.10, p. 5 (emphasis in original). See, also, ibid., para. 5.43 (iii), p. 50.

111 Bahraini Counter-Memorial, para. 7.19, p. 104.

SECTION 7. The Conduct of the Parties after the Doha Agreement

3.69 Events after the signing of the Doha Agreement until the filing of Qatar's Application of 8 July 1991 have already been described in paragraphs 3.61 to 3.67 of Qatar's Memorial, but further clarification is necessary in the light of allegations made in Bahrain's Counter-Memorial.

3.70 Bahrain repeatedly alleges that Qatar seised the Court without warning. However, it suffices to refer to the documents filed by Qatar with its Memorial, and also to a document now filed by Bahrain itself, to see that this was not the case. Qatar's intention to seise the Court was made perfectly clear both in the letters addressed by the Amir of Qatar to King Fahd of Saudi Arabia on 6 May 1991 and 18 June 1991[112] and during a meeting with King Fahd on 5 June 1991[113]. It is most unlikely that this intention was not communicated to Bahrain by Saudi Arabia, since Bahrain's own Foreign Minister states that at a meeting on 3 June 1991 between King Fahd and the Amir of Bahrain -

> "King Fahd confirmed that he had been approached several times by the Amir of Qatar regarding the matter and that he had asked the Amir of Qatar not to be in such a rush. King Fahd also confirmed that he had sent Prince Saud Al Faisal, the Saudi Foreign Minister, to Qatar with Saudi Arabia's proposals concerning the matter and when Saud Al Faisal returned he would send him to Bahrain[114]."

Indeed, at the meeting on 5 June 1991 between King Fahd and the Amir of Qatar, the Amir of Qatar had agreed to a three-week extension before submitting the case to the Court[115].

3.71 In Qatar's view, therefore, Bahrain must have been under notice that unless a solution was achieved within the time fixed and subsequently extended, Qatar would submit an appropriate application to the Court. It therefore seems extremely unlikely that Qatar's Application came as a complete surprise to Bahrain.

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112 Qatari Memorial, Annexes II.34 and II.35, Vol. III, pp. 213 and 217.

113 See, Qatari Memorial, para. 3.64, p. 60, and Annex II.35, Vol. III, p. 217.

114 Bahraini Counter-Memorial, Annex I.25, Vol. II, p. 157, at p. 165.

115 See, Qatari Memorial, para. 3.64, p. 60, and Annex II.35, Vol. III, p. 217.

SECTION 8. Conclusion

3.72 The facts set out in Qatar's Memorial and in the present Reply demonstrate that Bahrain's case is based on a number of errors of fact. Thus although Bahrain accepts that the 1987 Agreement to submit the disputes to the Court is binding, it misinterprets that Agreement by stating that any eventual reference to the Court "was clearly conditional upon the successful negotiation of a special agreement[116]". In fact the basic consent of both Parties to the jurisdiction of the Court in the 1987 Agreement was clear and unqualified. Nowhere was it stated that the consent to jurisdiction was subject to any condition to negotiate a special agreement.

3.73 The details of the Tripartite Committee's proceedings set out above demonstrate that neither Qatar nor Bahrain interpreted the task of the Committee to be only that of drawing up a special agreement. Indeed, it was only after the First Meeting that the Committee began to examine the possibility of drafting a special agreement. When this possibility began to seem remote at the Second Meeting, Prince Saud Al-Faisal of Saudi Arabia asked the Parties to consider ways of placing their separate claims before the Court. From the time of the Fifth Meeting when the Bahraini formula was discussed as a way of breaking the deadlock and allowing each State to present its claims separately, this question dominated the discussions of the Committee.

3.74 Moreover, Bahrain overlooks the failure of the Tripartite Committee to reach a special agreement and the resulting termination of the Committee's work at the end of 1988. It thus tries to ignore the circumstances that led to the conclusion of the Doha Agreement.

3.75 Bahrain also ignores the existence, importance and meaning of the fourth item of the 1987 Agreement which provided for a continuing role of the Mediator to guarantee implementation of the commitment in the Agreement to refer the disputes to the Court, whether through the Tripartite Committee or otherwise. It was pursuant to this role that Saudi Arabia persuaded the Parties to accept the Doha Agreement to implement the 1987 Agreement.

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116 Bahraini Counter-Memorial, para. 1.6, p. 3.

3.76 Bahrain does admit, however, that in the context of the Doha Agreement -

> "... there was one positive element in the situation which needed to be placed on record, namely, Qatari acceptance of the Bahraini Formula[117]."

Thus Bahrain acknowledges that there has been an unequivocal and unconditional acceptance by both Parties of the Bahraini formula, which stands on its own and defines the subject and scope of the disputes to be referred to the Court.

3.77 However, as explained above, this is not all that the Doha Agreement achieved. Inter alia, it also reaffirmed the Parties' consent to the jurisdiction of the Court and recorded their agreement to submission of the case to the Court after May 1991.

3.78 In view of the Parties' consent to jurisdiction and Bahrain's repeated assertion of its "willingness to come to the Court[118]" Qatar invites Bahrain to file its own Application pursuant to the Doha Agreement, as it is perfectly entitled to do, with full faith in the Court to do justice to each of the two Parties on their respective claims presented in accordance with the Bahraini formula.

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117 Bahraini Counter-Memorial, para. 6.71, p. 83.

118 Ibid., para. 1.13, p. 6.

PART II
JURISDICTION AND ADMISSIBILITY

CHAPTER IV
THE JURISDICTION OF THE COURT

4.01 The present Chapter will address the main legal issues which still divide the Parties relating to the jurisdiction of the Court. In Section 1 below, Qatar will discuss briefly the legal basis of the Court's jurisdiction and in particular the true relation between the 1987 and Doha Agreements. Qatar will then show that Bahrain's position as to the existence of a special burden of proof with respect to the question of jurisdiction is unfounded (Section 2). Bahrain has not taken issue with the binding character of the 1987 Agreement. It continues, however, to contest the binding character of the Doha Agreement. Qatar will therefore show in Section 3 that this fundamental contradiction in Bahrain's position is unsustainable and that the Doha Agreement like the 1987 Agreement is a binding international agreement. Qatar will then address Bahrain's attempts to interpret the Doha Agreement in an effort to modify that Agreement to suit its present thesis. It will be shown that the Doha Agreement clearly expresses the Parties' consent to submit to the Court the disputes existing between them in accordance with the Bahraini formula (Sections 4 and 5). Finally, in Sections 6 and 7, it will be shown that the Doha Agreement is sufficient to establish the jurisdiction of the Court under Article 36, paragraph 1, of the Statute, and that the issue of seisin, as indeed the alleged disadvantages suffered by Bahrain as a result of Qatar's Application to the Court, are really non-issues in the present proceedings.

SECTION 1. The Basis of the Court's Jurisdiction

4.02 The legal basis of the Court's jurisdiction in the present case has been fully discussed in the Qatari Memorial, and further factual elements have been given in Chapter III above. There is no need to repeat what has already been said except to recall that the jurisdiction of the Court is founded on two closely interrelated Agreements. For convenience of reference the more important parts of these Agreements relating to the question of jurisdiction are set out below.

4.03 The first Agreement is the 1987 Agreement by which the Parties accepted, inter alia, that -

> "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.
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> ...
>
> 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[119]."

This Agreement was concluded by two parallel exchanges of letters between the King of Saudi Arabia and each Amir. It was made known by an Announcement by Saudi Arabia made public on 21 December 1987[120].

4.04 The 1987 Agreement included, inter alia, two clear and quite separate provisions[121]. The first, set out in the first item, describes the ultimate stage to be reached as a final obligation - an obligation de résultat. This obligation is couched in mandatory language and leaves no doubt as to the ultimate stage which the Parties agreed to reach: a final ruling of the Court and execution by the Parties of the judgment arrived at. The second provision, set out in the third item of the 1987 Agreement, leaves to the Parties the choice of means to achieve the obligation set out in the first item. 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 methods by which the case would be submitted to the Court - special agreement, separate applications, unilateral application or otherwise - was left open. The Parties were

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119 Qatari Memorial, Annex II.15, Vol. III, p. 101.

120 Ibid. Contrary to what Bahrain says (Bahraini Counter-Memorial, para. 5.19, fn. 82, p. 36), Qatar does not see this Announcement as an integral part of the 1987 Agreement; it is a press release making known the Agreement resulting from the exchanges of letters.

121 See, Qatari Memorial, paras. 5.40-5.41, pp. 112-113.

thus only accepting an obligation to negotiate in good faith in order to achieve compliance with Article 40 of the Statute of the Court[122].

4.05 After its First Meeting, the Tripartite Committee decided to attempt to draft a special agreement as a possible means of referring the dispute to the Court under Article 40. Unfortunately, for the reasons set out in Chapter III above, the Committee failed to accomplish its task, and another solution was eventually found to implement the 1987 Agreement.

4.06 The second agreement is the Doha Agreement. That Agreement, implementing the 1987 Agreement, was concluded at the initiative of the Heads of State or their representatives who were present at the GCC Summit Meeting held in Doha in December 1990, and with the assistance of the Omani Minister of Foreign Affairs. In this new Agreement it was agreed that the good offices of Saudi Arabia would continue until the end of May 1991 but 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[123]."

4.07 The Bahraini formula incorporated by reference in the Agreement 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[124]."

4.08 In its Counter-Memorial Bahrain presents the Court with a false alternative by posing the following questions:

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122 It is necessary here to call attention to the way Bahrain distorts Qatar's case. In para. 5.18 of its Counter-Memorial Bahrain argues that the conditional character of the undertaking in the first item of the 1987 Agreement is even recognized by Qatar itself, referring to Qatar's statement in para. 5.41 of its Memorial that the Parties were "only submitting themselves to an obligation to negotiate in good faith in order to achieve the seisin of the Court". This statement related only to the third item, and not to the obligation under the first item as Bahrain alleges.

123 Qatari Memorial, Annex II.32, Vol. III, p. 205.

124 Ibid., Annex II.29, Vol. III, p. 191.

> "'Did the parties to the 1987 Agreement accept jurisdiction so as to be bound by virtue of that Agreement alone ?'
>
> or
>
> 'Did they merely agree in principle to submit their disputes to the Court, but subject to a Special Agreement to be negotiated subsequently?'[125]"

This is a false dichotomy because these are not the only possibilities and in any event the answer to both questions is in the negative.

4.09 As Qatar has made abundantly clear, neither of these questions corresponds to its position. As to the first question, as recalled above, Qatar has not claimed that the Parties to the 1987 Agreement were bound by virtue of that Agreement alone. On the contrary, the interrelation and complementary character of the 1987 and Doha Agreements has been constantly underlined by Qatar. As to the second question, Qatar has shown in detail in Chapter III above, in relating the history of the Mediation, that a special agreement was not the only means contemplated to approach the Court nor the one ultimately chosen by the Parties.

4.10 Bahrain's "special agreement" syndrome is all the more specious in that the Doha Agreement, implementing the 1987 Agreement, unquestionably contains the consent of the Parties on the subject and scope of the dispute and the consent of the Parties to the submission of the matter to the International Court

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125 Bahraini Counter-Memorial, para. 3.3, pp. 19-20.

of Justice after the lapse of a given period[126]. The relationship between the 1987 and Doha Agreements is the following. The former was sufficient under Article 36, paragraph 1, of the Statute to express the consent of the Parties to submit their disputes to the Court. The Doha Agreement not only confirms the consent to the jurisdiction of the Court but also allows the Parties to submit the matter to the Court after a given date in accordance with the Bahraini formula which defined the subject and scope of the disputes which could be submitted.

SECTION 2. The Burden of Proof with respect to the Question of Jurisdiction

4.11 In its Counter-Memorial, Bahrain devotes a whole section to the question of the burden of proof in which it tries to demonstrate that there is a special rule of evidence for applicants as regards the establishment of the jurisdiction of the Court[127]:

> "... the onus rests upon Qatar of establishing that the Court has jurisdiction. The parties are, in this respect, not in equal positions. ... something more is called for from Qatar by way of proving its positive assertion than is required of Bahrain in establishing its denial that the Court has jurisdiction. The general principle is encapsulated in the Latin maxim ei incumbit probatio qui dicit non qui negat[128]."

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126 In this respect Bahrain's attempts to draw a parallel with the Aegean Sea case are irrelevant (Bahraini Counter-Memorial, para. 7.4, p. 100). As the Court will appreciate, the situation here is quite different from the situation between Greece and Turkey in that case. There, Turkey's consent to jurisdiction was expressly conditional upon "joint submission", and the parties had agreed to negotiate a special agreement for such "joint submission" to the Court. Those negotiations had hardly begun when the joint Communiqué on which Greece purported to found the jurisdiction of the Court was issued. As the Court pointed out, the positions of the Greek and Turkish Governments appeared to have been quite unchanged between a meeting during which initial consideration was given to the text of a special agreement, and the meeting in Brussels only a few days later which was to result in the joint Communiqué relied upon by Greece. (See, Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, paras. 100 et seq., pp. 41 et seq.) This is in complete contrast with the present case. Here, not only was the commitment to go to the Court not made subject to the conclusion of a special agreement, but negotiations for a special agreement had broken down two years before the Doha Agreement, and had never been resumed. Furthermore, the Doha Agreement made no reference to any requirement of a special agreement and, given the failure of the Tripartite Committee, it is clear that the Parties could not have expected to negotiate a special agreement after the conclusion of the Doha Agreement. In addition, unlike the Brussels Communiqué, the Doha Agreement specified the subject and scope of the disputes which could be submitted to the Court, and provided a deadline after which the Court could be seised. See, also, para. 4.51, below.

127 See, Bahraini Counter-Memorial, paras. 4.5-4.9, pp. 23 et seq.

128 Ibid., para. 4.5, p. 23.

The way Bahrain presents the customary rules of international law in this regard calls for clarification. Basically three questions are to be examined: (i) whether the applicant has a greater burden of proof than the respondent; (ii) the standard of proof; and (iii) whether there is any type of presumption in this matter.

4.12 With regard to the first question of whether the applicant has a greater burden than the respondent, Article 38, paragraph 2, of the Rules of Court simply provides that -

> "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based... ."

Similarly, Article 49, paragraph 1, of the Rules states only that -

> "A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions."

In any event, it is a truism that an applicant has to give evidence of the grounds on which the Court has jurisdiction. However, there is nothing in the Rules of Court which indicates a departure from the ordinary rule of evidence that each party to a dispute has to prove its own assertions and that the burden of proof is consequently shared between the parties. Accordingly the maxim actori incumbit probatio is here more to the point. Many authors have advocated that in application of that maxim the Court will require the party putting forward a claim to establish the elements of fact and of law on which it seeks to rely without regard for the applicant/respondent relationship[129].

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129 See, for example, Manfred Lachs, "La preuve et la Cour internationale de Justice", in La preuve en droit, Etudes publiées par Ch. Perelman et P. Foriers, Bruxelles, Bruylant, 1981, pp. 110-111; S. Rosenne, The Law and Practice of the International Court, Sijthoff, 1965, Vol. II, p. 580; Gilbert Guillaume, "Preuves et mesures d'instruction", in La juridiction internationale permanente, S.F.D.I., Paris, Pedone, 1987, pp. 199-201; J.-C. Witenberg, L'organisation judiciaire, la procédure et la sentence internationale, Paris, Pedone, 1937, pp. 235 et seq.; idem, "Onus probandi devant les juridictions arbitrales", R.G.D.I.P. 1951, p. 327; idem, "La Théorie des preuves devant les juridictions internationales", R.C.A.D.I. 1936, II, Vol. 56, pp. 44-45; Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, London, 1987, p. 332.

4.13 Furthermore, another form of the same principle is expressed in the maxim reus in excipiendo fit actor[130]. This is all the more important in the present case in that, as explained above, although no formal preliminary objections have been presented by Bahrain, this separate phase of the proceedings is nevertheless addressed to questions of jurisdiction and admissibility which would normally be dealt with in preliminary objections[131]. Allusion is made indirectly to this maxim in Article 79, paragraphs 2 and 6, of the Rules of Court, relating to the procedure concerning preliminary objections:

> "2. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.
>
> ...
>
> 6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

In conclusion, there is no special principle of evidence in the matter of jurisdiction, but the fundamental principle that each party must prove its own assertions applies.

4.14 The second point raised by Bahrain concerns the standard of proof. In this regard, Bahrain refers to excerpts from the Factory at Chorzow, Jurisdiction case and the Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility case to support its view that Qatar must satisfy a higher standard of proof than Bahrain[132]. In fact, the excerpts from these cases, which were also cited by Qatar[133], simply apply the concept of preponderance of the force of argument, i.e., the relative force of the arguments presented by both parties. It is an obvious fact that the position which, for the majority of the judges, is the more convincing, will prevail. This does not entail any special standard of proof on one party or another.

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130 See, Separate Opinion of Judge Castro in the case of the Appeal concerning the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 135.

131 See, paras. 1.06-1.07, above.

132 Bahraini Counter-Memorial, para. 4.5, p. 23.

133 Qatari Memorial, para. 4.20, pp. 71-72.

4.15 The third question is whether there are any presumptions governing the proof of the existence of consent. The Qatari Memorial has shown that both the extensive and the restrictive theories have to be rejected. There is no presumption one way or another, although one author quoted in the Qatari Memorial tends to believe that objective reasons concerning the settlement of disputes support the view that the scope of consent to jurisdiction should be interpreted liberally[134]. The following passage from the Border and Transborder Armed Actions, (Nicaragua v. Honduras) Jurisdiction and Admissibility case is, in this regard, most relevant:

> "The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts. The determination of the facts may raise questions of proof. However the facts in the present case... are not in dispute[135]."

Repeating the words of the Permanent Court in the Factory at Chorzow, Jurisdiction case, the Court also declared that it was its duty to -

> "... ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it[136]."

In the present situation of a mixed factual and legal nature, proof of the factual elements is governed by the general rules of evidence described above, which put the Parties on a totally equal footing. In any event, as the following Sections will demonstrate, the consent to the jurisdiction of the Court is clearly established in this case by the 1987 and Doha Agreements.

SECTION 3. The Binding Character of the Doha Agreement

4.16 In its Memorial, Qatar has shown that the 1987 and Doha Agreements are international agreements under customary international law as reflected in the Vienna Convention on the Law of Treaties, Article 2 of which provides:

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134 See, Qatari Memorial, paras. 4.17-4.18, pp. 69-70, and the reference there to an article by Jonathan I. Charney. Bahrain reads that quotation as if it was endorsed by Qatar, but this is not the case. See, Bahraini Counter-Memorial, para. 4.6, p. 25.

135 Judgment, I.C.J. Reports, 1988, p. 76.

136 Ibid.

> "... '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."

Although Bahrain does not deny that the 1987 Agreement is a binding international agreement, it has argued in its Counter-Memorial that the Doha Agreement does not amount to a legally binding agreement for various reasons of a formal and substantive nature[137]. The former will be dealt with in sub-section A, the latter in sub-section B.

A. The Instrumental and Formal Aspects

4.17 It should be noted at the outset that Bahrain -

> "... does not take issue with Qatar regarding any question of the form of the claimed agreement ... there is no point in spending time denying the possibility that an agreement can take the form of minutes of meetings ... Accordingly, there is no need for Bahrain to deal further with the abstract question of form to which paras. 4.31-4.39 inclusive of the Qatari Memorial are directed[138]."

Furthermore, Bahrain does not find it necessary to question the description by Qatar of the 1987 text as "the 1987 Agreement[139]", and has announced that it will not make an issue of the existence of an agreement in the terms of the Saudi proposals[140]. Notwithstanding this, Bahrain disputes the characterization of the Doha Agreement as an agreement in simplified form entering into force upon signature[141].

4.18 Bahrain's arguments concerning instrumental and formal aspects of the Doha Agreement basically revolve around two themes: first, constitutional aspects in both Qatar and Bahrain; second, questions of registration with the United Nations and of filing with the Arab League. Each of these points will be examined in turn.

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137 Bahraini Counter-Memorial, para. 1.14 (2), pp. 7-8.

138 Ibid., para. 6.3, pp. 51-52.

139 Ibid., para. 1.6, fn. 7, p. 3.

140 Ibid., para. 5.7, p. 31.

141 Ibid., paras. 6.92-6.96, pp. 93-96.

1. Constitutional aspects

4.19 Bahrain disputes the validity of the Doha Agreement on constitutional grounds relating to both Qatar's and Bahrain's Constitutions.

a) Qatar's Constitution

4.20 Bahrain contends that neither Party regarded the Doha Agreement as an international agreement; and it purports to find evidence of this in the failure by Qatar to take the steps allegedly required by Article 24 of Qatar's Constitution in relation to the conclusion of treaties. Article 24 reads as follows:

> "The Amir concludes treaties by a decree and communicates same to the Advisory Council attached with appropriate explanation. Such treaties shall have the power of law following their conclusion, ratification and publishing in the Official Gazette.
>
> In no case shall such treaties include secret provisions in contradiction with their declared provisions[142]."

According to Bahrain, Qatar's alleged failure to fulfil these requirements has had the following results: first, that Bahrain was not put on notice that the Doha Agreement was considered by Qatar as an international agreement[143]; and, second, that Qatar is now estopped by its own conduct from asserting the "treaty quality" of the Doha Agreement[144]. Bahrain is wrong both in fact and in law.

4.21 With regard to the issue of fact, as explained above, Bahrain was clearly put on notice of Qatar's view that the Doha Agreement was a binding international agreement by virtue of the steps undertaken by Qatar to implement that Agreement[145].

4.22 Bahrain is also wrong in law since Qatar's Constitution is designed to provide for the application of treaties in municipal law; it does not determine the way treaties are concluded in international law. As in many countries, in Qatar

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142 See, Annex I.4, Vol. II, p. 25, hereto.

143 Bahraini Counter-Memorial, para. 6.86-6.87, pp. 89-90.

144 Ibid., para. 6.87, p. 90.

145 See, para. 3.70, above.

treaties are concluded on the international plane by the appropriate person whether it be the Head of State, the Foreign Minister or any other authorized person. The argument that if Qatar regarded the Doha Agreement as a treaty it would have followed its constitutional procedure of concluding a treaty thus completely misses this point. Moreover, just like any other State, Qatar is familiar with the practice of agreements in simplified form as a valid form of giving consent to be bound. In the present case, there was no need to apply Article 24 of the Constitution. The decision of the International Court, when delivered, will be executed by Qatar in accordance with its earlier legal commitments under the 1987 and Doha Agreements.

4.23 There is nothing in the Vienna Convention which would justify Bahrain invoking a provision of Qatari internal law as a ground for invalidating Bahrain's consent to be bound by a treaty. It can only rely on an alleged violation of its own internal law, subject, of course, to the provisions of Article 46[146].

b) <u>Bahrain's Constitution</u>

4.24 Bahrain asserts in its Counter-Memorial that the Doha Agreement was allegedly not concluded in conformity with Bahrain's Constitution. According to Bahrain, agreements such as the Doha Agreement require ratification under the Constitution, and cannot be concluded in a simplified form[147]. Bahrain argues that Qatar should have been aware of this requirement through the exchange of Official Gazettes and because the draft special agreement tabled by Bahrain on 19 March 1988 provided for ratification[148]. Bahrain suggests that these defects do not merely affect the validity of the Doha Agreement but its very existence[149], although if the question of validity were to be dealt with, such agreement would be found to be invalid, the consent "having been expressed in violation of a provision of [Bahrain's] internal law regarding competence to conclude treaties

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146 Bahrain's suggestion that the estoppel rule might be applied here is also completely inappropriate. No possible disadvantage or handicap can have arisen for Bahrain, even if Qatar had failed to apply its Constitution, which in any event is a purely internal matter.

147 Bahraini Counter-Memorial, paras. 6.92-6.96, pp. 93-96.

148 <u>Ibid.</u>, para. 6.91, p. 93.

149 <u>Ibid.</u>, para. 6.97, p. 96.

that was manifest and of fundamental importance[150]". These contentions of Bahrain call for the following comments.

(i) **Distinction between existence and validity**

4.25 Although the Counter-Memorial speaks about the intention of the Bahraini Foreign Minister and claims that the treaty could not have entered into force, it really seems to be trying to make a distinction between the existence and the validity of a treaty. The question of the entry into force of the Doha Agreement is dealt with elsewhere in this Reply, as is the irrelevance of the Foreign Minister's secret intentions[151]. In any event, Bahrain's implicit distinction between the existence and the validity of a treaty is far from being accepted in municipal law, and is even more difficult to apply in international law. To quote the late Professor Reuter:

> "On trouvera peu de trace d'une véritable inexistence dans la jurisprudence internationale[152]."

Leaving aside the theoretical aspects of the concept, its lack of application is explained by the fact that in order for the non-existence of a treaty to be established, proof has to be provided of a blatant absence of the elements which are necessary for the existence of a treaty. If it is taken for granted that the definition of a treaty is "an international agreement concluded between States in written form and governed by international law[153]", it is difficult to allege non-existence in the present case. Indeed, the Doha Agreement is an act concluded in written form, between States, containing international rights and obligations and governed by international law. A claim of non-existence would therefore be inconceivable.

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150 Bahraini Counter-Memorial, para. 6.98, p. 96.

151 See, paras. 4.27 and 4.56-4.60, below.

152 Paul Reuter, Droit international public, PUF, Paris, 1973, p. 60; see, for further criticism of the notion, J. Verhoeven, "Les nullités du droit des gens", Droit international 1, Paris, Pedone 1981, pp. 19-20.

153 Article 2, para. 1, sub-para. (a) of the 1969 Vienna Convention on the Law of Treaties.

(ii) Agreements in simplified form and the alleged requirement of ratification

4.26 Bahrain also alleges that in the circumstances it cannot be bound by signature of an agreement in simplified form but only by a ratified agreement. It should first be recalled that consent to be bound by a treaty is a problem not of municipal law but of international law. The forms of consent to be bound in international law are spelt out in Article 12 of the Vienna Convention on the Law of Treaties which enumerates signature among the forms of expression of consent to be bound by a treaty (Article 12). It should be further noted that the Vienna Conference expressly rejected the idea of a general presumption or a residuary rule stipulating the necessity of ratification. Bahrain can surely not deny the existence of a well recognized rule of international law (reflected in Article 7 of the Vienna Convention) according to which a Minister of Foreign Affairs is able to bind his country by an agreement in simplified form and is presumed to have the power to do so. As is well known, ratification is not the sole method by which a State may give its consent to be bound internationally, and agreements in simplified form are frequently used in State practice generally.

4.27 In the circumstances of the present case it is hardly possible to contest that the Doha Agreement is an agreement in simplified form:

- Its text was signed by Bahrain's Foreign Minister, who was competent under international law to enter into such an agreement. The presumption that a Foreign Minister is authorized ex officio to conclude an agreement to confer jurisdiction upon the International Court of Justice is reinforced in the present circumstances by the fact that high-ranking Bahraini officials, including the Prime Minister, were present at the Doha Summit and that the Minister of State for Legal Affairs was specially summoned to Doha to handle this matter.

- Its text was to enter into force on signature, if only because of the express provision of a time-limit, i.e., up to the end of May 1991. In this regard, Bahrain has not been able to adduce any evidence that the Doha Agreement was not to enter into force immediately according to its own terms. For all that

Bahrain might say to the contrary[154], agreements in simplified form generally enter into force on signature.

- Its text did not provide for ratification. If no ratification clause is included in such an agreement entering into force upon signature, the presumption is indeed that no ratification is necessary. The fact that Bahrain had proposed in a former draft text of a special agreement that it be ratified[155] - unlike Qatar which in its draft of 15 March 1988 had proposed entry into force upon signature - is of course totally irrelevant. The idea of ratification was never raised in Doha, it was not provided for in the Doha Agreement, and it would have been contrary to the need to bring that Agreement into force immediately to have provided for ratification.

- Its text aimed at implementing a previous agreement (the 1987 Agreement), itself not subject to ratification. In this context, it is incomprehensible how Bahrain believes it can reconcile the fact that it accepts as a binding agreement the 1987 exchanges of letters, which were also an agreement in simplified form applied immediately after signature by the Parties, with its refusal to recognize that the Doha Agreement has the same immediate effect.

4.28 For all the foregoing reasons, Bahrain's attempt to deny that the Doha Agreement has the character of an agreement in simplified form entering into force upon signature is totally unconvincing.

(iii) The irrelevance of Article 37 of Bahrain's Constitution

4.29 Bahrain further alleges that "Qatar was equally aware that any agreement giving the Court jurisdiction would require approval in Bahrain[156]". The text of Article 37 of Bahrain's Constitution of 1973 reads 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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154 Bahraini Counter-Memorial, para. 6.92, p. 93.

155 See, ibid., para. 7.13, p. 103.

156 Ibid., para. 1.14(2), p. 7.

> However, treaties of peace and alliance; treaties concerning the territory of the State, its natural resources or sovereign rights or public or private rights of citizens; treaties of commerce, navigation and residence; and treaties which entail additional expenditure not provided for in the budget of the State, or which involve amendment to the laws of Bahrain, shall come into effect only when made by a law. In no case may treaties include secret provisions contradicting those declared[157]."

The assertion that Qatar knows the Bahraini Constitution is unfortunately mere wishful thinking. It is well-known that it is always extremely difficult to interpret the text of the Constitution of another State. Even the most obvious phrase may have unexpected meanings arising from constitutional practice. Furthermore, interpretation of another State's Constitution may easily be considered as an interference in that State's internal affairs.

4.30 If Bahrain insists that Qatar try to understand the meaning and ratio legis of Bahrain's Constitution, Qatar is bound to repeat what it has said in its Memorial, that is, that prima facie Article 37 spells out conditions for the introduction of treaties into municipal law[158]. Bahrain has been careful not to answer this argument. Qatar is also aware of some treaties which have been concluded by Bahrain and have not been subject to ratification. Qatar presumes that any such treaties, whatever their effect in municipal law, bind Bahrain in international law.

4.31 To come now to the position of Bahrain with regard to the application to the Doha Agreement of the second paragraph of Article 37 of its Constitution, such application is hardly compatible with the fact that the Bahraini authorities did not consider it necessary to have recourse to this special municipal procedure with respect to the 1987 Agreement, which included the following paragraph :

> "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, which shall have to execute its terms."

This was, however, a cardinal commitment from a substantive point of view. The commitment to refer to the Court the disputed matters, which concerned rights over territory, natural resources and sovereign rights, was undertaken in that Agreement. Qatar is not aware that the 1987 Agreement has been submitted to

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

158 Qatari Memorial, paras. 5.31 et seq., pp. 108-109.

the allegedly competent authorities under Bahrain's Constitution. If Bahrain felt in 1987 that the procedure of a decree or a law was unnecessary, although it does not deny that the 1987 Agreement was a binding international agreement, it is difficult, a fortiori, to see how Bahrain can argue that such a procedure would be necessary with respect to the Doha Agreement.

4.32 Furthermore, both the 1987 and Doha Agreements seek to obtain from the Court a judgment which will declare the law. The judgment has no constitutive effect, but only a declaratory effect stating the situation in law. This might account for the absence of reaction by Bahrain in 1987, but the same logic should then be extended to the Doha Agreement.

4.33 In conclusion it must be said that Qatar could not in good faith believe that Bahrain did not mean to honour the terms to which it was putting its signature. In such circumstances, alleged non-compliance with the Bahraini Constitution is no more than a pretext.

2. Questions of registration and filing

4.34 In its Counter-Memorial Bahrain has also raised certain formalistic arguments about registration of the Doha Agreement with the United Nations and filing with the League of Arab States ("the Arab League").

a) Registration with the United Nations

4.35 Two arguments are raised in this context by Bahrain. The first argument is that registration was made so late that it is evidence that Qatar did not believe that the Doha Agreement was an international agreement[159]. In this regard, Article 102 of the Charter of the United Nations provides:

> "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

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159 Bahraini Counter-Memorial, para. 1.14(2), pp. 7-8. The same argument is repeated at para. 6.89, p. 91.

Article 102, paragraph 1, sets no time-limit but provides for registration "as soon as possible"; nor has the United Nations Secretariat in practice fixed any time-limit. The relevant provision requires that registration must take place before a treaty or international agreement is invoked before an organ of the United Nations. As regards the allegedly last-minute registration of the Doha Agreement, this does not indicate any change in Qatar's perception as to the legal status of the Agreement, but simply the knowledge that registration would be essential if Qatar wished to invoke the Agreement before the Court. In any event, and as a practical matter, since the Doha Agreement was registered with the United Nations before the case was submitted to the Court, there can be no question about Qatar's right to invoke it.

4.36 The second argument concerns Bahrain's protest against Qatar's registration of the Doha Agreement. In this connection, Bahrain states that in answer to its protest it received a reply from the Office of Legal Affairs of the Secretary-General of the United Nations to the effect that:

> "... Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument.
>
> It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if such treaty or international agreement does not already have that status[160]."

Bahrain concludes:

> "Bahrain believes that this was the first occasion on which, in the activities of the United Nations relating to registration, a State had objected to the registration of a treaty on the ground that it did not regard the text in question as amounting to an agreement in international law[161]."

4.37 This conclusion is not consonant with the practice of the Secretariat of the United Nations which has taken a neutral approach to such questions since the adoption of the first regulations on the subject in 1945[162]. The standard position

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160 Bahraini Counter-Memorial, para. 6.90, pp. 91-92.

161 Ibid., p. 92.

162 Resolution 97(I) of the General Assembly.

of the Secretariat in this respect is reflected as follows in the Repertory of Practice of United Nations Organs:

> "... since the terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102[163]."

For various examples of States' interpretation of this practice and of their consequent abstention from objecting to registration, further reference may be made to the Repertory of Practice[164]. In fact, what Bahrain views as a unique event in the history of the United Nations is just a result of the standard cautious policy of the Secretariat which has been applied since the beginning of the practice of registration.

b) Filing with the Arab League

4.38 Bahrain states that -

> "... despite the requirements of Article 17 of the Pact of the Arab League, Qatar did not file the 'agreement' with the Secretary General of the Arab League[165]."

4.39 The non-filing of the Doha Agreement is without significance. Since the Arab League came into existence in 1945, approximately 47 years ago, only ten agreements have been filed with the Arab League by its members, including only one by Bahrain.

B. The Substantive Aspects: the Content of the Doha Agreement

4.40 In the previous sub-section it has been shown that from the formal point of view, the Doha Agreement must be regarded as an international agreement. In addition, an examination of the content of the Doha Agreement demonstrates

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163 Repertory of Practice of United Nations Organs, Supplement No. 1, Vol. II, New York, 1958, para. 12, p. 400.

164 Ibid., paras. 14-20, pp. 400-402.

165 Bahraini Counter-Memorial, para. 1.14(2), p. 7. See, also, ibid., para. 6.88, pp. 90-91.

that it qualifies as an international agreement. The following paragraphs will therefore examine the Doha Agreement from a substantive point of view, i.e., in the light of its content. This is all the more essential because of Bahrain's contention that there is a great deal wrong with Qatar's case as regards the "substantive and substantial" aspects of the Doha Agreement[166].

4.41 In its letter to the Secretary-General of the United Nations of 9 August 1991[167] and in its letter dated 18 August 1991 to the Registrar of the Court, Bahrain stated that the Doha Agreement was not an international agreement governed by international law. In its Memorial, Qatar has refuted this unsubstantiated allegation[168]. However, the Bahraini Counter-Memorial again asserts that "the 1990 Minutes do not constitute an agreement in the sense of a binding legal undertaking[169]". Although Qatar has already rebutted this assertion in its Memorial, it is necessary to make certain additional comments, due to Bahrain's unorthodox approach to this question in its Counter-Memorial.

4.42 In its Counter-Memorial Bahrain correctly states at the outset that -

> "... the question of whether a particular instrument to which two States have subscribed their signatures is to be regarded as a binding international agreement is dependent upon their intentions[170]."

But then, in a rather obscure passage, it states:

> "The determination of the intention of the parties can be controlled by subjective or objective considerations. If the subjective considerations alone are sufficient for this purpose then the declaration by one of the States that it had not intended to conclude a binding agreement would be sufficient to dispose of the matter. Bahrain submits that that is an acceptable approach to the problem ... Insofar, however, as the matter is one to be dealt with on the basis of objective evidence, then Bahrain contends that in this respect also the indications of the attitudes of the parties in the

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166 Bahraini Counter-Memorial, para. 6.3, p. 51.

167 Qatari Memorial, Annex II.37, Vol. III, p. 225, at pp. 238-243; Bahraini Counter-Memorial, Annex I.21, Vol. II, p. 125.

168 Qatari Memorial, paras. 5.04 et seq., pp. 98 et seq.

169 Bahraini Counter-Memorial, para. 6.75, p. 84.

170 Ibid.

present case ... compel the conclusion that the 1990 Minutes were not intended to be, and are not, binding[171]."

4.43 The first part of this passage - relating to the so-called "subjective considerations" - is virtually a petitio principii. In essence, Bahrain is simply asserting that a single party's alleged lack of intention to be bound, even if undeclared when signing the agreement, would be sufficient to deprive the agreement of any binding character. Understandably, from its point of view, Bahrain submits that this is "an acceptable approach to the problem", but as will be shown below this is not an "accepted" approach to the problem[172].

4.44 As for the objective considerations, these have already been dealt with in sub-section A above dealing with the formal aspects. Claiming to be taking an objective approach, Bahrain also asserts that the Doha Agreement was a purely "diplomatic document" not involving the intention of the Parties to be bound. The following discussion will demonstrate that the Doha Agreement was not merely a diplomatic document and that it expressed the intention of the Parties to be bound.

1. The Doha Agreement is not merely a "diplomatic document"

4.45 In arguing that the Doha Agreement is not a binding agreement and is "no more than a diplomatic document[173]", Bahrain attempts to put it into the category of so-called "non-binding international agreements", which are considered as having no legal effect[174]. In the same vein, Bahrain tries to give the Doha Agreement no greater value than that of a moral or political undertaking, such as might be incorporated in diplomatic instruments which deliberately do not create any legal obligation. These contentions are not convincing. It will be shown below that the Doha Agreement cannot be assimilated to a non-binding document, such as proceedings of a meeting, a joint communiqué, or a declaration of intention.

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171 Bahraini Counter-Memorial, para. 6.75, p. 84.

172 See, paras. 4.56-4.60, below.

173 Bahraini Counter-Memorial, p. 85.

174 See, F. Münch, "Non-binding Agreements", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 29 (1969), pp. 1-11; O. Schachter, "The Twilight Existence of Nonbinding International Agreements", American Journal of International Law, Vol. 71 (1977), No. 2, pp. 296-304; and Qatari Memorial, para. 5.07, p. 99.

4.46 First, it is obvious that the Doha Agreement, although entitled "Minutes", is not the equivalent of minutes of a meeting, which generally are limited to recording certain facts, situations or declarations, and where, for example, "a majority of items minuted involved observations of fact, explanations, statements of views or notes of matters left for further consideration[175]". Nevertheless, because it was entitled "Minutes", Bahrain does not hesitate to compare the Doha Agreement with the minutes of the Tripartite Committee Meetings[176]. However, if one looks at the content of the Tripartite Committee minutes mentioned by Bahrain, in particular those of the Second and Fourth Meetings, it has to be acknowledged that they were framed merely as a record of the proceedings of those Meetings, and simply reported the statements made at the Meetings. Moreover, it is noteworthy that the wording "it was agreed" in these minutes, on which Bahrain insists so heavily, was placed in parentheses at the end of the record of the proceedings and dealt with matters such as future meetings which were incidental to the conduct of business[177].

4.47 As far as the signed minutes or procès-verbaux (referred to as "Agreed Minutes" in the Bahraini Counter-Memorial) of the First and Sixth Meetings of the Tripartite Committee are concerned, their nature and content were also completely different from those of the Doha Agreement[178]. The signed minutes of the First Meeting, for example, after listing the members of the three participating delegations, related only what had happened during the Meeting. The signed procès-verbal of the Sixth Meeting was also drafted in a purely narrative manner.

4.48 Nowhere in the various minutes of the Tripartite Committee cited in the Bahraini Counter-Memorial was the verb "agree" used with reference to legal commitments, and the "agreements" reached at those Meetings were not legally

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175 Repertory of United Nations Practice, Vol. V, New York, 1955, p. 295.

176 Bahraini Counter-Memorial, para. 6.79, p. 87.

177 Ibid., Annex I.10, Vol. II, p. 53, at p. 74, and Annex I.13, Vol. II, p. 85, at p. 88.

178 See, Qatari Memorial, Annexes II.20 and II.31, Vol. III, pp. 129 and 199; Bahraini Counter-Memorial, Annexes I.7 and I.18, Vol. II, pp. 37 and 109.

binding in character, as Bahrain has acknowledged[179]. Indeed, no legal commitment can be inferred from phrases such as:

- "It was agreed that the basic documents should be in English ...";

- "It was agreed to hold another meeting ...";

- "It was agreed that the three countries would keep in contact in order to agree on the date ...";

- "It was agreed that the next ... meeting would be agreed upon in due course ...".

4.49 The content of the Doha Agreement is of an entirely different nature. A simple comparison between the texts speaks for itself. Therefore, it is not possible for Bahrain to infer that the Doha Agreement is non-binding simply by reference to the non-binding character of the minutes drafted after each of the Tripartite Committee Meetings.

4.50 Second, the Doha Agreement cannot be considered as equivalent to a joint communiqué or a press release, which does nothing more than note an understanding about certain international problems or common questions, or which embodies a particular commitment to enter into negotiations in the future. Although it is true that Bahrain has not expressly assimilated the Doha Agreement to a joint communiqué, in a roundabout way it nonetheless suggests something of the kind when discussing "The relationship between the Agreement of 1987 and the 1990 Minutes[180]".

4.51 Although Bahrain admits that the 1987 exchanges of letters between King Fahd of Saudi Arabia and the Amirs of Qatar and Bahrain constitute an international agreement[181], it argues that the 1987 Agreement was not "a treaty or convention in force for the purpose of Article 36(1) of the Statute", that it contained merely "a commitment to negotiate in good faith a Special

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179 Bahraini Counter-Memorial, para. 6.80, p. 87.

180 Ibid., Chapter VII, pp. 99 et seq.

181 Ibid., para. 5.7, p. 31.

Agreement"[182], and that it has created a situation "remarkably similar to that faced by the Court in the Aegean Sea Case[183]". In making this argument, as noted above[184], what Bahrain is really trying to do is implicitly to draw a parallel between the Doha Agreement and the Brussels Communiqué issued on 31 May 1975 by the Prime Ministers of Greece and Turkey[185]. However, the actual content of the Doha Agreement clearly shows that the intention of the Parties was, inter alia, the submission of their disputes to the International Court of Justice after the expiry of a certain period of time, the identification of the subject and scope of the dispute through reference to the Bahraini formula, and the definition of legal commitments with regard to the continuation of Saudi Arabia's Mediation. These provisions are of a legal, not a political, nature and are therefore legally binding.

4.52 Third, Bahrain presents the Doha Agreement as a purely political instrument, thus treating it as expressing no more than a declaration of common intent, without any legal commitment. When States agree on a text that is just a statement of common intent, they have no intention of being legally bound, and they do not necessarily intend to deprive themselves of the possibility of subsequently changing their mind and of eventually taking another position, if they deem it necessary to do so. However, it is impossible to read the Doha Agreement in this way. The wording of the Doha Agreement indicates that an agreement has already been reached and is not merely a declaration of intention either to reach an agreement in the future or otherwise.

4.53 Thus, in stating that "After the end of this period, the parties may submit the matter to the International Court of Justice...", the Doha Agreement clearly recognizes a legal right which may be exercised after a certain date. Similarly, by reaffirming "what was agreed previously", the text also confirms the legal obligation entered into in 1987 concerning the mandatory reference of the disputes to the International Court of Justice.

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182 Bahraini Counter-Memorial, para. 7.1, p. 99.

183 Ibid., para. 7.2, p. 99.

184 See, para. 4.10, footnote 126, above.

185 See, Bahraini Counter-Memorial, para. 7.4, p. 100.

4.54 By enunciating legal rights and obligations, the Doha Agreement was clearly drafted in order to produce legal effect between the Parties, and is therefore "governed by international law", as provided in Article 2 of the Vienna Convention on the Law of Treaties[186]. Moreover, not only the actual terms of the Doha Agreement but also the circumstances in which it was drafted support the conclusion that it is a binding international agreement and not merely a declaration of intention[187].

4.55 Since the text of the Doha Agreement as it stands gives rise to international obligations, in accordance with the principle of effectiveness it is necessary to give that text all the legal effect that good faith and the actual words of its provisions allow, in the light of the object and purpose of the Agreement. In particular, effect has to be given to the ostensible purpose of the Doha Agreement which was to implement the consent to the jurisdiction of the Court set out in the first item of the 1987 Agreement and to ensure a final settlement of the dispute. In order to achieve that purpose the Doha Agreement defined the subject and scope of the disputes that could be referred to the Court, the period after which the Court might be seised, and the relationship between such settlement by adjudication and Saudi Arabia's Mediation.

2. The intention of the Parties to be bound

4.56 The intention of the Parties to create legal rights and obligations, which is required in any binding international agreement, is apparent in the language and structure of the Doha Agreement and the attendant circumstances of its conclusion and adoption. The intention of the Parties to be bound appears from the text itself, and what has to be done is to give effect to the Parties' intention as expressed[188]. The latter aspect, i.e., the interpretation of the Doha Agreement, will be examined in the following Section of this Chapter. At this stage, suffice it to say that, according to the standards generally accepted for determining the

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186 Under Article 2, para. 1, sub-para. (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".

187 See, in general, Chapter III, Section 6, above.

188 See, Lord McNair, The Law of Treaties, Oxford, 1961, at p. 365; and P. Reuter, Introduction to the Law of Treaties, London, 1989, p. 74.

binding character of agreements in international law[189], the text of the instrument signed in 1990 has a certain precision and specificity. It sets forth the undertakings arrived at between Qatar and Bahrain, which concern the institution to be called upon to resolve the dispute, i.e., the International Court of Justice, the subject and scope of the dispute to be dealt with by the Court, and the deadline after which the matter may be submitted to the Court. From the behaviour of both Qatar and Bahrain[190], it appeared to be their clear understanding at that time that these undertakings were intended to have a legal effect, and were not merely of a political or moral nature, and therefore that they were binding upon the signatories.

4.57 Bahrain contends that it never had the intention to be legally bound by the content of the Doha Agreement. That contention, however, is a mere assertion put forward after Qatar filed its Application instituting the present proceedings. When the two States were engaged in the drafting of the Doha Agreement at the initiative of Saudi Arabia and with the assistance of Oman, Qatar heard nothing about any reservation which Bahrain might have had concerning the binding character of the instrument. Similarly, as far as Qatar is aware, Bahrain did not express any doubts after the signature of the Agreement as to its binding character. It was only after Qatar had filed its Application that, through the letters dated 14 July and 18 August 1991 from the Minister of Foreign Affairs of Bahrain to the Registrar of the Court, it became aware for the first time of Bahrain's intention to consider the Doha Agreement as not legally binding. Furthermore, since Qatar acted on the basis of what was apparently the common intention of the Parties as expressed in the terms of the Doha Agreement, Bahrain cannot now properly maintain that its intention was not what it appeared to be at the time of the conclusion of the Agreement.

4.58 Bahrain's contention may be further criticised from another point of view. According to its Counter-Memorial -

> "... it is evident from all that has so far been said, as well as from what the Foreign Minister of Bahrain has affirmed regarding his intentions at the time of the adoption of the 1990 Minutes, that

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189 A particular expression of these standards was given, for example, in the Memorandum of 12 March 1976 from the State Department Legal Adviser, on "Case Act procedures and Department of State criteria for deciding what constitutes an international agreement", Digest of U.S. Practice in International Law, 1976, pp. 263-267.

190 See, Chapter III, Section 6, above.

> Bahrain did not regard those Minutes as constituting a binding international agreement[191]."

The opposite, however, is the case. The drafting history of the Doha Agreement, upon which Bahrain relies so heavily[192], clearly evidences the close involvement of Bahrain's Minister of State for Legal Affairs in the drafting process from the earliest stages, leading up to his inclusion in the Bahraini delegation in Doha in the later stages[193]. While the intention - or the lack of intention - of Bahrain is claimed to be "evident" in the passage just quoted above, Bahrain does not in fact offer any evidence to support its contention other than the Statements by its own Ministers appended to its Counter-Memorial. There is no question here of weighing the value of these Statements in themselves, a point which has already been addressed in the present Reply[194]. In the view of Qatar, the intention allegedly revealed in these Statements cannot be taken into consideration, not only because such allegations of intention are exclusively self-serving, but principally because they cannot affect in any way the legal consequences flowing from the signature of the Doha Agreement by the Foreign Minister of Bahrain.

4.59 When a Minister of Foreign Affairs appends his signature to an instrument, the content of which includes a commitment couched in legal terms as in the present case, he is presumed to act with the intention of creating a legal obligation on behalf of his State. This presumption is clearly reflected in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that "In virtue of their functions", Ministers for Foreign Affairs "are considered as representing their State", "for the purpose of performing all acts relating to the conclusion of a treaty"[195]. It is hardly conceivable that a Minister of Foreign

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191 Bahraini Counter-Memorial, para. 6.84, p. 89, footnote omitted.

192 Ibid., paras. 6.37 et seq., pp. 68 et seq.

193 See, Bahraini Counter-Memorial, Annex I.26, Vol. II, p. 177. It is curious, to say the least, that the direct and active participation of the Minister of State for Legal Affairs was thought to be necessary if the document to be signed was really understood to have no legal significance and to be non-binding, and if that participation was just to ensure that the document to be signed was not binding.

194 See, para. 3.55, footnote 96, above. Moreover, as underlined by the Permanent Court in the case concerning Certain German Interests in Polish Upper Silesia, "The Court is entirely free to estimate the value of statements made by the Parties" (Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, p. 73).

195 Sir Ian Sinclair describes this presumption as "incontestable". The Vienna Convention on the Law of Treaties, 2nd edition, Manchester University Press, 1984, p. 32.

Affairs, having the inherent capacity to perform acts relating to the conclusion of international agreements, and particularly to sign them, can later say that he did not have the intention of binding his Government by his signature.

4.60 In the particular circumstances of this case, the fact that Bahrain's assertion that it did not intend to enter into a binding agreement was made only after the filing of the Application by Qatar must surely be taken into consideration. Insofar as the instrument adopted in December 1990 was drafted in such a way as necessarily to create a new legal situation in relation to the existing disputes between Qatar and Bahrain, owing to the content of its operative part, it would have been for Bahrain to make an express reservation as to its binding character, if that was really the intent of Bahrain at the time. This derives from the principle of trust and confidence in international relations. According to a dictum of the Court in the Nuclear Tests (Australia v. France) case:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential[196]."

Accordingly, Qatar concludes that Bahrain's present contention that a declaration by one State that it had not intended to conclude a binding agreement would be sufficient to dispose of the matter is not at all an "acceptable approach to the problem". It is hardly necessary to comment further upon that contention which, if it were correct, would mean that any State could at will repudiate its international commitments simply by stating that it had not intended to undertake them.

Section 4. The Interpretation of the Doha Agreement

4.61 As to the question of interpretation, Bahrain takes issue with Qatar concerning both the 1987 Agreement and the Doha Agreement. However, since the question of the alleged conditionality of the first provision of the 1987 Agreement has already been discussed in the present Reply[197], Qatar will turn

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196 Judgment, I.C.J. Reports 1974, para. 46, p. 268; see, also, ibid. (New Zealand v. France), para. 49, p. 473.

197 See, paras. 3.07 et seq., and paras. 4.04-4.05, above.

directly to the points of interpretation raised by Bahrain in connection with the Doha Agreement.

4.62 In the previous Section, it has been demonstrated that the Doha Agreement is a binding international agreement. Consequently, it must be interpreted in the light of the principles and criteria embodied in the Vienna Convention on the Law of Treaties. Articles 31 and 32 of the Vienna Convention are the relevant Articles.

4.63 The ordinary meaning of the words used in the Doha Agreement will be taken up first, the wording being analysed within its context. As for the travaux préparatoires, it must be borne in mind that these are only a supplementary means of interpretation and cannot be used so as to modify the clear result pointed to by the ordinary meaning of the words in their context, when that meaning is clear. This is why Qatar has previously taken the view, and maintains, that there is no necessity to refer to the travaux préparatoires, as the conditions laid down by Article 32 of the Vienna Convention are not fulfilled in the present case[198]. However, if recourse is nevertheless to be had to any supplementary means of interpretation of the Doha Agreement, it will be found that what are known in the Vienna Convention as "the circumstances of its conclusion" support Qatar's position[199].

A. The Ordinary Meaning of the Words

4.64 In the Bahraini Counter-Memorial, the discussion devoted to "the meaning of the 1990 Minutes" is somewhat selective. It mainly concentrates on the meaning of a single Arabic expression, "al-tarafan", and its English translation as "the parties" or "the two parties"[200]. The meaning of the other words is examined

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198 Qatari Memorial, paras. 5.57-5.58, pp. 119-120.

199 According to Lord McNair, any interpretation process consists in giving effect to the intention of the parties "as expressed in the words used by them in the light of the surrounding circumstances", op. cit., Oxford, 1961, p. 365.

200 Bahraini Counter-Memorial, paras. 6.7 et seq., pp. 54 et seq.

- if indeed it is examined - in a cursory manner, as if it were to be entirely subordinated to the meaning attributed by Bahrain to the word "al-tarafan"[201]. Bahrain greatly exaggerates the importance of this point, as may be seen from the numerous expert opinions annexed to its letter of 18 August 1991 and to its Counter-Memorial. In fact the real problem is a legal problem, not a purely linguistic one.

4.65 In concentrating its attention on the meaning of "al-tarafan", Bahrain is juggling away other parts of the text as it stands. On the pretext that the "Major disagreement between the Parties is limited to the meaning of two phrases[202]" - these two phrases, according to Bahrain, are "the parties" or "the two parties", and "and the arrangements relating thereto" - Bahrain pays no attention to the first and third sentences of the second paragraph of the text. Similarly nothing is said in the Bahraini Counter-Memorial concerning the third paragraph of the text. This is clearly contrary to one of the most basic principles of interpretation, according to which the meaning of words is to be taken in the proper context of those words and in the light of the object and purpose of the whole text[203]. Accordingly, each of the three paragraphs constituting the operative part of the Doha Agreement will now be considered in turn.

1. The first paragraph of the Doha Agreement

4.66 Under the first paragraph of the Agreement it was agreed -

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

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201 Bahraini Counter-Memorial, paras. 6.26 et seq., pp. 62 et seq. In this respect, it is significant that in Chapter VI of the Bahraini Counter-Memorial, within the Section devoted to "The meaning of the 1990 Minutes", sub-section A, entitled "The relevant language is Arabic", comprises only one point: "The meaning of al-tarafan".

202 Bahraini Counter-Memorial, para. 6.6, p. 53.

203 According to Article 31, para. 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". In its 1922 Advisory Opinion on the Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, the Permanent Court stated: "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense" (P.C.I.J., Series B, No. 2, at p. 23).

As already demonstrated in Qatar's Memorial, the reference to "what was agreed previously" can apply only to the Agreement arrived at in December 1987 within the framework of the good offices of Saudi Arabia[204]. It must simply be recalled that the basic commitment undertaken at that moment was that -

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

4.67 Bahrain proceeds on the false assumption that there were other "agreements" that were reaffirmed in the first paragraph of the Doha Agreement, in particular those allegedly contained in the minutes of the Meetings of the Tripartite Committee, notably those of the Sixth Meeting held in December 1988[205]. This contradicts entirely what Bahrain has said concerning the value of mere "minutes" in its attempt to negate the legally binding character of the Doha Agreement simply because it was entitled "Minutes"[206]. Bahrain's approach here is unsustainable, all the more because Bahrain has recognized the binding character of the 1987 Agreement as an international agreement[207].

4.68 In the same context Bahrain also repeats its argument that its commitment to go to the Court was conditional upon the joint submission of the dispute to the Court under a special agreement:

> "... in re-affirming what had previously been agreed, the parties were intending to reaffirm a course of conduct pursued exclusively on the basis that the Parties would jointly submit the entirety of their dispute to the Court by a special agreement[208]."

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204 Qatari Memorial, paras. 3.58, 4.49 and 4.51, pp. 58, 87 and 88.

205 Bahraini Counter-Memorial, para. 6.29, p. 63. In fact, as already shown, the signed minutes of the Sixth Meeting did not contain any relevant agreement but rather recorded the divergent positions of the Parties. See, paras. 3.45-3.47, above. In Qatar's opinion, although the minutes of the Tripartite Committee cannot be equated with the binding international agreements otherwise entered into between Qatar and Bahrain, this of course does not mean that they are to be completely disregarded with respect to other aspects of this case.

206 See, Section 3, subsection B of this Chapter, above.

207 Bahrain has indicated that there is no issue as to the existence of an agreement in the terms of the Saudi proposals of December 1987. See, Bahraini Counter-Memorial, para. 1.6, p. 3 and paras. 5.1 et seq., pp. 28 et seq.

208 Bahraini Counter-Memorial, para. 6.27, p. 62.

This contention has already been dealt with above[209]. In any event, it is a strange interpretation of the Doha Agreement that leads to the conclusion that its purpose was limited to reaffirming a course of conduct which had patently led to a deadlock. In fact the inclusion of a paragraph in the Doha Agreement reaffirming what was agreed previously was at least in part the result of Bahrain's attempt to repudiate its obligation under the first item of the 1987 Agreement[210].

2. The second paragraph of the Doha Agreement

4.69 According to the second paragraph of the Doha Agreement it was agreed -

> "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."

This paragraph is obviously the cornerstone of the whole Agreement. While its second sentence is the provision enabling the Parties to institute proceedings before the International Court of Justice, it must be underlined that the three sentences comprising the paragraph are strictly interrelated.

4.70 Both the first and third sentences of this paragraph deal with the continuation of Saudi Arabia's good offices, but they cannot be viewed as both having entirely the same purpose, otherwise the two provisions concerning the continuation of those good offices would have been incorporated in one and the same sentence. The first sentence allowed the Mediator to make a last effort to resolve the substance of the disputes until the month of May 1991, during which time the disputes would remain exclusively subject to the Mediation process. On the other hand, the last sentence provides for the concomitant action of the Mediator after submission of the matter to judicial settlement, the two methods of settlement then being pursued pari passu[211]. Thus, the Doha Agreement established two distinct systems for Saudi Arabia's good offices: one providing for

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209 See, in particular, paras. 3.07 et seq., above.

210 See, para. 3.58, above.

211 See, Qatari Memorial, para. 5.56, p. 118.

Mediation alone up to May 1991, the other one providing for two parallel lanes of peaceful settlement after that date. This is not disputed in the Bahraini Counter-Memorial, where it is stated that Saudi Arabia's good offices were to continue even when the case was before the Court[212].

4.71 It is clear from the second sentence of the paragraph that the reference of the case to the Court was dependent on the passing of the time-limit of May 1991, if no settlement had been arrived at by that time under Saudi Arabia's auspices. Qatar's acceptance of the Bahraini formula and the agreement that "the parties may submit the matter" to the Court at the end of a certain period of time were new elements enabling the commitment to go to Court in the 1987 Agreement to be implemented.

4.72 In support of its basic contention that the text of this sentence does not accord to each Party the right unilaterally to commence proceedings, Bahrain relies essentially upon a long discussion of the meaning of the Arabic word "al-tarafan"[213]. It has annexed to its Counter-Memorial no fewer than four expert opinions, all dealing with the meaning of this word. In fact Bahrain's purely linguistic arguments are quite subsidiary, and largely irrelevant for two essential reasons. First, it must be recognized that the issue before the Court is not primarily one about translation from Arabic into English. As conceded by Bahrain -

> "... the task of the Court is not to choose one or the other of these English expressions [i.e., "the parties" or "the two parties"] but instead to identify a form of words that best reflects in English the true sense of the Arabic words[214]."

If it is thus not so much a question of choosing between two English translations, but of determining what, in the text in question, best represents the meaning of the terms, then the purely linguistic arguments cannot be decisive. Second, as has already been shown by Qatar, and even by Bahrain's own experts, the word "al-tarafan" does not necessarily imply joint action, the question of whether the action is joint or separate depending upon the context in which the word is to be

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212 Bahraini Counter-Memorial, para. 6.72, p. 83.

213 Ibid., paras. 6.7 et seq., pp. 54 et seq.

214 Ibid., para. 6.8, p. 54, footnotes omitted.

found[215]. In the context of the second paragraph of the Doha Agreement, and in the wider context of that Agreement read as a whole, as well as of the previous Agreement concluded in 1987, the word "al-tarafan" does not necessarily imply joint action by the Parties. Rather, the context shows that in the present case the use of the word "al-tarafan" indicates that under the Doha Agreement each Party has the right to refer its own claims to the Court. This interpretation can also be supported, if necessary, by the "preparatory works" and the circumstances of the conclusion of that Agreement[216].

4.73 The word "al-tarafan" was also used both in the Framework[217] which initiated the Mediation process and in the 1987 Agreement. A consideration of these two important documents, entered into prior to the Doha Agreement, clearly demonstrates that the word "al-tarafan" can be interpreted in the conjunctive or the disjunctive sense, depending on the context. Thus, for example, in the Framework, the word "al-tarafan" is used in paragraph (a) of the Third Principle which provides that "The Parties shall undertake to refrain ... from engaging in any propaganda activity against each other ...". Clearly, "al-tarafan" here means "each of the parties". A similar interpretation would necessarily be placed on the word "al-tarafan" as used in paragraph (b) of the Third Principle. As for paragraph (c), which provides that "The Parties shall undertake not to present the dispute to any international organization", the same words could be translated either as "both parties" or "each party". Again, in paragraph (b) of the second item of the 1987 Agreement, the word "al-tarafan" could be translated in either of the same two ways. Moreover, it must be added that, where Qatar has translated this item as "The parties undertake to refrain from to-date from any media activities against each other[218]", the translation prepared by the United Nations Secretariat and referred to by Bahrain states "The two parties undertake hereafter to refrain from carrying out any propaganda activity against the other

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215 See, for example, the Opinion of Dr. Holes submitted by Bahrain as Attachment 5 to the Annex to Bahrain's letter of 18 August 1991, at p. 5. See, also, the Supplementary Opinions of Professor Ahmed El-Kosheri and of Professor Shukry Ayyad in Volume II of the present Reply, Annex III.1, p. 77, and Annex III.2, p. 101, respectively.

216 See, Chapter III, Section 6 above.

217 Qatari Memorial, Annex II.1, Vol. III, p. 1.

218 Qatari Memorial, Annex II.15, Vol. III, p. 101, at p. 104.

party[219]". In such a case, it is obvious that "al-tarafan", even when it is translated as "the two parties", in fact means "each party".

4.74 The artificial nature of Bahrain's argument regarding "al-tarafan" is all the more evident in that it takes no account of the condition that the matter has to be submitted to the Court "in accordance with the Bahraini formula". In fact, the use of the word "al-tarafan", whether translated as "the parties" or "the two parties", is perfectly consistent with the use of the Bahraini formula, as this formula was conceived precisely in order to allow each Party to submit its own claims to the Court. Indeed, this has been made clear by Bahrain itself. At the meeting of the legal experts held on 6 December 1988, preceding the Sixth Meeting of the Tripartite Committee, Dr. Husain Al-Baharna commented upon the formula, stating -

> "... we saw this as a compromise formula since we are formulating a general formula and it is left for each Party to submit whatever claims it wants concerning the disputed matters[220]."

4.75 As has been explained in Chapter III above, and contrary to Bahrain's allegation, Qatar took the initiative of adding the phrase "in accordance with the Bahraini formula, which has been accepted by Qatar" to the text of the Doha Agreement[221]. When Bahrain then amended the text by replacing "either of the two parties" by "the parties" or "the two parties" ("al-tarafan") and by adding "and the proceedings arising therefrom", these two amendments were regarded by Qatar as reflecting Bahrain's position that it wanted each Party to be able to formulate its own claims and present them to the Court, so as to safeguard its interests[222].

4.76 The amendments proposed by Bahrain and accepted by Qatar, if they were really intended to give the meaning which Bahrain now contends, could easily have been introduced in clear explicit words to that effect. The Statement

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219 Bahraini Counter-Memorial, Annex I.2, Vol. II, p. 5, at p. 9 (emphases added).

220 Tripartite Committee Documents, Document No. 9, p. 231, at p. 235 (emphasis added).

221 See, Chapter III, Section 6, above.

222 If the language "either of the two Parties" had been retained, this would have entailed an obligation for one Party alone to submit the whole dispute to the Court, i.e., the other Party's case in addition to its own, which in the present circumstances would be both nonsensical and impossible.

of Bahrain's Foreign Minister annexed to the Counter-Memorial indicates that he and Bahrain's Minister of State for Legal Affairs had extensive consultations with the Omani Foreign Minister regarding the wording of the Doha Agreement, so that they could have insisted upon inclusion of words to the effect that only "both the parties together" could approach the Court. If the intention was that a joint submission was needed, and bearing in mind that the words "al-tarafan" were introduced by Bahrain, some more precise wording might have been expected, and the amendment should have been drafted using clear language known to all Arab lawyers, so that it was clear that what was intended was "the two parties together", or "jointly"[223]. When it now interprets the word "al-tarafan" as meaning "the parties jointly" or "the two parties together", it is obvious that Bahrain is trying to add something which it should have introduced into the text at that time, if that was really its intention, but which it did not actually add. Qatar maintains that, in interpreting the Doha Agreement, the common intention is to be found in the words actually used in the text of the Agreement, and not in the alleged subjective intentions of one of the Parties when such intentions are not reflected in the terms used in the Agreement. If Bahrain's position were adopted this would amount not to an interpretation but to a modification or amendment to that Agreement.

4.77 As for the words "and the proceedings arising therefrom", or "the procedures arising therefrom" (as translated by Bahrain), Bahrain contends that they were introduced into the Doha Agreement "in order to make it quite clear that Court proceedings could only be begun by both Parties together and, therefore, that further steps would need to be taken by the two parties jointly to bring the case to the Court[224]". To support this contention, the Bahraini Counter-Memorial relies on the Statement of Dr. Al-Baharna, "who formulated the phrase", and who has declared in his Statement "that his intention in using the words was to emphasize that the Parties would need to take further steps jointly to bring the case to the Court[225]". It must again be observed that private intentions of delegates participating in a negotiation are absolutely irrelevant for the subsequent interpretation of an agreed text. Only the intention of the Parties as expressed in the document can be taken into account. If, as Bahrain contends now, such language was to mean steps to negotiate a special agreement, it was up

223 See, Supplementary Opinion of Prof. Ahmed El-Kosheri, Annex III.1, Vol. II, p. 77.

224 Bahraini Counter-Memorial, para. 6.33, pp. 65-66.

225 Ibid., para. 6.35, p. 66.

to Bahrain to propose precise wording to this effect when it drafted its amendment.

4.78 Bahrain contends also that the words "and the proceedings [or "procedures"] arising therefrom" related to the Bahraini formula, and that the proceedings or procedures arising from the Bahraini formula necessarily imply "joint submission" under a special agreement, since the formula was initially intended to be incorporated into a special agreement[226]. Such a contention simply ignores the fact that the Bahraini formula can stand on its own, and that it was as such that it was accepted by Qatar.

4.79 Qatar maintains that "the proceedings [or "procedures"] arising therefrom" are those arising from the submission of the matter to the Court in accordance with its Statute and Rules[227]. This is similar to the position in many compromissory clauses in ad hoc agreements which confer jurisdiction on the Court under Article 36, paragraph 1, of the Statute, but which do not specify the manner of seisin. Even if it is assumed, for the sake of argument, that this phrase refers exclusively to the words "in accordance with the Bahraini formula", the following question must then be asked: What proceedings could arise from the text of that formula, which contains merely the identification of the disputes to be put to the Court ? The answer can only be found in the Statute and Rules of the Court, because the Bahraini formula is a general formula stating the subject and scope of the disputes to be referred to the Court. Being a general formula, it leaves it to each Party to formulate its own claims[228], at least under the first part of the formula, the second part being more specific in that it asks the Court to draw a single maritime boundary. Accordingly, contrary to Bahrain's contention, the words "the proceedings arising therefrom", which echoed earlier references to compliance with the Court's procedures[229], not only do not prevent each Party

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226 Bahraini Counter-Memorial, para. 6.34, p. 66.

227 See, Qatari Memorial, paras. 4.58-4.59, p. 92, and para. 5.60, pp. 120-121.

228 As already explained in the Memorial, this would have been the situation even if the Bahraini formula were contained in a special agreement. See, Qatari Memorial, para. 5.69, p. 125.

229 Such references occur both in the 1987 Agreement and the Tripartite Committee's discussions. See, for example, Tripartite Committee Documents, Document No. 1, p. 1, at p. 4, where Prince Saud Al-Faisal spoke of referring the issue to the Court "in accordance with the conditions and procedures of the Court".

from submitting the matter to the Court by a unilateral application as Bahrain contends, but positively enable the Court to be seised in this way.

3. The third paragraph of the Doha Agreement

4.80 The last paragraph of the Doha Agreement reads as follows:

> "should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration."

This paragraph embodies the commitment to withdraw the case from the Court if another solution is reached, notably through Saudi Arabia's good offices, which, under the second paragraph, "will continue during the submission of the matter to arbitration". In its Memorial, Qatar asked the question: "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[230]?" Bahrain refrained from answering this question in its Counter-Memorial[231]. The existence of such a provision, which was not incorporated in the two States' respective drafts when they tried to conclude a special agreement, is further evidence that the submission of the matter to the Court might be made immediately after the expiry of the deadline provided for in the Doha Agreement. Otherwise, such a provision would make no sense at all, in view of Articles 88 and 89 of the Rules of Court concerning discontinuance of a case.

4.81 Qatar therefore concludes that the language of the Doha Agreement is clear, and that the ordinary meaning of the words in their context leads to the conclusion that the jurisdiction of the Court has been definitely established by this Agreement. As will be shown below, Qatar's interpretation of the Agreement can also be supported, if necessary, by the "preparatory works" and the circumstances of the conclusion of the Agreement.

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230 Qatari Memorial, para. 5.49, p. 116.

231 Perhaps the answer was to be included in paras. 6.66 and 6.67 which do not appear in the Bahraini Counter-Memorial as it was filed on 11 June 1992.

B. The Circumstances surrounding the Agreement

4.82 The circumstances in which the Doha Agreement was drafted have been recalled in Chapter III of the present Reply. It is not necessary to repeat them again, for they speak for themselves and clearly shed light upon the new approach taken in the Doha Agreement to the manner of settling the existing dispute between Qatar and Bahrain.

4.83 Bahrain itself has conceded that the Doha Agreement was an important new development[232]. However, invoking the particular circumstances in which the Agreement was drawn up, Bahrain considers that -

> "... the purpose of the Minutes as finally adopted was not primarily to achieve a major alteration in approach, but, by any appropriate means short of major change to put a diplomatic end to an untimely and ill-conceived Qatari initiative[233]."

This is an extraordinary assertion, since the surrounding circumstances of the conclusion of the Doha Agreement all point to the fact that the Mediator himself thought that the time had come for the dispute to be submitted to the Court[234]. It must also be borne in mind that the Doha Agreement was arrived at, as stated in its preamble, "Within the framework of the good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz".

4.84 It is indisputable that the Doha Agreement, while constituting a logical progression in a course of events which had been entirely aimed at trying to submit the dispute to the Court, introduced a new element into the situation which had prevailed prior to its adoption. The step forward taken in the Doha Agreement resulted, inter alia, from the impossibility of agreeing in the Tripartite Committee on an acceptable formulation of a special agreement submitting to the Court all the matters in dispute between the two Parties. The Doha Agreement was clearly aimed at escaping from the deadlock with which both States were confronted after the failure of their efforts to negotiate a special agreement in 1988. In order to escape from the deadlock, a new approach was introduced by the Doha Agreement which consisted in linking Qatar's acceptance of the

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232 Bahraini Counter-Memorial, para. 6.71, p. 83.

233 Ibid., para. 6.70, pp. 82-83.

234 See, para. 3.57, above.

Bahraini formulation of the subject matter of the disputes together with the determination of a deadline after which the Court might be seised of the disputes. Thus, the Agreement reached at Doha in 1990 emerged as having the function of an ad hoc agreement containing a compromissory clause making it possible for each Party to submit an application to the Court presenting its own claims. On the other hand, in the light of the circumstances of its conclusion, Bahrain's interpretation of the Doha Agreement would make the Agreement ineffective for a fulfilment of its object and purpose.

SECTION 5. Consent in the Doha Agreement

4.85 The interpretation of the Doha Agreement according to the Vienna Convention leads to the conclusion that, by means of that text, Qatar and Bahrain have expressed their consent to submit to the Court the disputes existing between them as defined by the Bahraini formula, and that their consent must be regarded as final.

A. The Exchange of Consents between the Parties

4.86 In its Memorial Qatar has shown that the terms of the Doha Agreement confirmed the existence of an exchange of consents between the Parties both to submit their disputes to the Court and with respect to the definition of the subject matter of those disputes[235]. The Bahraini Counter-Memorial has not discussed these questions, which remain at the root of the present case, to any extent.

1. The consent of the Parties to refer the disputes to the Court

4.87 The Doha Agreement confirmed what was previously agreed by Qatar and Bahrain and more particularly their acceptance of referral of their existing disputes to the International Court of Justice, as provided for in the 1987 Agreement. However, where the 1987 Agreement stated that "All the disputed matters shall be referred to the International Court of Justice", the Doha Agreement added that "After the end of this period [i.e., after May 1991], the parties may submit the matter to the International Court of Justice ...". The consent of both States dealt not only with the reference of the disputes to the Court - a question already settled in the 1987 Agreement - but also with the

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235 See, in general, Qatari Memorial, Chapter IV.

moment from which the Court could be seised. As is evident from the record of the drafting of the Doha Agreement, this particular provision was incorporated in the first draft presented by the Omani Foreign Minister and was never challenged either by Qatar or by Bahrain[236].

4.88 The indication that the Court could be seised after the expiry of a time-limit was something new, to which the two interested States gave their agreement. For the first time, a deadline was agreed upon, and it is important to recognize the significance of this deadline with respect to the consent of the Parties to refer their disputes to the Court.

4.89 This indication of the period after which "the parties may submit the matter to the International Court of Justice", was one of the most important aspects covered by the Doha Agreement. It determined the date from which the proceedings before the Court might be instituted.

2. The consent of the Parties to the subject matter of the disputes to be submitted to the Court

4.90 The second essential element which was dealt with in the exchanged consents relates to the subject and scope of the disputes. As explained in Chapter III above, at the opening session of the GCC Summit Meeting in Doha in December 1990, the Amir of Qatar declared that he accepted the proposal previously made by Bahrain concerning the definition of the subject matter of the disputes so that the matter could be referred to the Court without delay.

4.91 Bahrain admits that the "Qatari acceptance of the Bahraini formula ... was a major step forward by Qatar[237]"; but, looking at the Doha Agreement only as part of an "ongoing political process[238]" aiming at the conclusion of a special agreement, Bahrain considers simply that "progress was made at Dohah as regards the definition of 'the question'[239]". Hypnotised now by the idea of the need for a special agreement, Bahrain refuses to put Qatar's acceptance of the

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236 See, Chapter III, Section 6, above.

237 Bahraini Counter-Memorial, para. 6.71, p. 83.

238 Ibid., para. 1.14(2), p. 8.

239 Ibid., para. 7.18, p. 104.

Bahraini formula in its proper context. In fact, in the Agreement this acceptance of the Bahraini formula was a quid pro quo for Bahrain's undertaking to allow submission of the disputes to the Court after May 1991. Bahrain also fails to mention that it endorsed the Qatari acceptance of the Bahraini formula by signing the Doha Agreement, and that it is itself thus bound by the Bahraini formula.

4.92 The Bahraini Counter-Memorial has exerted enormous efforts to try to reduce the Doha Agreement to a single point, i.e., Qatar's acceptance of the Bahraini formula[240]. But how can it be asserted that the Doha Agreement did no more than record Qatar's acceptance of the Bahraini formula, when the first Omani draft shown to Qatar did not even include the reference to the Bahraini formula, which was subsequently added by Qatar itself[241]? In short, according to Bahrain, the Doha Agreement was intended to serve no other purpose than that of recording a change in Qatar's position with regard to the Bahraini formula. It would be difficult to distort more wildly the content and the significance of the Doha Agreement.

B. Absence of Requirement of Double Consent

4.93 Since the consent to the jurisdiction of the Court and to the submission to it of defined disputes after May 1991 was given under the 1987 and Doha Agreements, there is no need for further confirmation of the consent so established. As stated in the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, in the Aerial Incident of 27 July 1955 (Israel v. Bulgaria) case -

> "The requirement of consent cannot be allowed to degenerate into a negation of consent or, what is the same thing, into a requirement of double consent, namely, of confirmation of consent previously given[242]."

4.94 While Bahrain does not expressly argue that a double consent is required, it implicitly does so. By assuming that the conclusion of a special agreement was necessary in order to implement the Doha Agreement after May 1991, Bahrain is trying to transform the general requirement of consent into a requirement of

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240 Bahraini Counter-Memorial, para. 7.19, p. 104.

241 See, paras. 3.61 et seq., above.

242 I.C.J. Reports 1959, p. 187.

"double consent". This is nothing but an attempt to negate or to withdraw a consent which has already been given. Going back on what has been expressly agreed upon between Qatar and Bahrain would certainly be contrary to the most well-established principles of international law.

4.95 As Qatar has already shown in its Memorial[243], the consent given by the Parties to the jurisdiction of the Court and to the definition of the disputes was irrevocable, and there was no need for that consent to be further confirmed.

SECTION 6. Seisin of the Court

4.96 Qatar's position with respect to the distinction between jurisdiction and seisin was made clear in paragraphs 4.57 to 4.64 of its Memorial. In Qatar's view seisin is a rather simple matter. It is the procedural way by which the Court is seised of a case. This matter is explicitly governed by Article 40, paragraph 1, of the Statute and by Articles 38 and 39 of the Rules of Court. According to Article 40, paragraph 1, of the Statute -

> "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated." (Emphases added.)

Seisin of the Court is thus achieved either by notification of a special agreement or communication of a written application. When - as in the present case - jurisdiction is based on an Agreement containing provisions having the same effect as an ad hoc agreement, seisin may be made by unilateral application unless otherwise stated in the agreement concerned.

4.97 In contrast, Bahrain's assertions are revealing of some misconceptions on this point[244]. First, Bahrain obscures the distinction between the jurisdiction of the Court to deal with the case - a question which is entirely governed by the agreements in force between the parties - and the validity of the formal step by which the proceedings are to be instituted - a matter which is primarily governed by the Statute and Rules of the Court, subject to any special provisions upon

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243 Qatari Memorial, paras. 4.44-4.46, pp. 84-85.

244 See, Bahraini Counter-Memorial, para. 3.5, p. 20, para. 4.4, p. 22, para. 5.43 (ii), p. 49 and para. 7.20, p. 105.

which the parties may have agreed as to the method of instituting proceedings under a given title of jurisdiction.

4.98 Second, Bahrain mistakenly equates the notion of "special agreement" with that of "joint seisin". This is certainly wrong. A special agreement is an agreement to submit an existing dispute to the jurisdiction of the Court. Such an agreement may provide that the Court will be seised by the parties jointly, or by one of the parties, or indeed provide nothing at all. Article 39, paragraph 1, of the Rules of Court is explicit in this regard:

> "When proceedings are brought before the Court by the notification of a special agreement, in conformity with Article 40, paragraph 1, of the Statute, the notification may be effected by the parties jointly or by any one or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to the other party."

4.99 The basic distinction seems to be whether the agreement has provided for a mode of seisin of the Court or not. If there is such a provision, it binds the parties and must be followed closely. If there is no provision in the agreement, several courses are open[245].

4.100 According to Article 38, paragraph 1, of the Rules of Court -

> "When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute."

Thus, when the Court is seised either pursuant to a compromissory clause in an agreement falling under Article 36, paragraph 1, of the Statute or pursuant to a

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245 In this context, in Bahrain's Counter-Memorial where the institution of proceedings in the case of the Territorial Dispute (Libyan Arab Jamahiriya/Chad) is addressed, Bahrain states that "The reference at para. 4.61 [of Qatar's Memorial] to the institution of proceedings in the Libya/Chad case is mistaken. Both Libya and Chad agreed that they notified to the Court a Special Agreement (the 'Framework Agreement') under Article 40" (Bahraini Counter-Memorial, para. 3.2(c), fn. 42, p. 19). Although it is true that Chad subsequently agreed that it could be considered that the "Accord-Cadre" was a special agreement, each party seised the Court unilaterally, on different dates; and whereas Libya notified what it considered to be a special agreement, Chad filed an application instituting proceedings. This is precisely what Qatar has stated in paragraph 4.61 of its Memorial, and Qatar therefore fails to see why it should be described by Bahrain as being "mistaken".

declaration made under Article 36, paragraph 2, seisin is normally by unilateral application.

4.101 Accordingly, it is Qatar's position that in the two Agreements upon which Qatar founds the Court's jurisdiction the mode of seisin was left open, provided, of course, that it complied with the Statute and Rules of the Court. This is clear from the plain terms of each Agreement. In addition, the Doha Agreement records the Parties' implicit consent to seisin of the Court in any manner allowed by the Statute and Rules of the Court once the May 1991 deadline had expired. Thus, Qatar was entitled to seise the Court on 8 July 1991.

4.102 Bahrain contends in its Counter-Memorial that the express language of the Doha Agreement required joint seisin. Even when the idea of a special agreement was being contemplated, the question of seisin was not discussed. In any event, the Doha Agreement contains no provision requiring joint seisin. The only condition in the Doha Agreement concerns the period which had to run before the Court might be seised, i.e., the expiry of the May 1991 deadline. That provision was complied with by Qatar.

4.103 In conclusion Qatar maintains that the seisin of the Court was properly made by its Application filed with the Registry of the Court on 8 July 1991.

SECTION 7. Bahrain's Alleged Disadvantages

4.104 In the preceding Sections Qatar has shown that the Court has jurisdiction in the present case, since both States have given their consent to jurisdiction, and that the question of seisin raised by Bahrain is not an issue. The Court was properly seised by Qatar's Application. Unable to address the above questions with legal arguments, Bahrain has devoted a great deal of energy to extra-legal arguments about alleged disadvantages arising from the fact that the Court has not been seised by a joint submission.

A. The Alleged Disadvantages in being placed in the Position of a Defendant

4.105 According to Bahrain "the procedure of joint submission" avoids "one party being plaintiff and the other being defendant[246]", and "Bahrain is disadvantaged by being made Defendant[247]". This is an extraordinary assertion, since procedural equality between the parties in a particular case cannot be viewed as being destroyed or impeded by the respective positions of the parties in the proceedings. In any event, there have been cases which have been brought jointly to the Court where one party is really the plaintiff and the other the defendant (for example, the North Sea Continental Shelf case). The respective position of the parties in fact depends on the substance of the case and the nature of each State's claims.

4.106 However, Bahrain alleges that there is a disadvantage inherent in the position of a defendant. Thus, it implies that an applicant secures advantages simply by virtue of adopting the posture of a plaintiff in contentious proceedings; that only the points of view of the applicant are reflected; that the nature, order and timing of the written pleadings can no longer be agreed between the parties[248]; and Bahrain even suggests that a defendant is "impliedly pilloried as a State being dragged reluctantly before the Court[249]"; indeed, it goes further, affirming that this is a "dishonour"[250] ! Such allegations have no foundation.

4.107 The allegation that a plaintiff secures advantages by adopting the posture of a plaintiff and that this results in a real substantive inequality between the parties amounts to saying that in the judicial settlement of international disputes, parties are never equal when there is an applicant and a respondent, and that the respondent is always disadvantaged and dishonoured ! This is totally contrary to

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246 Bahraini Counter-Memorial, para. 1.7, p. 4.

247 Ibid., p. 113.

248 Ibid., para. 8.15, p. 113.

249 Ibid., para. 8.15, p. 113.

250 Ibid., para. 9.1, p. 115.

the principle of equality between parties before the Court, if not an affront to the impartiality of the Court[251]. As the Court stated in the Barcelona Traction case:

> "The scope of the Court's process is however such as, in the long run, to neutralize any initial advantage that might be obtained by either side[252]."

4.108 The statement that only the points of view of Qatar are reflected must also be rejected. As a general principle, it can never be said that in contentious proceedings only the views of the plaintiff are reflected. Moreover, in the present case, as Qatar has explained above, the Bahraini formula was designed by Bahrain precisely so that each Party might present its own claims to the Court. If, at the present stage, only Qatar's claims are before the Court, it is because Bahrain has chosen to refrain from making use of the Bahraini formula. If Bahrain were to file a parallel application, Qatar would evidently become defendant with respect to the claims so presented.

4.109 The idea that the nature, order and timing of the written pleadings can no longer be agreed between the Parties is also unconvincing. If Bahrain, in conformity with the Doha Agreement and the Bahraini formula, files an application in its turn and presents its claims, the Rules of Court would allow the President of the Court, after having ascertained the views of the Parties, to order simultaneous exchanges of written pleadings. For its part, Qatar would make no objection to simultaneous exchanges of written pleadings. This is consequently a non-issue.

4.110 Finally, the suggestion that Bahrain could be morally harmed by being made a defendant is totally alien to the process of judicial settlement. As has been noted above, the Manila Declaration provides as follows:

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251 As pointed out by Rosenne: "The characteristic feature of the procedure of the Court, as has been repeatedly stressed, is the equality of the parties. This is, in the Court, not an abstract notion or a mere declaration of principle, but a firm reality originating in the non-eclectic character of international law and the very nature and object of the judicial process". (The Law and Practice of the International Court, Sijthoff, 1965, Vol. II, p. 546.) See, also, the long discussion by the same author which evidences that the applicant/respondent relationship is purely procedural and without effect on substance, pp. 526-527.

252 Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 25.

> "Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States[253]."

B. Alleged Disadvantages deriving from the so-called "Evasion of Bahrain's constitutional requirements"

4.111 To the extent Bahrain discusses its Constitution in relation to the question of jurisdiction, this has been dealt with in detail above[254]. However, Bahrain also alleges that it is disadvantaged by the "evasion" of its alleged constitutional requirements. However, the question of alleged constitutional requirements is totally irrelevant in this context. It is sufficient to say here that if any requirements of Bahrain's Constitution have not been fulfilled, it is Bahrain, and not Qatar, which is guilty of the "evasion". Thus, Bahrain simply cannot say that it is disadvantaged when the remedy to any alleged disadvantage is entirely in its own hands.

C. Alleged Disadvantages deriving from the Absence in the Doha Agreement of a Clause on Non-Disclosure of Settlement Proposals

4.112 In several places in its Counter-Memorial Bahrain repeats the idea that -

> "... by starting proceedings unilaterally Qatar has entirely by-passed an important question relating to the admissibility of certain evidence upon which the Parties were at the time of the application still not agreed[255]."

This matter was dealt with in detail in Qatar's Memorial[256]. Bahrain has not met any of Qatar's arguments, but simply repeats several times that the matter was outstanding. Bahrain ignores the fact that there was no further discussion of such a clause in the Tripartite Committee after its Third Meeting[257]. In any event, Bahrain cannot ignore the fact that this matter was not mentioned in the Doha Agreement.

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253 See, para. 1.08, above.

254 See, paras. 4.24-4.33, above.

255 Bahraini Counter-Memorial, para. 1.13, p. 6; see, also, ibid. para. 5.40 (3), p. 48, para. 7.9, p. 102 and para. 8.3, p. 108.

256 See, Qatari Memorial, paras. 5.83-5.89, pp. 130-132.

257 See, para. 3.29, above.

4.113 Qatar rejected such a clause because Bahrain's proposed draft appeared excessive and unreasonable. Bahrain now contends that the draft provision was merely intended to reflect rules of customary international law[258] and normal rules of confidentiality. This is obviously not the case as appears from the text of the proposed draft. However, if Bahrain were right in that contention the clause would be redundant.

D. Alleged Lack of Equality in Submitting Claims; the Question of Zubarah

4.114 Although Bahrain states that it is not "unwilling that the dispute should come before the Court", it adds that -

> "... its willingness to come to the Court is conditioned upon all pertinent issues being brought to the Court at the same time ... As can be seen, the issue of Zubarah, which to Bahrain is real and important, forms no part of the case as presented by Qatar[259]."

What Bahrain fails to say is that the alleged inequality which it appears to believe it suffers as a result of the fact that the issue of Zubarah is not now before the Court arises not from Qatar's Application but from its own failure to make use of its right under the Doha Agreement to file its own application to the Court in accordance with the Bahraini formula.

4.115 Bahrain continues to question the possibility for it of proceeding by way of a separate application or a counter-claim, referring again to the Asylum and Legal Status of the South-Eastern Territory of Greenland cases[260]. Bahrain alleges that, unlike in those cases, where there was an underlying and demonstrable willingness of the Parties to go to the Court and a common subject matter, the same is not true in the present case. However, as Qatar has amply demonstrated, there is a common consent to the jurisdiction of the Court (the 1987 and Doha Agreements) and an agreement on the subject and scope of the disputes (the Bahraini formula), and there should therefore of course be no obstacle to joinder if Bahrain were to file its own application.

4.116 Qatar has made its position perfectly clear with regard to each Party's right to submit claims falling within the Bahraini formula:

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258 See, Annex to Bahrain's letter of 18 August 1991, para. 20(c), pp. 18-19.

259 Bahraini Counter-Memorial, para. 1.13, p. 6.

260 Ibid., paras. 8.7-8.14, pp. 109-113.

> "... 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[261]."

Thus, Qatar can also only repeat its position for the third time, the first time being in a letter from the Agent of Qatar to the Registrar of the Court dated 31 August 1991 and the second in the Qatari Memorial[262]:

> "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."

The anxiety expressed by Bahrain on this issue, and in particular about Zubarah, is really not understandable, given that it was acknowledged by Bahrain - and in fact advocated by Dr. Husain Al-Baharna himself in the Tripartite Committee - that one of the reasons for proposing the Bahraini formula was precisely to allow each State to bring its own claims, and Bahrain's desire to include Zubarah as one of those claims[263].

4.117 In conclusion, it may be said that Bahrain suffers no real "disadvantages" resulting from Qatar's Application. In any event, such allegations can have no relevance to the real issues in the present proceedings.

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261 Qatari Memorial, para. 4.42, p. 83.

262 Ibid., para. 5.80, p. 129.

263 See, para. 3.38, above.

CHAPTER V
THE ADMISSIBILITY OF QATAR'S APPLICATION

5.01 The Court's Order of 11 October 1991 required the Parties to address the question of the admissibility of Qatar's Application. In accordance with the Court's Order, in its Memorial Qatar provided the Court with information both as to the Bahraini formula incorporated in the Doha Agreement, and as to the origin and nature of the claims submitted by Qatar's Application. In this regard Qatar concluded 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[264]."

5.02 Neither in its reasoning nor in its submissions does Bahrain's Counter-Memorial raise any question about the admissibility of Qatar's Application. Indeed, Bahrain states that it does "not object[...] to the admissibility of Qatar's present Application[265]". With regard to the admissibility of Qatar's claims, Bahrain also raises no objections:

> "Understandably, Qatar has addressed the question of admissibility only in terms of the issues which it has itself submitted to the Court. As regards these, Bahrain is prepared not to question that the Qatari claim as at present framed is admissible[266]."

5.03 Subsequently, however, Bahrain adds a rather nebulous reservation:

> "Such acceptance of admissibility cannot extend to any other proceedings, even ones involving the same issues as those now raised by Qatar. Thus, for example, if in such later proceedings Qatar were to question the admissibility of any Bahraini claim to Zubarah by reference to considerations which, in its turn, Bahrain might perceive at that time and in that context as also being applicable to Qatar's claims, Bahrain would feel free to invoke such considerations - to the extent of their relevance - against the admissibility of any claims that Qatar might assert, e.g. in relation to the Hawar Islands[267]."

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264 Qatari Memorial, para. 6.05, p. 134.

265 Bahraini Counter-Memorial, para. 9.8, p. 117.

266 Ibid., para. 1.16, p. 11 (emphasis in original).

267 Ibid., para. 9.8, p. 117.

5.04 Given Bahrain's first statement quoted in paragraph 5.02 above, Qatar understands that Bahrain has acknowledged that Qatar's claims, as presently framed in the Application, are admissible. Bahrain's discussion subsequent to this acknowledgement is purely hypothetical. First, it refers to possible other proceedings. Qatar does not know what such proceedings might be, and consequently cannot make any comment on this subject. Second, it refers to the admissibility of claims which Bahrain might raise. In this regard, the Court's Order of 11 October 1991 requires the Parties to address "the questions ... of the admissibility of the Application", i.e. of Qatar's Application. It is therefore legally impossible for Qatar to address the admissibility of any other hypothetical application, and in any event it would also be materially impossible to address an application which, up to the present, Bahrain has refrained from filing.

PART III
SUMMARY

6.01 Qatar welcomes Bahrain's participation in the present proceedings. Qatar also welcomes the opportunity given by the Court's Order of 26 June 1992 to file a Reply on "questions of jurisdiction and admissibility". For the convenience of the Court, Qatar will summarize hereafter the contentions and evidence of fact and law contained in Parts I and II of this Reply which are directly relevant to those questions.

Factual Elements

6.02 Bahrain has raised no issue concerning the existence and nature of the disputes submitted to the Court by Qatar's Application and which relate to sovereignty over the Hawar islands, sovereign rights over the Dibal and Qit'at Jaradah shoals, and the delimitation of the maritime areas of Qatar and Bahrain. Since Bahrain has accepted the admissibility of Qatar's claims as at present framed, it would be inappropriate to re-examine the facts relating to these disputes stated in Qatar's Memorial. Qatar has, however, considered it necessary to put on record[268] its rejection of some of the inaccurate statements concerning the history of the disputes made by Bahrain in its Counter-Memorial[269], in particular as to the extent of Qatar's territory and of Al-Thani authority and control over that territory in the latter part of the 19th century and the first part of the 20th century.

6.03 Qatar relies on two Agreements, which are "treaties" within Article 36, paragraph 1, of the Statute of the Court, as providing the legal grounds upon which the jurisdiction of the Court is based. These are the 1987 Agreement and the Doha Agreement of 1990, which were made between the Parties in the manner and circumstances described in Qatar's Memorial[270] supplemented by the explanatory detail in this Reply[271].

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268 See, Chapter II, above.

269 Bahraini Counter-Memorial, Chapter II, Section 1.

270 See, Qatari Memorial, Chapter III.

271 See, Chapter III, above.

6.04 The 1987 Agreement was entered into pursuant to the Framework of the Mediation which had been undertaken by Saudi Arabia between the Parties. The First Principle of the Framework as originally agreed in 1978 provides that all issues of dispute between Qatar and Bahrain, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together. The Fifth Principle of the Framework, as agreed in May 1983, provides that in the event that negotiations on the substance of one or more of the disputes fail -

> "... 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[272]."

6.05 Since the negotiations on the substance which were undertaken over several years pursuant to the Framework of the Mediation failed to reach a successful conclusion, in 1987 the Parties took the first step towards implementing the Fifth Principle, by entering into the 1987 Agreement.

6.06 The first item of the 1987 Agreement establishes the Parties' consent to the jurisdiction of the Court in unambiguous terms, as follows:

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

At that time, the Parties had not defined "the disputed matters" which were covered by their consent to jurisdiction other than as follows: "the long-standing dispute ... over the sovereignty over the Hawar Islands, the maritime boundaries ... and any other matters[273]". In the second item the Parties agreed to maintain the status quo between them pending a final settlement.

6.07 In this Agreement, the Parties left open the way in which the disputed matters were to be submitted to the Court. They were, however, agreed that this should be done in accordance with the "regulations and instructions" of the Court.

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272 See, Qatari Memorial, paras. 3.09 et seq., pp. 35 et seq.; and Annex II.10, Vol. III, p. 49. See, also, for Bahrain's recognition that these Principles were accepted by both Parties, Bahraini Counter-Memorial, para. 5.5, p. 30.

273 Qatari Memorial, Annex II.15, Vol. III, p. 101, at p. 103.

Accordingly, the third item of the 1987 Agreement provided for the creation of a committee to perform a procedural role -

> "... 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." (Emphasis added.)

6.08 When the Tripartite Committee was established, neither Party considered that the 1987 Agreement made reference to the Court conditional upon the conclusion of a special agreement[274]. Indeed, the conduct of the Parties in the preliminary and First Meetings of the Tripartite Committee confirms that neither understood that the 1987 Agreement required the conclusion of a special agreement. It was only at the end of the First Meeting that the Committee decided to explore the possibility of reaching a special agreement. Both Parties presented drafts, and thereafter discussion centred around the definition of the dispute to be submitted to the Court. However, the Parties were unable to agree on the inclusion of certain matters[275]. In the light of this difficulty, between the Fourth Meeting of the Tripartite Committee in June 1988 and the Fifth in November 1988, on 26 October 1988 Bahrain produced a general formula, which became known as the Bahraini formula[276].

6.09 During the Fifth Meeting, on 15 November 1988, Qatar raised various questions about the formula, which Bahrain requested time to answer. However, at the same Meeting, it was announced that King Fahd considered that the date of the beginning of the forthcoming GCC Summit Meeting in December 1988 was the date for terminating the Tripartite Committee's work, whether or not it had succeeded in achieving what was requested from it[277]. It was then decided to hold a final Meeting, which took place on 6-7 December 1988. At that Sixth Meeting, Qatar suggested that an amended version of the Bahraini formula might be fitted into a special agreement with the addition of two annexes setting out the claims of Qatar and Bahrain, respectively. This proposal reflected the idea which had already begun to emerge that each Party would have to seek an adjudication

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274 See, paras. 3.07 et seq., above.

275 See, in general, Chapter III, Section 3, above "The Proceedings of the Tripartite Committee".

276 See, para. 3.32, above.

277 See, para. 3.35, above.

of its own claims. In the event, no agreement was reached on the text of a special agreement and the Tripartite Committee's work was terminated. Neither Bahrain nor Qatar made any attempt to reconvene the Tripartite Committee[278].

6.10 Despite the efforts of King Fahd, who was given renewed periods of time in 1988 and 1989 to seek an agreement between the Parties on the substance of the dispute, by the time of the GCC Summit Meeting held in Doha in December 1990 no progress had been made in this regard. When Qatar raised the subject again at the formal opening of the Summit Meeting, King Fahd stated that the time had come for dispute to be referred to the International Court of Justice. The Amir of Qatar then announced that he would accept the Bahraini formula to allow immediate reference to the Court. However, the Parties agreed to grant Saudi Arabia a further period of five months to attempt to reach a settlement on the merits before submission could be made to the Court.

6.11 After there discussions at the Summit Meeting, there were consultations between the Foreign Minister of Oman and the two Parties separately. These consultations led to the drafting in the form of minutes of the second Agreement which Qatar invokes as a basis of jurisdiction[279]. This (the Doha Agreement) was signed on 25 December 1990 by the Foreign Minister of Qatar, Bahrain and Saudi Arabia[280].

The Questions of Jurisdiction and Admissibility

6.12 Bahrain does not take issue with the fact that the 1987 Agreement is a binding agreement. However, it alleges that the Doha Agreement is not a binding agreement but was a mere diplomatic gesture to save the face of Qatar. This allegation is without any foundation. The Doha Agreement provided the means needed for the fulfilment of the 1987 Agreement and was negotiated within the Framework which had for its ultimate objective the settlement of the disputes between Qatar and Bahrain. Having regard to all the circumstances and the history of the events leading to the signature of the Doha Agreement, it is plain

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278 See, paras. 3.37-3.51, above.

279 See, in general, Chapter III, Section 6, above.

280 The Arabic text and an English translation of the Doha Agreement may conveniently be found in Annex 6 to the Application. See, also, Qatari Memorial, Annex II.32, Vol. III, p. 205, for the English translation.

that the objective at the Doha Meeting was the final settlement of the disputed matters. The Doha Agreement was designed to effect this purpose by providing that, if the dispute was not settled through Mediation by the end of May 1991, it could be referred to the International Court of Justice:

> "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."

6.13 Although the Doha Agreement is entitled "Minutes", the structure of the document is set out in the form of an agreement. The preamble refers to the Framework of the Mediation and the consultations between the three Foreign Ministers. It then recites what "was agreed" and sets out the operative provisions in three paragraphs. The text is formally signed by the three Foreign Ministers. In the absence of compelling evidence to the contrary, this is, on the face of it, a binding international agreement amounting to a treaty within the Vienna Convention on the Law of Treaties. It is also sufficient to establish the jurisdiction of the Court under Article 36, paragraph 1, of the Statute of the Court.

6.14 Qatar maintains that this Agreement, which implemented the 1987 Agreement, provided the means necessary to meet the requirements of Article 40 of the Statute so as to enable the Court to exercise its jurisdiction in relation to the existing disputes between the Parties in accordance with the Bahraini formula.

6.15 If the Foreign Minister of Bahrain had intended that Bahrain should not be bound, he ought to have expressed this intention on or before the signature of the Agreement. The Agreement being on the face of it valid and binding, Bahrain is not now entitled to invoke its own constitutional requirements in order to escape its international obligations. Accordingly, Qatar maintains that both the 1987 Agreement and the Doha Agreement are treaties in force within the meaning of Article 36, paragraph 1, the Statute of the Court.

6.16 The position of Qatar with respect to the operative part of the Doha Agreement is as follows:

a) Paragraph 1 reaffirms the consent to the Court's jurisdiction embodied in the 1987 Agreement.

b) Paragraph 2 defines the subject and scope of the disputes which may be referred to the Court in accordance with the Bahraini formula[281], and authorizes the Parties to submit to the Court claims falling within the terms of the Bahraini formula.

The Doha Agreement, however, does not provide any particular method of commencing proceedings before the Court other than that of complying with the Court's Statute and Rules, as indicated by the use of the wording "and the proceedings arising therefrom". It is thus open to each of the Parties to submit its own claims to the Court. Contrary to what has been contended by Bahrain, the word "al-tarafan" does not require joint action and all the circumstances and the object of the Agreement demonstrate the right of each Party to submit its own claims. Of the alternatives between the notification of a special agreement and the filing of a written application provided by Article 40 of the Statute of the Court, the one to which the Doha Agreement obviously points is the latter. Otherwise the Agreement would have no object or purpose. The only condition remaining to be fulfilled before the disputes could be referred to the Court was the expiry in May 1991 of the period during which the Mediator was given a further opportunity to try to reach a settlement on the substance of the dispute.

Paragraph 2 also provides for the continuation of Saudi Arabia's good offices during the submission of the matter to arbitration which indicates that, following the expiry of the period in May 1991, the expectation was that the matter would be referred to the Court.

c) Paragraph 3 confirms this conclusion by providing that, if a solution acceptable to the two Parties is reached, the case will be withdrawn from "arbitration".

6.17 In broad terms, these are the grounds on which Qatar maintains that, on the basis of the 1987 Agreement and the Doha Agreement, the Court has jurisdiction to entertain the disputes referred to in the Application.

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281 The text of the Bahraini formula 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". (Qatari Memorial, Annex II.29, Vol. III, p. 191.)

6.18 Bahrain has not objected to the admissibility of Qatar's Application[282]. Moreover, Qatar has noted that, despite the Court's Order of 11 October 1992, Bahrain has not made any formal submission on the issue of the admissibility of the Application itself, and indeed has not addressed this question in its Counter-Memorial. It must therefore be regarded as having implicitly admitted the admissibility of Qatar's Application, and Bahrain's only reservation relates to possible future proceedings and has no relevance to the present proceedings. For these reasons, Qatar has nothing further to add on the question of admissibility.

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282 See, Bahraini Counter-Memorial, para. 9.8, p. 117.

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
Minister Adviser,
Agent of the State of Qatar

LIST OF ANNEXES

VOLUME II