INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING MARITIME DELIMITATION

AND TERRITORIAL QUESTIONS

BETWEEN

QATAR AND BAHRAIN

(QATAR v. BAHRAIN)

(QUESTIONS OF JURISDICTION AND ADMISSIBILITY)

REJOINDER

SUBMITTED BY

THE STATE OF BAHRAIN

29 December 1992

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

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ABBREVIATIONS

The following is a list of the main abbreviations used:

B/CM	Bahraini Counter-Memorial.
Q/M	Qatari Memorial.
Q/Rep	Qatari Reply.
Q/TCM Bundle	Bundle consisting of the Arabic text of minutes of meetings of the Tripartite Committee with English translations by Qatar deposited at the Registry by Qatar in accordance with Article 50, paragraph 2 of the Rules of the Court.

NOTE REGARDING TRANSLITERATION OF ARABIC MATERIAL

The system of transliteration followed in this Rejoinder is that set out at page 7 of the *Concise Encyclopedia of Islam*, published by Stacey International, 1989, save for names which are in common use and quotations from experts' reports and the Qatari Memorial.

NOTE REGARDING TRANSLATIONS

In this Rejoinder, Bahrain has used, wherever possible, translations which are already before the Court. Nevertheless, Bahrain does not wish to limit its right to raise questions relating to particular points of translation should it at any stage become necessary to do so.

NOTE REGARDING ANNEXES

Material in support of statements made in this Rejoinder will be found in the Annexes hereto, unless it has already been produced to the Court in the Annexes to the Counter-Memorial. Material that is already in the Annexes to the Qatari Memorial or Reply is generally not duplicated unless it is material emanating from Bahrain, material of which the translation may be controversial or material to which the text makes frequent reference.

CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN

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REJOINDER OF BAHRAIN

PART ONE

CHAPTER 1

INTRODUCTION

1.01 This is the Rejoinder of Bahrain filed pursuant to the Order of the Court of 26 June 1992. It responds to the Reply of Qatar on questions of jurisdiction and admissibility.

1.02 Bahrain does not consider that it is necessary to burden the Court with an especially elaborate or extensive rejoinder to the Qatari Reply. The latter, as the Court will readily recognise, is largely a restatement of the position taken by Qatar in its Memorial - though with a few changes in emphasis. The present pleading will, therefore, concentrate on responding to misstatements or errors in the Qatari Reply and on identifying those respects in which that pleading has avoided, or failed to react to, points of significance in Bahrain's Counter-Memorial. Bahrain will deal with such matters within the same basic framework as that of its Counter-Memorial.

SECTION 1. The central elements of the case

1.03 The central elements of the case have not been altered as a result of

the Qatari Reply. The case remains, as it has always been, essentially one about the nature and effect of the 1990 Minutes.

1.04 The Parties are not really at issue about the 1987 Agreement. Bahrain does not deny that the text contained in general terms an undertaking by the Parties to refer their dispute to the Court. However, the 1987 Agreement was not complete in conferring jurisdiction. It was expressly conditioned upon the successful outcome of the work of a Tripartite Committee charged with "approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted" to it.[1] At all material times the Parties saw the task of this Committee as that of drawing up an agreement whereby the Parties would jointly submit their dispute to the Court in the form of a special agreement containing provisions acceptable to, and accepted by, both sides. Nothing ever happened to change this condition. The initiative of Qatar in December 1990 was an attempt to alter it, but this attempt was expressly and clearly rejected by Bahrain.

1.05 Turning, as the case does, upon the nature and effect of the 1990 Minutes, the Court will, no doubt, be struck by the failure of Qatar to produce any first-hand evidence in support of its understanding of the effect of those Minutes. True, Qatar has produced expert statements of a linguistic kind seeking to interpret, particularly, the words *al-ṭarafān* as meaning "either of the parties". It has produced also an affidavit of a handwriting expert to support its contention that the manuscript insertion of the words "in accordance with the Bahraini formula" was made not by the Bahraini Foreign Minister but by the Legal Adviser of the Qatari delegation. But the very presence of these statements serves to highlight the total absence of other statements that could have had more bearing on the central issues. The Bahraini Foreign Minister and the Bahraini Minister of State for Legal Affairs have, on the other hand, both testified that they intended and

[1] Qatari translation. The United Nations translation reads: "...communicating with the International Court of Justice and completing the requirements for referral of the dispute thereto". Both the Qatari and Bahraini translations are shown side by side in B/CM, Annex 1.3, Vol. II, at p. 18.

understood the words finally used in the 1990 Minutes as confirming that proceedings before the Court could only be instituted by the two Parties together.

1.06 Nor will the Court overlook the details of the evolution of the final text of the 1990 Minutes - an evolution which involved two changes in earlier drafts which made it clear beyond any doubt that Bahrain entirely rejected any idea that proceedings before the Court could be instituted unilaterally by either Party.

SECTION 2. The propriety of Bahrain's conduct in the present proceedings

1.07 Qatar has seen fit to write of "the impropriety" of Bahrain having raised objections to the jurisdiction of the Court and seeks to attribute responsibility to Bahrain for the fact that Qatar "appears to be in the position of a claimant" in respect of the preliminary objection, that "for the first time in the history of the Court two rounds of written pleadings have become necessary in a preliminary phase" and that "the adjudication of questions of jurisdiction and admissibility has been abnormally delayed".[2]

1.08 Qatar fails to recall that the Order of the Court of 11 October 1991 was only made after a meeting between the President of the Court and the Parties at which Qatar agreed to the course proposed.

1.09 Moreover, despite Qatar's stated reluctance to be put in the position of claimant,[3] it sees fit to question Bahrain's own desire that pleadings should be filed simultaneously, and without either party appearing as plaintiff

[2] Q/Rep., paras. 1.06-1.07, pp. 2-3. Qatar appears, incidentally, to have overlooked the precedents, set out in para. 20 of the Annex to the Bahraini letter to the Court of 18 August 1991, for the separate treatment of questions of jurisdiction.

[3] Q/Rep., para. 1.08, p. 3.

or defendant, as had always been envisaged by both States.[4]

1.10 The Court, knowing as it does the circumstances in which it decided to order the filing of a Reply and a Rejoinder in the present case and, especially, that Bahrain was quite uninvolved in this development, will immediately recognise that these assertions are quite without foundation. In themselves, they require no answer; but they are of a piece with much else in the Qatari Reply that is a medley of imagination and unsupported and unsupportable invention.

SECTION 3. The question of "warning"

1.11 Qatar also makes a preliminary point of the alleged conformity of its conduct with "two Agreements entered into between itself and Bahrain"[5] and of the fact that it gave repeated warning of its intentions to the Mediator. Although Bahrain will presently deal more fully with the first of these points, it wishes immediately to stress again that though there was one agreement, that of 1987, it was imperfect and conditional. The 1990 Minutes do not constitute a further agreement entitling Qatar unilaterally to commence proceedings. Moreover, as to the messages said to have been conveyed to the Mediator, whatever may have been their content, they were not communicated to Bahrain and Bahrain was completely taken by surprise by the filing of the Application on 8 July 1991. As Qatar must be aware, it was the constant practice of Saudi Arabia not to communicate correspondence from one party to the other.[6]

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[4] See below, paras. 7.21-7.22, pp. 75-76.

[5] Q/Rep., para. 1.08, p. 3.

[6] As Prince Saud Al-Faisal, the Saudi Arabian Minister of Foreign Affairs said at the second meeting of the Tripartite Committee: "I should like to confirm that, throughout the period of Saudi Mediation, Saudi Arabia did not deliver to either Bahrain or Qatar documents belonging to the other party. Its role was limited to proposing certain ideas, with the express purpose of avoiding any exploitation of Saudi mediation to strengthen either party's position at the expense of the other party". (Translation by Qatar). Annex I.5, at p. 129.

SECTION 4. Bahrain's renewal of its offer to conclude a Special Agreement

1.12 Qatar has described as "a diversionary measure" Bahrain's presentation to Qatar of a draft Special Agreement for the joint submission of the case to the Court.[7] Far from being "a diversionary measure", Bahrain sees its offer as being a specific and positive contribution to the settlement of the dispute between Qatar and itself. Bahrain has thus made plain its willingness to participate in the implementation of the 1987 Agreement in the only manner foreseen in that Agreement.

1.13 The text of the Bahraini draft agreement is annexed to this Rejoinder.[8] Bahrain reaffirms its adherence to its offer to conclude a Special Agreement on these terms. Bahrain recalls what it said in its Counter-Memorial: "The Court should not feel that a proper striving to ensure the application of the judicial process to the present dispute can only be satisfied by permitting Qatar to proceed with the present case in its present form. An approach that is much more likely to be conducive to a properly conducted case is one in which the Parties come to the Court jointly and willingly - as was and remains the intention of the Mediator and of Bahrain".[9]

1.14 It may, indeed, be observed that even after Qatar's unilateral application on 8 July, 1991, the Saudi Mediator presented to the two sides in September, 1991, a further proposal for a joint agreement.[10] In its Reply Qatar, although admitting that it did receive in September, 1991, such a proposal for a joint agreement, fails to reflect the fact that such an initiative on the part of Saudi Arabia is quite incompatible with Qatar's thesis that at

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[7] Q/Rep., para. 1.10, p. 4.

[8] Annex 1.3, p. 107.

[9] B/CM, para. 9.3, pp. 115-116.

[10] Q/Rep., note 9 to para. 1.10, p. 4.

Dohah the earlier common understanding that the Court was to be seised by way of a Special Agreement had been abandoned.[11]

[11] B/CM, para. 7.23, pp. 105-106.

CHAPTER II

ADMISSIBILITY

2.01 Subject to one important reservation, Bahrain is in agreement with Qatar on the question of admissibility. Bahrain does not deny that the Qatari claim as at present framed is admissible.[12]

2.02 Bahrain must, however, affirm the reservation that it made in its Counter-Memorial, paragraphs 9.6-9.8, pp. 116-117, to the effect that, if Qatar should in any other proceedings raise any objection to the admissibility of Bahrain's claim in respect of Zubarah, Bahrain must be free to invoke against Qatar's present claims any points of admissibility that are suggested by the nature of any such Qatari objection.

2.03 This reservation is necessitated by the obscurity which still attaches to Qatar's position regarding the Zubarah matter. Though invited to acknowledge the admissibility of Bahrain's claim in respect of Zubarah, Qatar has not done so - as the Court will see from paragraphs 5.03-5.04 of the Qatari Reply. This hesitation itself demonstrates Qatar's fundamental unwillingness truly to accept the Bahraini Formula - a formula which was intended to ensure that there could be no objection to the admissibility of the matter of Zubarah.

[12] B/CM, para. 1.16, p.11.

CHAPTER III

THE HISTORICAL PERSPECTIVE

3.01 Enough has now been said in the Qatari Memorial, the Bahraini Counter-Memorial and the Qatari Reply on the history of the dispute to make unnecessary any further detailed discussion. Bahrain does no more than reiterate that the Qatari narrative of events is incomplete and tendentious. There is no substance in the mere reassertion[13] by Qatar that during the second half of the 19th century the Al-Thani family exercised authority and control over the whole of the peninsula. It demonstrated no presence in Zubarah and it was absent from the Hawar Islands. The pair of Turkish maps invoked by Qatar[14] do not provide any evidence whatsoever of Qatari presence in the islands. If the Al-Thani really exercised authority over these areas there would be some concrete evidence of it. In fact, there is none.

3.02 These are not matters with which the Court need further concern itself in connection with questions of jurisdiction and admissibility. Bahrain expresses the hope that Qatar will not refer to them in the course of the oral proceedings. Any such reference will necessarily occasion a substantive reply from Bahrain and the resulting exchange will lengthen the proceedings in a manner that will not assist the Court or benefit either side.

[13] Q/Rep., para. 2.08, p. 9.

[14] Q/Rep., para. 2.10, pp. 9-10.

PART TWO

JURISDICTION

4.01 In dealing with the remainder of the Qatari Reply, Bahrain will not attempt to mirror exactly the headings and sub-headings used by Qatar. Instead Bahrain will relate its response to the main issues in the case as set out in the Bahraini Counter-Memorial and the manner in which the Qatari Reply impinges on them.

CHAPTER IV

THE 1987 AGREEMENT

4.02 The principal disagreement between the Parties regarding the 1987 Agreement is whether it contemplated only a joint reference to the Court (as Bahrain contends) or whether it also gave expression to the consent of both Parties to the possibility of a unilateral application (as Qatar contends).

SECTION 1. The background to the 1987 Agreement

4.03 Bahrain, in showing in its Counter-Memorial that the approach to the Court would be by the Parties jointly, began by noting that the background to the 1987 Agreement contained nothing suggestive of the possibility of unilateral recourse to judicial settlement.[15] Qatar, it may be observed, has entirely disregarded that pertinent element in the interpretation of the 1987 Agreement and makes no comment on the course of the discussions prior to the 1987 Agreement.

[15] B/CM, paras. 5.2-5.6, pp. 28-30.

SECTION 2. The 1987 Agreement

4.04 The first item in the Agreement provides that:

> "All the disputed matters shall be referred to the International Court of Justice...for a final ruling binding upon both parties..."

Initially, Qatar contended that by this item the Parties:

> "unequivocally and unconditionally accepted the reference of their existing disputes to the International Court of Justice."[16]

Bahrain denied this in its Counter-Memorial,[17] arguing that:

> "the commitment was vitally qualified by the provision [in the third item] for the formation of a committee consisting of representatives of the Parties and the Mediator."

In its Reply Qatar, though contesting Bahrain's statement that the third item qualifies the first, no longer repeats that the first item serves by itself as an unequivocal and unconditional acceptance of the Court's jurisdiction. This is not surprising. If, in fact, the 1987 Agreement had been a complete and unconditional submission to the jurisdiction, Qatar would find it impossible to explain why it has waited four years before filing its Application, and why the Tripartite Committee has wasted those four years in trying to agree on matters over which no further agreement was necessary.

4.05 The continuing disagreement between the Parties relates to the third item in the Agreement:

> "Formation of a committee comprising representatives of the States of Qatar and Bahrain and of the Kingdom of Saudi Arabia for the purpose of..."

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[16] Q/M, para. 5.40, p. 112 and para. 6.08, p. 135.

[17] B/CM, para. 5.12, p. 33.

(Qatari translation)

"...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."

(UN translation)

"...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 judgment which shall be binding on both parties."[18]

4.06 Basically, Bahrain contends that this item subjects the general understanding contained in the first item to a condition, namely, that the Parties agree upon a joint submission. Qatar contends that:

"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."[19]

4.07 Qatar appears to attach great weight to an argument expressed thus:

"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 reference '...either by 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 the Court and as excluding reference by an application under

[18] B/CM, Annex I.3, Vol. II, at p. 18.

[19] Q/Rep., para. 3.02, p. 13.

Article 38."[20]

4.08 The response to this has two aspects: First, the Qatari Reply misrepresents the terms of the third item of the 1987 Agreement in saying that it "states simply that reference of the dispute to the Court is to be 'in accordance with the Court's regulations and instructions'". This unsatisfactory abbreviation omits the first lines of the third item, namely, "formation of a committee..." etc., which precede the words "in accordance with the Court's regulations and instructions". Qatar thus omits the major requirement that a Tripartite Committee should be formed to approach the Court and complete the requirements for the referral of the dispute thereto. The introduction of the Tripartite Committee shows clearly that the Parties must act jointly in their approach to the Court; and this requirement fundamentally qualifies whatever theoretical possibilities Qatar may seek to extract from Article 40 of the Statute and Articles 38 and 39 of the Rules.

4.09 In the second place, the Qatari argument contains a fundamentally mistaken view of Article 40 of the Statute. This Article only indicates the method of seisin. The alternatives of "special agreement" or "written application" there specified have never assumed that, for the latter alternative, an agreed basis of jurisdiction was not necessary. On the contrary, the "written application" presupposes either a pre-existing agreed basis of jurisdiction (i.e. a compromissory clause in a treaty) or a subsequent agreement to jurisdiction *(forum prorogatum)* as in the *Corfu Channel* case.[21]

4.10 Qatar also invokes in support of its position a letter from the Amir of Bahrain to King Fahd of Saudi Arabia of 26 December 1987. Notwithstanding the express reference in the letter to "the conditions"

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[20] Q/Rep., para. 3.08, pp. 15-16.

[21] This is clear from any survey of doctrine and practice. See, e.g., Rosenne, *Law and Procedure of the International Court*, pp. 524-525; Guyomar, *Commentaire du Reglement de la Cour Internationale de Justice*, pp. 230-245.

controlling the submission of the matter to the International Court of Justice, Qatar observes that "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".[22] Because, it would seem, the Amir of Bahrain did not in 1987, before the work of the Tripartite Committee even began, expressly refer to any need for a joint submission, Qatar pretends that by implication he was accepting the possibility of an eventual unilateral submission. The idea is so extraordinary as to defy belief - the more so because its expression is coupled with total silence in response to the comment made by Bahrain on the draft letter dated 27 December 1987 that Qatar put forward at the summit meeting, held in Riyadh on 26-29 December, in implementation of the 1987 Agreement and which contained the express statement that the Foreign Ministers of the two Parties would "open negotiations between them with a view to preparing the necessary Special Agreement..." (emphasis supplied).[23]

SECTION 3. The work of the Tripartite Committee

4.11 Qatar devotes a section of its Reply[24] to an attempt to establish that Bahrain's analysis of the work of the Tripartite Committee was "inaccurate". This attempt must fail, as Bahrain will now show. Nothing is said in the ensuing 15 pages[25] of the Qatari Reply that in any way diminishes the force of the section in the Bahraini Counter-Memorial that demonstrates in detail how the work of that Committee was directed to the preparation of a Special Agreement for a joint submission and nothing else.[26]

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[22] Q/Rep., para. 3.10, p. 16.

[23] See B/CM, paras. 5.21-5.22, p. 38.

[24] Section 3. The proceedings of the Tripartite Committee, Q/Rep., paras. 3.13-3.48, pp. 17-31.

[25] Q/Rep., paras. 3.13-3.51, pp. 17-32.

[26] See B/CM, paras. 5.21-5.42, pp. 39-49.

4.12 Before entering as summarily as possible into the detail of this series of meetings, one general observation should be made. Nowhere in its Reply does Qatar grapple with one basic consideration in the light of which the whole of the Tripartite Committee's work is to be assessed. If it was anticipated that the outcome of the work of the Committee would be that each side would be able separately to institute proceedings before the Court, why was it deemed necessary to establish the Committee? The truth is that in the light of what preceded the 1987 Agreement, as well as of the 1987 Agreement itself, the only thought in the mind of, at any rate, Bahrain (and, it is believed, Qatar also notwithstanding its present assertions to the contrary) was that the case would go to the Court on the basis of a joint submission under a Special Agreement and in no other way.

A. The Preliminary Meeting[27]

4.13 In dealing with activity before the First Tripartite Committee meeting the Bahraini Counter-Memorial drew attention to a draft letter of 27 December 1987 to the International Court of Justice which Qatar had put forward at the Riyadh Summit Meeting of 26-29 December that year.[28] The second paragraph of this letter contemplates that the Foreign Ministers of the two Parties would "open negotiations between them with a view to preparing the necessary Special Agreement" to submit their differences to the International Court of Justice. In its Reply Qatar, though mentioning this draft letter,[29] makes no attempt to rebut the inference that Bahrain drew from it.

4.14 The Qatari Reply then proceeds to quote from a Bahrain draft

[27] B/CM, paras. 5.21-5.23, pp. 37-39 and Q/Rep., para. 3.14, pp. 17-18.

[28] B/CM, para. 5.21, p. 38. See above, para. 4.10, pp. 12-13.

[29] Q/Rep., para. 3.14, p. 18.

agreement proposed at the same meeting[30] and comments that "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". Since the Bahraini draft was directed precisely towards the joint submission of the dispute to the Court, it is impossible to see how this Qatari statement can be supported.[31]

B. The First Meeting[32]

4.15 Qatar introduces a quotation from the opening remarks of Saudi Arabia's Foreign Minister to the effect that the main purpose of the meeting was to "consider ways and means for referring the issue" to the Court as showing that the Committee "did not...commence its work on any assumption that reference of the case to the Court could only be by a special agreement".[33] Whatever may have been the course of the exchanges in that meeting,[34] it is clear that at no stage during that meeting did the

[30] B/CM, para. 5.21, p. 37; Q/Rep., para. 3.14, p. 18.

[31] For clarity Bahrain subsequently at the First Tripartite Committee Meeting on 17 January 1988 submitted a revised draft Agreement substituting the words "with the aim of reaching a special agreement to submit the disputed matters between the parties to the International Court of Justice for a final judgment binding upon the Parties" (Q/M, Annex II.19, Vol. III at p. 125), for the words "with the aim of contacting the International Court of Justice and fulfilling all the requirements necessary to have the dispute submitted to the Court according to its procedures and so that a final and binding judgment be rendered" that had appeared in the draft submitted on 27 December 1987 (Q/M, Annex II.17, Vol. III, at p. 115). Thus, even if there were, which is not admitted, any ambiguity in the Agreement of 27 December 1987 Bahrain's position was made completely clear in the subsequent draft.

[32] See B/CM, para. 5.24, pp. 39-40; Q/Rep., paras. 3.15-3.18, pp. 18-20.

[33] Q/Rep., paras. 3.15-3.16, pp. 18-19.

[34] The discussion about replacing the words "for the purpose of contacting the International Court of Justice" with the words "for the purpose of reaching a special agreement ..." (see Q/Rep., para. 3.17, p. 19 and note 30 above) hardly supports the view that the Committee was "well aware that there was more than one possibility of referring the dispute to the Court". But even if the discussion did show such an "awareness" (which Bahrain certainly does not admit), it is difficult to see how "awareness" of the possibility can be equated with a willingness to give effect to it; and, it may be observed, Qatar

representatives of Qatar envisage the possibility of a unilateral application. On the contrary, the letter which Qatar envisaged was to be followed by the submission of an agreement. The inescapable fact is that the meeting concluded with an agreement that each side would by 19 March 1988 prepare a draft agreement for the joint submission of the dispute to the Court. It is this decision that matters because it shows what the Tripartite Committee believed the 1987 Agreement required it to do.[35]

4.16 Furthermore, on 27 March 1988, Qatar presented a memorandum containing comments on the Bahraini draft special agreement. These comments contained a paragraph relating to Article II of the Bahraini draft which was omitted in the translation filed by Qatar with the Court in Volume III of its Memorial, Annex II.24, pp. 158-9. At precisely the point where accuracy is important in reflecting Qatar's understanding of the nature of the exercise, there was omitted from the bottom of p. 158 and the top of p. 159, the following:

> "First: With regard to Article II:
>
> (1) What was agreed between our three states was to prepare a joint Special Agreement to refer the matters of the difference existing between us to the ICJ for a decision in accordance with international law. It is quite clear - and this is the formulation used for special agreements in similar circumstances - that this necessitates that the special agreement should contain a submission of the matters of difference and the request that it be decided.
>
> But instead of this, the Bahraini draft, at..."

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properly refrains from pushing its argument so far.

[35] In note 48 on p. 19 of the Reply, Qatar mentions the statement made by Bahrain at the top of p. 40 of its Counter-Memorial and states that "this is one of a number of instances of Bahrain taking a statement out of context and twisting it to suit its own case". Bahrain both rejects the substance of this remark and objects to the use of a word such as "twisting" - a word which falls below the level of courtesy expected in pleadings before the Court. The agreed minutes signed by all three States at the end of the first Tripartite Committee Meeting on 17 January 1988 referred to the preparation of drafts by Bahrain and Qatar for "the formulation of the Special Agreement to refer the difference to the ICJ...". Bahrain's translation is set out at Annex I.1, p. 81. For Qatar's translation, see Q/M, Annex II.20, Vol. III, pp. 131-2.

This paragraph demonstrates three things.

1. Qatar expressly agreed to prepare a Special Agreement in compliance with the 1987 Agreement.

2. This agreement fell within the scope of the reaffirmation in the first paragraph of the 1990 Minutes of what had previously been agreed.

3. Such are the character and significance of the omitted passage that legitimate doubts arise as to whether its omission by Qatar was accidental.[36]

C. The Second, Third and Fourth Meetings

4.17 If one bears in mind that Qatar introduced into its Reply the examination of the proceedings of the Tripartite Committee for the purpose of supporting the proposition expressed in paragraph 3.13 of that pleading (namely, that it was inaccurate of Bahrain to contend that the task of the Committee was limited to securing a special agreement), it will quickly be seen that the sub-section that deals with the Second, Third and Fourth Meetings[37] does not advance the Qatari case at all. That sub-section - as its title indicates - was concerned only to describe the "Inconclusive Discussions on Drafts of a Special Agreement". Its net effect is to support what is said in the Bahraini Counter-Memorial, paras. 5.27-5.32, pp. 41-44.

[36] The words "First: with regard to Article II" at the beginning of the section which starts with this paragraph are omitted, as is the rest of the above quotation. The only section with a similar, underlined heading in the entire 13 pages of Arabic text is concerned with Article V of the draft, the other article to which Qatar objected. This heading, "Secondly: with regard to Article V of the Bahraini draft", has also been omitted in the Qatari translation. Of course, if a heading which begins with the word "Secondly" had remained in the text, a reader would have noticed the absence of a heading starting "First" at an earlier point in the document, and would have been alerted that something had been omitted from the text. As it is, the omission (or deletion) of both "First" and "Secondly" conceals from the reader the fact that the text has been rendered incompletely until the Arabic has been checked against the English on a line by line basis. See Annex I.2, p. 85. See also para. 5.18 below, pp. 32-33.

[37] Q/Rep., paras. 3.19-3.31, pp. 20-24.

D. The Fifth and Sixth Meetings

4.18 The same comment may be made regarding the manner in which Qatar deals with the Fifth[38] and Sixth[39] meetings of the Tripartite Committee. In vain does one seek in the Qatari narrative any reflection of the proposition with which the whole section opens. Indeed, at one point the Qatari representative, Dr Hassan Kamel, is reported as having said: "Qatar was and still prefer [sic] a special agreement prepared in the normal and traditional way"[40] - an observation which can only be read as reflecting Qatar's understanding that the task of the Tripartite Committee was that of producing a Special Agreement for a joint institution of proceedings. Basically, during the course of these two meetings the focus of discussion shifts, instead, to the Bahraini Formula. Qatar seeks to imply that Dr. Al-Baharna referred to an application during the course of discussions. The word which he used (and is recorded in the Saudi minutes) was *talab*, which has the general sense of "request".[41] It is the word used for "request" in the Arabic text of the Bahraini Formula. It is clear that Dr. Al-Baharna was not

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[38] Q/Rep., paras. 3.32-3.36, pp. 24-25.

[39] Q/Rep., paras. 3.37-3.48, pp. 26-31.

[40] Q/Rep., para. 3.33, p. 25. The translation by Qatar is from the Q/TCM Bundle, p. 205. (Annex I.6, p. 131). The quotation continues "and not according to the exceptional way adopted in two cases only..". Bahrain believes a more accurate translation would be: "...Qatar has preferred and, naturally, would (still) prefer that our Special Agreement should be prepared in the traditional way and not according to what was followed in two exceptional cases only." (Emphasis added). If Dr. Hassan Kamel's speech is read in its entirety it is clear that he is contrasting the expression of the question in Article II in the form of Bahrain's "general formula" with its expression in the form of a list of the issues in dispute (i.e. "in the normal and traditional way"). Dr. Hassan Kamel was expressing a preference for a question which listed the issues, and it is to this that his argument was directed. He was not contrasting a special agreement with an application.

[41] If the word "request" is substituted for "application" in Qatar's translation of Dr. Al-Baharna's statement quoted at para. 3.40 on p. 27 of the Qatari Reply, the implication which Qatar seeks to make disappears:

> "Excuse me Dr. Hassan, I did not say that. I said that the Statute and the Rules of the Court do not impose any particular formula for the question. All that is required is that the request submitted to the Court contained two things: the subject of, and parties to the dispute". (Emphasis added).

referring to an application in the sense of a unilateral institution of proceedings, but to the possibility of each of the two sides, within the framework of a single joint submission, submitting its own independently formulated questions. This comes out very clearly in the sentences quoted by Qatar from the statements of both Dr. Hassan Kamel and Dr. Al-Baharna:[42]

> "Each party will sign its own annex"

and

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

The annexes here spoken of were seen as annexes to the single joint submission, not as separate unilateral applications. The technique of two separate annexes was designed to overcome the failure of the two Parties to agree on a common formulation of "The Question" (Article II); but always as annexes to a Special Agreement. Indeed, this is admitted in the Qatari Reply.[43]

4.19 The general trend of these discussions is summed up in paragraph 3.48 of the Qatari Reply:

> "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."

The record of the discussions does not contain an iota of support for any suggestion that the Parties had in mind the submission of the case to the Court by separate unilateral applications - and quite rightly so, because no such idea was in the minds of the Parties. The idea was to have <u>two</u> annexes to <u>one</u> Special Agreement.

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[42] Q/Rep., para. 3.44, p. 30.

[43] Q/Rep., para. 3.46, p. 30.

4.20 Moreover, this particular theme is implicitly abandoned in the next paragraph of that same section[44] when the Reply states:

> "It was becoming apparent that the claims of each Party were such that they would have to be resolved either by give-and-take...or by separate presentation to the Court by each Party."

Here, again, there is no statement that separate presentation would mean separate Applications; and, again, it is right that there should be no such statement because that idea was not present in the minds of anyone.

4.21 When the idea of two annexes was raised by Qatar in the Sixth Tripartite meeting, the Parties at the same time sought agreement on one formula for Article II, drafted in a comprehensive and "neutral" way so that each Party could, consistently with this formula, frame its written pleadings so as to put forward its own claims. But this was still to be pursuant to a Special Agreement, jointly notified to the Court. The idea of Article II being drafted so as to allow each Party the freedom to make its own claims in its own pleadings did not reflect any thought that either Party was free to proceed by unilateral application.

4.22 A further consideration which belies the Qatari argument that the discussion of the individual formulation of questions was equivalent to an understanding that each Party should be allowed to file individual and separate Applications is that, if such an approach had begun to form part of the thinking of the Parties, it is extraordinary that there should have been no discussion of which side would take the initiative in starting the proceedings. It is hardly likely that the records would fail to reflect discussion of the very first question that would have come to mind if this approach had ever been considered!

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[44] Q/Rep., para. 3.50, p. 32.

4.23 Qatar asserts[45] that the signed minutes of 7 December 1988 did not record an agreement on the matters to be submitted to the Court. Nothing could be further from the truth. As the text of the signed minutes, in Qatar's own translation, made quite plain, the two parties agreed on a list of five subjects:

> "There followed a discussion aimed at defining the subjects to be submitted to the Court, which shall be confined to the following subjects:
>
> 1. Hawar Islands, including Janan Island
> 2. Dibal Shoal and Qit'at Jaradah
> 3. Archipelago base lines
> 4. Zubarah
> 5. Fishing and Pearling areas and any other matters related to maritime boundaries.
>
> The two parties agreed on these subjects."[46]

4.24 To conclude, as Qatar does, with the assertion that "Bahrain has failed to address the fact that the work of the Tripartite Committee had terminated in failure in December 1988"[47] is so inaccurate that it could only have been written by someone who had forgotten paragraphs 5.37-5.42, pp. 47-49, of the Bahraini Counter-Memorial. As has already been shown,[48] the

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[45] Q/Rep., paras. 3.46-3.47. For Qatar's translation of the minutes, see Q/M, Annex II.31, Vol. III, pp. 201-203.

[46] Translation by Qatar, Q/TCM Bundle, p. 282. Annex I.7, at p. 139. The underlining is not in the original Arabic and has been added by Qatar. For Bahrain's translation, see B/CM, Annex I.18, Vol. II, p. 109.

[47] Q/Rep., para. 3.51, p. 32.

[48] See above, para. 1.14, pp. 5-6. Moreover, if the Parties had agreed that the Tripartite Committee had completed its task and was not to reconvene, would not such an important point have been included in signed minutes, of "what has been agreed to", as opposed to the "word for word minutes... prepared to cover the details of the discussions and what has been said in the meeting"? It was the practice of the Parties that the former (but not the latter) type of minutes was signed by all three Foreign Ministers. See Qatar's translation of the statement of the Saudi Foreign Minister at the first

presentation of a new draft Special Agreement to the two Parties by Saudi Arabia in September 1991 is incompatible with such an assertion.

meeting of the Tripartite Committee, Annex I.4, at p. 125.

CHAPTER V

THE 1990 MINUTES

SECTION 1. Introduction

5.01 The central point in the argument regarding the jurisdiction of the Court in this case is that of the nature and effect of the 1990 Minutes - a text which Qatar seeks to quicken into legal vitality by persisting in referring to it as the "Doha Agreement". Bahrain has already made clear its dissent from this nomenclature and will adhere to the objectively correct title of the "1990 Minutes".

5.02 At a certain point, the Qatari Reply criticizes Bahrain for dealing first with the substantive content of the 1990 Minutes instead of grappling initially with the legal nature of that text.[49] There was and remains a good reason for this approach to the matter. Bahrain wishes to assist the Court by focusing its argument on the points to which the Court seems likely to direct its principal attention. Though the Qatari arguments regarding the form and legal character of the Minutes are not convincing (as will be shown in paragraphs 5.49-5.63 below), the Qatari case is at its most weak in its attempt to construe the words of the 1990 Minutes as authorising Qatar to institute proceedings unilaterally against Bahrain. This is the area of contention that necessarily occupies the centre stage and which therefore engages Bahrain's primary attention.

5.03 A preliminary word is required also about the burden of proof. One has only to read the Qatari arguments on burden of proof in the Reply[50]

[49] Q/Rep., para. 1.11, pp. 4-5.

[50] Q/Rep., paras. 4.11-4.15, pp. 47-50.

together with the Bahraini arguments in the Counter-Memorial[51] to see that the former in no way respond to the latter. Bahrain will not repeat here the arguments it has already made. However, it feels bound to point to the fact that, though the Qatari Memorial quoted both the *Chorzow Factory* case and the *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* case in support of the requirement that the force of the arguments in favour of jurisdiction should be "preponderant",[52] the Qatari Reply in no way responds to Bahrain's indication that this requirement pertains not only to the legal arguments but also to the proof of pertinent factual allegations.[53] Bahrain adheres to its contention that the Court has recognized that in a case such as the present the burden rests upon the Party asserting that the Court has jurisdiction to prove that such jurisdiction exists. There is no presumption of jurisdiction to be rebutted by the Party opposing jurisdiction; quite the reverse.

SECTION 2. The meaning of the 1990 Minutes

5.04 In its Counter-Memorial, Bahrain developed its interpretation of the 1990 Minutes by reference to (A) the meaning of *al-tarafān* in Arabic, (B) the consistency of that interpretation with the rest of the document, (C) the preparation of the 1990 Minutes, (D) the incompatibility of the Qatari approach with the idea of a single case fully disposing of the dispute between the Parties, (E) the failure of Qatar to insist on clear language authorizing a unilateral application and (F) the general context of the Minutes. Bahrain will now examine the manner in which these arguments are treated (or not treated, as the case may be) in the Qatari Reply.

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[51] B/CM, paras. 4.5-4.9, pp. 23-27.

[52] Q/M, para. 4.20, p. 71.

[53] B/CM, paras. 4.8-4.9, pp. 26-27.

A. The meaning of *al-ṭarafān*

5.05 The interpretation of *al-ṭarafān*, as used in the second paragraph of the 1990 Minutes, must necessarily be the starting point of a consideration of the effect of that document. Qatar, in its Reply, has criticized Bahrain for focusing on these words, stating that "in fact the real problem is a legal problem, not a purely linguistic one".[54] How this last remark contributes to the solution of the problem before the Court cannot readily be seen. The real problem is one of determining what the relevant paragraph of the 1990 Minutes means. Since the sole question before the Court is whether those Minutes accord Qatar a right to institute these proceedings by a unilateral application, it is on the words that are directly relevant to this question that one must concentrate; and the relevant words are "*al-ṭarafān*" because they determine whether proceedings may be begun by "either" of the Parties or only by "both" of them. Even Qatar admits that it is the paragraph containing these words which "is obviously the cornerstone of the whole Agreement".[55]

5.06 Qatar's tactic, it seems, is to try to complicate the approach to the interpretation of *al-ṭarafān* by observing that the expression "does not necessarily imply joint action" and that "the question of whether the action is joint or separate depend[s] upon the context in which the word is to be

[54] Q/Rep., para. 4.64, pp. 70-71.

[55] Q/Rep., para. 4.69, p. 73.

Nonetheless, that Qatar is understandably concerned to divert the Court's attention from the dominant importance of "*al-ṭarafān*" is shown by such expressions as the following:

> "In concentrating its attention on the meaning of "*al-ṭarafān*", Bahrain is juggling away other parts of the text as it stands." (Q/Rep., para. 4.65, p. 71);

and

> "While it [the second paragraph of the 1990 Minutes] 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." (Q/Rep., para. 4.69, p. 73.)

found".[56] It even prays in aid the approach of Bahrain's own experts.[57] But when it comes to detailed examination of the use of *al-ṭarafān* in other texts, the Qatari Reply is quite inadequate, as will now be shown.

1. The guidance to be derived from the Qatari and Bahraini draft joint submissions of 1988

5.07 The Bahraini Counter-Memorial placed in the forefront of its argument the manner in which *al-ṭarafān* had been used in the Qatari and Bahraini draft joint submissions of 1988.[58] As Bahrain there said:

> "Perhaps the simplest and shortest way of disposing of this case in the sense for which Bahrain contends is to adopt the view of the matter presented by one of Qatar's experts, Professor El Kosheri."[59]

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[56] Q/Rep., para. 4.72, pp. 74-75.

[57] *Id.*

[58] B/CM, paras. 6.10-6.14, pp. 55-57.

[59] *Id.* As Professor El Kosheri states in para. 43 of his original Opinion (Q/M, Vol. III, pp. 28-1), which is cited in the Bahraini Counter-Memorial at paras. 6.11-12, pp. 55-6:

> "There is nothing wrong in terms of English linguistics when using the word 'parties' to express what is known in Arabic as '*Tarafan*' or as '*Atraf*', since the English language does not distinguish between the dual and the plural. ...Therefore, there is *prima facie* no issue in objecting to Qatar's translation of the word '*Al-Tarafan*' as meaning 'the parties' in the second paragraph of the signed Minutes dated 25 December, 1990. ... In fact the State of Bahrain itself acted in the same manner as witnessed in Attachment 7 to the Annex submitted to the International Court of Justice with the letter from the Bahraini Minister of Foreign Affairs dated 18 August 1991. The said Attachment 7 comprised what is referred to as 'Copy of original draft Bahraini Special Agreement of 19th March, 1988, as amended in October 1988 in English and Arabic'. Article I in the English version started with the reference to 'The Parties'. ...The same reference to 'The Parties' is repeated as follows: at the beginning of Article II.1. ... In all seventeen instances, the Arabic version of the Bahraini draft agreement referred to as '*Al-Tarafan*'. ...It is difficult to understand why what was linguistically correct for Bahrain in 1988 has become incorrect for Qatar in 1991."

Starting from this expert's own approach,[60] Bahrain said that he had "hit the nail on the head and made in unexceptionable terms the very point that Bahrain seeks to make". What then was this point? It was that the expression *al-ṭarafān* had been used in the Bahraini draft Special Agreement in precisely the sense that Bahrain contends it was subsequently used in the 1990 Minutes - as meaning "both Parties together".

5.08 How does the Qatari Reply deal with this argument - so fundamental that it is capable by itself of disposing of the whole issue? The answer: Qatar entirely disregards it. There is not a word of express response in the Reply - an omission that speaks louder than a thousand words. The point is unanswered because it is unanswerable.

5.09 Yet the extraordinary fact is that, while disregarding the item (the 1988 draft joint submission) which so strongly supports the Bahraini position, Qatar impliedly concedes the value of Bahrain's general approach, namely, that of assessing the meaning of *al-ṭarafān* in the 1990 Minutes by reference to its use in earlier documents *in pari materia*. Qatar does this by referring to the use of *al-ṭarafān* in the Framework which initiated the Mediation process and in the 1987 Agreement.[61] While Bahrain certainly does not concede that the use of *al-ṭarafān* in these two documents could mean "each of the parties",[62] Bahrain makes the obvious, but necessary, point that these documents use the phrase in a very different context and are not nearly so directly relevant as the subsequent draft joint submission of 1988. The latter used *al-ṭarafān* in precisely the same context as it was used in the 1990 Minutes (i.e. in relation to the submission of the case to the Court), while the Framework of the Mediation used the word in relation to a joint undertaking

[60] See, especially, B/CM, paras. 6.12-6.13, p. 56.

[61] Q/Rep., para. 4.73, p. 75.

[62] Except, of course, in the sense of "both the parties". See the Opinions of Professor Badawi and Dr. Holes, Annexes I.10 and I.11 at paras. 9-22, at pp. 169-174 and para. 9, at pp. 192-193 respectively.

to refrain from engaging in propaganda and the 1987 Agreement used it in the framework of a joint undertaking to refrain from impeding negotiations and from presenting the dispute to any international organization. Similarly, paragraph (b) of the second item of the 1987 Agreement also contained a joint undertaking to refrain from media activities.

2. The use of *al-ṭarafān* in the Bahraini Formula, 1988

5.10 Bahrain added a further argument to the one based on the draft joint submission of 1988. This pointed to the use of *al-ṭarafān* in the Bahraini Formula.[63] Bahrain noted that as "this formula was proposed by Bahrain as a contribution to the text of a joint submission to the Court and was received and seen by Qatar as such. ...[it] could only be taken to mean conjunctively 'both the Parties'".[64]

5.11 Again, Qatar has avoided specifically confronting this argument. The Qatari Reply contains not a word about the precedential significance of the use of *al-ṭarafān* in the Bahraini Formula as meaning "the parties together". Instead, it contends that Bahrain's argument "takes no account of the condition that the matter has to be submitted to the Court 'in accordance with the Bahraini formula'".[65] In itself this sentence is quite implausible because, if one thing is clear from the Bahraini argument, it is precisely that the Bahraini Counter-Memorial is emphasizing the relevance of the Bahraini Formula.

5.12 The sentence which follows and which, in substance, effectively exhausts the Qatari argument on the point is the one to which Bahrain must take exception:

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[63] B/CM, paras. 6.15-6.17, pp. 57-58.

[64] *Ibid.*, para. 6.16, p. 57.

[65] Q/Rep., para. 4.74, p. 76.

> "In fact, the use of the word '*al-tarafān*', 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."[66]

Nothing could be further from the truth than the gloss that Qatar thus seeks to place upon the Bahraini Formula. As has been clearly stated by Bahrain and as is, indeed, evident from the circumstances in which the Bahraini Formula was presented to Qatar, the formula was conceived as a means of enabling each Party to formulate the precise details of its claims within the framework of a **single case** submitted to the Court by them **jointly** under a Special Agreement.[67]

5.13 Moreover, if Qatar believes that it was linguistically possible that *al-tarafān* denoted one of the parties alone in the second of the three paragraphs, it must be prepared to accept the possibility that the same is true in the third:

> "Should a brotherly solution acceptable to *al-tarafān* be reached, the case will be withdrawn from arbitration."

It would follow from Qatar's interpretation of the meaning of *al-tarafān* that the case would be withdrawn from arbitration if the brotherly solution was acceptable to one Party but not to the other.[68] Clearly this interpretation

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[66] Q/Rep., para. 4.74, p. 76. Emphasis added.

[67] See B/CM, paras. 6.15-6.17, pp. 57-58. It is idle for Qatar to quote comments of Dr Al-Baharna made at the meeting of 6 December 1988 taken out of context (Q/Rep., para. 4.74, p. 76). The discussion in which those comments were made was entirely about the content of a Special Agreement to submit the case jointly to the Court. The words "it is left for each Party to submit whatever claims it wants concerning the disputed matters" presupposed such a joint submission.

[68] Qatar and its experts also seem to think that Bahrain should have asked for express wording meaning "together" to be added to *al-tarafān* in the second of the three paragraphs. (For the arguments of Qatar's experts, see the Opinion of Professor El Kosheri, Q/M, Vol. III, pp. 297-298; and the Opinion of Professor Ayyad, *ibid.*, pp. 330-331; *c.f.* Q/Rep., Vol. II, p. 92). Bahrain considers the wording entirely clear without such an addition. (See the Supplementary Opinion of Dr. Holes, B/CM, Annex II.4, Vol. II, para. 5(iii) at p. 297 and para. 10 at p. 300. See also para. 20 of his

was never intended.

3. The linguistic approach

5.14 In thus laying emphasis upon the failure of Qatar to deal with *al-ṭarafān* in both the joint submission of 1988 and in the Bahraini Formula, 1988, Bahrain would not wish in any way to give the impression that it does not seek to maintain the linguistic arguments in support of the proposition that *al-ṭarafān* must be read in the conjunctive sense. These arguments have been developed in detail by Bahrain's linguistic experts, Professor Badawi and Dr. Holes, in their Opinions attached to the Bahraini Counter-Memorial. Qatar has made some attempt to respond to these arguments in the Opinions of Professor El Kosheri and Professor Ayyad attached to the Qatari Reply. These have now been examined by Professor Badawi and Dr. Holes in further Opinions contained in Annexes 10 and 11 to this Rejoinder. It will be noted that Bahrain's experts do not limit their linguistic examination to the word *al-ṭarafān*. They also examine it in its context and, therefore, identify the relevance to its interpretation of other expressions which appear in the same sentence and evidently contemplate further joint action by both Parties.[69]

Second Supplementary Opinion, Annex I.11, at p. 196 below). Yet if the view of Qatar's experts were right, would not a word meaning "together" have most definitely been needed after *al-ṭarafān* in the third paragraph? There is nothing to suggest that either party believed this to be necessary at the time when the minutes were finalised.

[69] Both experts show that *al-ṭarafān* cannot mean "either party" in the crucial sentence and Professor Badawi demonstrates in particular how the examples in which "both parties" approximate to "each party" contained in para. 4.73 of the Qatari Reply and cited by Professor Ayyad (Q/Rep., Vol. II, pp. 111-112) are of no help to Qatar (see paras. 8-22 of Professor Badawi's Supplementary Opinion, Annex I.10, at pp. 169-174 below and paras. 3-11 of Dr. Holes' Second Supplementary Opinion, Annex I.11, at pp. 189-193 below). Professor Badawi also shows that Qatar's experts have failed either to rebut the detailed linguistic analysis of the crucial sentence which is set out in his first Opinion, or to suggest any alternative analysis. (See below, Professor Badawi's Supplementary Opinion, Annex I.10, paras. 29-30, pp. 176-177). He also shows how Qatar's experts have adopted certain aspects of his analysis, which indicate that the crucial sentence contemplated protracted action, commensurate with Bahrain's view that the parties contemplated the need for further steps before a submission could be made to the Court. (See below, *ibid.*, paras. 23-28, pp. 174-176 and paras. 50-53,

B. Consistency of the Bahraini interpretation with the rest of the 1990 Minutes

1. The significance of re-affirming "what was agreed previously"

5.15 Bahrain has explained in its Counter-Memorial[70] that the reaffirmation in the first paragraph of the Minutes of "what was agreed previously between the two parties" cannot be limited to the 1987 Agreement but must refer to:

> "the various points upon which agreement had previously been reached, including agreement that the approach would be by a joint submission pursuant to a single special agreement."[71]

Qatar counters this explanation by the assertion that it had demonstrated in its Memorial that this reference can apply "only" to the 1987 Agreement[72] and that "Bahrain proceeds on the false assumption that there were other 'agreements' that were reaffirmed in the first paragraph" of the 1990 Minutes.[73]

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pp. 185-186). Opinions on legal questions from Professor Aboulmagd and Mr. Adnan Amkhan are contained at Annexes I.8 and I.9 respectively. These demonstrate in particular how in "Arabo-Islamic tradition" evidence of the intention of the parties to an agreement is relevant in interpreting it, with the consequence that *travaux préparatoires* are admissible in evidence. (See below, the Supplementary Opinion of Professor Aboulmagd, Annex I.8, pp. 143-145 and the Supplementary Opinion of Mr. Adnan Amkhan, Annex I.9, paras. 6-10, pp. 154-157). The attention of the Court is also drawn to Professor Aboulmagd's discussion of the wording "the procedures arising therefrom" in the second operative paragraph of the 1990 Minutes (Aboulmagd's Supplementary Opinion, *ibid.*, pp. 147-148), in which he shows that Qatar and its experts have failed to produce any satisfactory, alternative explanation to that of Dr. Al Baharna.

[70] B/CM, paras. 6.27-6.30, pp. 62-64.

[71] *Ibid.*, para. 6.30, p. 64.

[72] Q/Rep., para. 4.66, p. 72. Emphasis added.

[73] *Ibid.*, para. 4.67, p. 72.

5.16 As to the first of these points, Bahrain has checked carefully the three references given by Qatar in footnote 204 on p. 72 of its Reply and can find nothing in any of the three paragraphs there cited which either asserts or supports the contention that the reference to "what was previously agreed" can apply only to the 1987 Agreement.

5.17 As to the second point, there was no element of "false assumption" by Bahrain regarding the "other agreements" reaffirmed in the first paragraph of the 1990 Minutes. As the Court will appreciate, Bahrain is prepared to acknowledge that minutes may record "agreements" or "understandings" of a general nature reached in the course of discussions without those agreements being legally binding. Were the position otherwise it would be impossible for States even to enter into discussions which are recorded in agreed minutes or into negotiations with a view to moving gradually to a conclusion through interim agreement on a number of points, conditional upon achieving agreement on the package as a whole. That is how Bahrain understood not only the minutes of the meetings preceding the 1990 Minutes, but also the 1990 Minutes themselves. Bahrain thus approaches characterization of the minutes from a point of view entirely different from that of Qatar.

5.18 Moreover, it is to be recalled that "what was agreed previously" also included the basis upon which the whole negotiations had proceeded, namely, that the Parties were attempting to formulate a joint agreement to submit the dispute to the Court. There can be no doubt that the Parties had previously agreed to proceed by way of a Special Agreement. Indeed, Qatar's own memorandum, dated 27 March 1988, and placed before the Tripartite Committee, stated:

> "what was agreed between our three States was to prepare a joint

Special Agreement...".[74]

Thus, when the 1990 Minutes re-affirmed what was agreed previously, that re-affirmation must be deemed to cover this earlier agreement to prepare a joint Special Agreement. Qatar's interpretation of the 1990 Minutes is self-contradictory. On the one hand, the Parties re-affirmed their earlier agreement to proceed by way of a Special Agreement; and on the other hand (so Qatar argues) they agreed to dispense with the need for a Special Agreement and to allow either party to initiate proceedings by way of unilateral application. The contradiction is manifest. If the words in question had been intended to refer only to the 1987 Agreement, it would have been so much easier and more effective simply to have said so. Qatar's assertion that it was "a strange interpretation of the [1990 Minutes] that leads to the conclusion that [their] purpose was limited to reaffirming a course of conduct which had patently led to a deadlock"[75] fails to recognise that it was acceptance by Qatar of the Bahraini Formula that largely broke the particular deadlock reached at the previous Tripartite Meetings.

2. The significance of the use of the singular number in the expression "the matter" or "the case" as the object of the verb "submit"

5.19 In its Counter-Memorial, Bahrain pointed out that the reference to "matter" or "case" in the singular, as the object of the verb "submit" in paragraph 2 of the 1990 Minutes, was manifestly incompatible with the Qatari contention that the 1990 Minutes foresaw the possibility that each of the Parties might make individual applications to the Court and thus give rise to two separate "matters" or "cases".[76] Qatar has seen fit to disregard this

[74] Qatar's reproduction of the Qatari memorandum of 27 March 1988 is misleading and incomplete, since it omits this phrase (Qatari Memorial, Annex II.24, Vol. III, p. 158). See, also, para. 4.16 above, pp. 16-17 and note 36. The full translated text is reproduced as Annex I.2, p. 85 to this Rejoinder, with the parts omitted by Qatar in italics.

[75] Q/Rep. para. 4.68, p. 73.

[76] B/CM, paras. 6.31-6.32, pp. 64-65.

significant point entirely in its Reply.

3. The significance of the words "and the procedures arising therefrom"

5.20 Bahrain has in its Counter-Memorial explained that the words "and the procedures arising therefrom" that appear in the second part of the 1990 Minutes were introduced in order to make it quite clear that proceedings before the Court could be begun only 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.[77]

5.21 In response, the Qatari Reply maintains, first, that "it was up to Bahrain to propose precise wording to this effect when it drafted its amendment".[78] As will be seen in the next sub-section,[79] Bahrain made its position quite plain by insisting on words which would not have permitted the Parties to institute proceedings unilaterally.

5.22 Secondly, in countering the Bahraini explanation that the words "and the procedures relating thereto" related to the Bahraini Formula and that the latter necessarily implies a joint submission under a Special Agreement, Qatar maintains that:

> "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".[80]

At the risk of repetition, Bahrain must once again insist that it is not a fact that "the Bahraini formula can stand on its own". If reference is made to the

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[77] B/CM, paras.6.33-6.36, pp. 65-67.

[78] Q/Rep., para. 4.77, pp. 77-78.

[79] See below, paras 5.23-5.36, pp. 35-42.

[80] Q/Rep., para. 4.78, p. 78.

Bahraini Formula, such reference must be made both to its actual language and to the circumstances in which it was proposed. As to the language of the formula, nothing could be clearer than the words "The Parties request the Court...". They are words appropriate to, and only appropriate to, a joint request. Moreover, the Bahraini Formula was presented within the framework of negotiations towards a Special Agreement providing for a joint submission to the Court. It cannot be lifted out of that context. It does not "stand on its own". The fact that Qatar may have "accepted it" on the basis that Qatar thought it stood on its own, or wanted it to do so, can make no difference. An offeree cannot accept an offer in terms other than those in which the offer is presented.

C. The *travaux préparatoires*[81] leading to the adoption of the 1990 Minutes support the Bahraini interpretation

5.23 Qatar has started its discussion of the 1990 Minutes with a consideration of the background to their adoption and the manner of their preparation. Bahrain welcomes this Qatari identification of a leading element in the debate. The value of this factor lies not in mere historical interest but in the important role that review of the evolution of the text plays in determining the true meaning of the relevant words.

5.24 A basic fact which must constantly be recalled is that, whatever doubt Qatar may seek to cast upon the meaning of the expression *al-ṭarafān* in the second paragraph of the Minutes as a matter of abstract terminology or pure linguistics, the approach of Bahrain in the course of the preparation of the text was entirely and unwaveringly predicated upon the exclusion of any suggestion that proceedings could be started by unilateral application. This approach was understood by the intermediary States, Saudi Arabia and Oman; it was not opposed by them and this was, indeed, fully reflected in

[81] The expression "*travaux préparatoires*" is used merely as a convenient way of referring to the evolution of the 1990 Minutes and does not imply any acceptance by Bahrain that the 1990 Minutes amount to a treaty.

changes made in the text. Regardless of the view of the matter that Qatar may have taken, it is clear beyond a shadow of a doubt that there was no meeting of the minds of the two sides in the sense for which Qatar contends; and that, by itself, is sufficient to dispose of the case. In the absence of clear evidence of agreement or consent by Bahrain that the Court should possess jurisdiction on the basis of a unilateral application, the Court has no jurisdiction on that basis.

5.25 That is the short point. It is relevant to recall in this connection the approach of the Chamber of the Court in the recent *El Salvador/Honduras* case on the question of the extent of the competence conferred upon the Chamber by the *compromis* established between the Parties, especially on the question of whether that competence extended to the delimitation of maritime areas as well as that of the determination of their status. The Chamber, presented with direct evidence in the form of a statement by the Foreign Minister of El Salvador, that he never had the intention of conferring upon the Chamber a power to carry out a delimitation in the area in controversy, stated quite clearly that there was no meeting of minds on that issue and that, therefore, the Chamber had not been given the power to carry out such a delimitation.[82]

5.26 Qatar's narrative of the events of December 1990 is quite simplistic. It disregards entirely the extraordinary historical circumstances in which the Heads of State of the Gulf Cooperation Council were meeting, namely, the aftermath of the Iraqi invasion of Kuwait and the preparation for the collective response to that event. When Bahrain described the 1990 Minutes as having been signed only to "avoid conveying the impression to the other Heads of State of the Gulf Cooperation Council that the Amir of Qatar had entirely failed to secure his objective" and to get Qatar "off the hook", that was a description which accurately reflects the situation. Qatar cannot

[82] See *ICJ Reports 1992*, paras. 377 and 388. The Chamber there said: "... it is only from a meeting of minds on that point that jurisdiction is created".

change that by simply saying that Bahrain's assertion is "wrong".[83] The facts speak for themselves. If there is any element of error in the Bahraini description of the situation, it could lie only in not having sufficiently emphasized the fact that the 1990 Minutes also record Qatar's unequivocal acceptance of the Bahraini Formula - a fact which in itself has a material bearing on the correct interpretation of those Minutes.

5.27 As already briefly indicated at the beginning of this Rejoinder,[84] there is a striking dissimilarity between the approach of the Parties to the provision of evidence on the subject of what actually happened, and was in the minds of the participants, at the exchanges leading up to the adoption of the 1990 Minutes. Bahrain submitted with its Counter-Memorial statements by its Foreign Minister and its Minister of State for Legal Affairs which provide clear first-hand evidence of the evolution of the 1990 Minutes. The Foreign Minister, as the principal participant on the Bahraini side, expresses his personal recollection of what happened and of what he understood by the emerging texts and the changes that were made in them.[85] The fact that he did not correctly identify the precise document in which he inserted the

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[83] Q/Rep., para. 3.60, p. 36.

[84] See above, para. 1.05, pp. 2-3.

[85] In note 96 on p. 34 of its Reply, Qatar raises questions regarding the admissibility and weight of the statement made by the Bahraini Foreign Minister. Qatar does not attempt, by argument or with the support of authority, to elaborate the questions that it raises. Bahrain submits that there can be no doubt about the admissibility of the statement. Indeed, evidence of a comparable kind was admitted - without even being challenged, in the *El Salvador/Honduras case* (see *ICJ Reports 1992*, para. 377). Questions regarding the weight of such evidence can, of course, be raised, but they are for the Court to decide in the light of all the circumstances of the case. The fact that the Court treated comparable evidence in another case "with great reserve" (see the passage cited by Qatar from the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), ICJ Reports 1986*, p. 43) can have no bearing upon the manner in which the Court may treat such evidence in this case.

The same question was raised by Qatar regarding the statement made by the Minister of State for Legal Affairs, but in addition it was said that this Minister, being the Agent of Bahrain, "cannot be heard as a witness". There is nothing in those provisions of the Statute and of the Rules of the Court dealing with the position of Agents that supports the Qatari objection, nor does there appear to be anything in principle or in the decisions of the Court to give the slightest support to the Qatari contention.

words "in accordance with the Bahraini formula" does not shake the basic thrust of his evidence in any material respect.[86] The evidence of the Minister of State for Legal Affairs regarding those aspects of the discussion which were within his direct knowledge entirely confirms what the Foreign Minister states.

5.28 In contrast with this primary evidence produced by Bahrain, Qatar produces nothing whatsoever that directly contradicts the Bahraini evidence regarding the emergence of the text. Instead, Qatar takes refuge in statements of knowledge and belief attributed in a general manner to its representatives. Witness the following illustrations of this approach:

> "The sequence of events...as known to Qatar's representatives ..."[87]
>
> "... Qatar was particularly gratified to see ..."[88]
>
> "The Foreign Minister of Oman then again visited the Qatari delegation in the evening of 24 December and advised them ..."[89]
>
> "At about 11 a.m. on 25 December, the Omani Foreign Minister came

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[86] See Q/Rep., paras. 3.61-3.64, pp. 36-38. The Minister had actually made a comparable insertion in the draft presented to him earlier by Saudi Arabia and inadvertently confused the first draft with the second. The Minister of State for Legal Affairs, who had not been present at the meetings when the Foreign Minister had made his amendment to the Saudi draft and had seen only the Omani draft, merely followed the Minister's statement.

The point lies at the margins of the case. Substantively, it changes nothing since it matters not who inserted the words in the Omani draft. What matters - as will be seen later, see paras. 5.31-5.36 below, pp. 40-42 - is that the change was made and agreed, thus bringing the interpretation of the Bahraini Formula squarely into consideration as an element in the determination of the proper effect of the Minutes. Moreover, there has been no suggestion that the Foreign Minister was mistaken in his recollection that he had made the amendment which replaced "either Party" by "the two Parties". See below, paras. 5.31-5.36, pp. 40-42.

[87] Q/Rep., para. 3.61, p. 36.

[88] *Id.*

[89] *Ibid.*, para. 3.65, p. 38.

and showed the Qatari delegation what he termed the final version ..."[90]

"Qatar found the word '*al-ṭarafān*' ... perfectly acceptable because ..."[91]

"Qatar therefore agreed ..."[92]

5.29 A comparably casual approach to matters of proof is shown in the final paragraph of the Qatari description of the sequence of events concerning the drafting of the 1990 Minutes:

> "The approach of Saudi Arabia and Oman during the negotiations clearly reveals that they did not think of the 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."[93]

Qatar makes no attempt to demonstrate by reference to objectively verifiable facts how the "approach" (unspecified) of Saudi Arabia and Oman can "reveal" that those States "did not think" of the negotiations as merely leading to an agreement to make a further effort to reach a Special Agreement. The attribution to Saudi Arabia and Oman of a particular state of mind is pure invention.

5.30 Questions of evidence apart, however, the Qatari Reply makes virtually no effort to deal substantively with the evolution of the 1990 Minutes - the relevance and course of which are set out in the Bahraini Counter-Memorial, paras 6.37-6.55, pp. 68-76. In that pleading Bahrain first

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[90] *Ibid.*, para. 3.66, p. 38.

[91] *Id.*

[92] *Id.*

[93] Q/Rep., para. 3.68, p. 39.

disposed of the argument advanced in the Qatari Memorial that recourse to preparatory work was not necessary and was not in conformity with the Arabo-Islamic legal tradition. This treatment appears to have been effective for no reference to this alleged feature of the Arabo-Islamic legal tradition appears in the Qatari Reply.

5.31 But the most important aspect of Bahrain's exposition of the development of the text of the 1990 Minutes was the identification of two specific and deliberate changes in the drafts which indicate quite clearly that Bahrain was not prepared to agree to any wording that would enable Qatar to argue that proceedings might be instituted by the application of one party alone.
Thus:

(i) Bahrain rejected the words "by each of them" that appeared in the Saudi Arabian draft presented on 24 December 1990;[94] and this draft was dropped; and

(ii) Bahrain insisted on the replacement in the subsequent Omani draft of the words "either of the two parties" by the words "*al-ṭarafān*", the two parties.[95]

5.32 Qatar must have understood from Bahrain's insistence on replacing "either of the parties" by "*al-ṭarafān*" ("the two parties") that Bahrain was not prepared to agree that "either of the parties may submit the matter to the International Court of Justice". Yet Qatar now seeks to interpret "*al-ṭarafān*" so as to mean that "either of the parties" could indeed submit the dispute to the Court by unilateral application. This interpretation deprives the Bahraini amendment of all sense. What would have been the purpose of Bahrain substituting "*al-ṭarafān*", if the result was to be exactly the same as the

[94] B/CM, para. 6.49, p. 73.

[95] B/CM, para. 6.51, p. 74.

phrase in the draft to which Bahrain objected?

5.33 As to the first of these changes, the Qatari Reply says no more than that "Qatar confirms that it was unaware of the Saudi Arabian draft and therefore of any changes proposed in that draft by Bahrain".[96] Regardless of what the correct position may be, and Bahrain does not admit the correctness of the Qatari statement, the point to be noted is that Qatar thus avoids any discussion of the fact that Bahrain's action in relation to the Saudi draft provides clear evidence of the unacceptability of any Qatari right individually to file an application.

5.34 As to the second point, the Qatari Reply says that:

> "Qatar found the word '*al-tarafān*' (the parties) ... 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."[97]

This represents a further attempt by Qatar to confuse two distinct matters: (a) the possible presentation by the Parties of separate claims within the framework of a "neutral" Article II - the Bahraini Formula - forming part of a Special Agreement and (b) the filing of two separate Applications independently of any Special Agreement. The possibility of the former does not in any way imply any Bahraini willingness to accept the latter.

5.35 Qatar's Reply also makes the comment that:

> "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

[96] Q/Rep., para. 3.67, p. 39.

[97] Q/Rep., para. 3.66, p. 38.

amendments ..."[98]

Bahrain finds this explanation virtually incomprehensible. After all, Bahrain's proposals were no more than a continuation of the approach that had been followed over a number of years. Why, then, should Bahrain have made amendments with no more purpose than to "suggest" that Bahrain was "thinking of further negotiations" or "that it was considering a special agreement" when the amendments were in fact proposed in the very text that itself already contemplated both further negotiations and the conclusion of a special agreement?

5.36 It is also important to observe that Qatar does not pursue the legal discussion of the inferences to be drawn from the changes in the text adopted at the insistence of Bahrain. In paragraph 4.81 of its Reply Qatar states:

> "As will be shown <u>below</u>, 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."[99]

But there is nothing in the following pages of the Qatari Reply "<u>below</u>"; and if instead of looking "below" we look "above", the little that is said "above" has already been the subject of comment. In short, Qatar has offered nothing to contradict the significance which Bahrain properly attaches to the facts leading up to the adoption of the 1990 Minutes.

D. <u>Incompatibility of the Qatari approach with the idea of a single, fully dispositive case</u>

5.37 Bahrain set out in its Counter-Memorial in some detail why Qatar's idea of a single unilateral application, or even parallel or sequential unilateral applications, to the Court did not conform with the basis on which all the

[98] Q/Rep., para. 3.66, p. 38.

[99] Q/Rep., para. 4.81, p. 79. Emphasis added.

negotiations relating to the submission of the case to the Court had been conducted prior to the 1990 Minutes.[100] In particular, Bahrain explained that an essential ingredient in the negotiations, and one particularly reflected in the Bahraini Formula, was the ability of Bahrain to present its claims in respect of Zubarah at the same time as the other aspects of the dispute between the Parties were presented to the Court. The Qatari Reply mentions the question of Zubarah in a different context,[101] namely, the question of the inequality of the Parties. It will, in this instance, be convenient to defer to that part of this Rejoinder fuller consideration of this matter.[102]

E. The failure of Qatar to insist on clear language authorizing a unilateral application

5.38 The Bahraini Counter-Memorial contained a section developing the theme that:

> "If the Parties had agreed in the 1990 Minutes to change the whole basis on which they had previously been negotiating, then they would not have failed to spell out that major transformation in their ideas."[103]

Again, Qatar fails to respond to the argument. Instead, it turns the proposition round and contends that if the Bahraini amendments to the draft minutes "were really intended to give the meaning [for] which Bahrain now contends, [they] could easily have been introduced in clear explicit words to that effect".[104] The argument continues:

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[100] B/CM, paras.6.56-6.61, pp. 76-79.

[101] Q/Rep., paras. 4.114-4.117, pp. 90-91.

[102] See below, paras. 7.12-7.17, pp. 70-73.

[103] B/CM, paras. 6.62-6.67, pp. 79-82.

[104] Q/Rep., para. 4.76, p. 76.

> "When it now interprets the word '*al-tarafān*' 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."[105]

5.39 The answer to this argument is plain. In the light of the sequence of events on 23 and 24 December 1990 which preceded the adoption of the Minutes, how could anyone who had at that time observed the changes in the drafts which Bahrain requested and obtained have been left in any doubt as to the objective which Bahrain sought? Even assuming (which Bahrain does not for a moment accept) that as a matter of the abstract use of the language the word '*al-tarafān*' could be equivocal in its meaning, what matters is its relationship to the words which it replaced. As already suggested, there could have been no conceivable purpose in a Bahraini insistence upon the removal of words which expressly permitted either of the Parties to institute proceedings only to replace it with a word which would (so Qatar contends) have had the same effect. The Qatari argument makes no sense at all.[106]

5.40 The Qatari Reply does not in any way respond to the point as made by Bahrain in its Counter-Memorial.[107] It was not Bahrain that was seeking to make a fundamental change in the approach previously adopted. It was Qatar. Bahrain had no intimation whatever that Qatar was seeking to make such a fundamental change. Bahrain was merely endeavouring to maintain the previous approach. If Qatar insists that it was its own point of view that prevailed, is it not extraordinary that it did not insist on the inclusion of language that would make the position plain beyond doubt? The closest, it may be noted, that Qatar gets to asserting that the 1990 Minutes permitted "unilateral seisin" is the statement that:

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[105] Q/Rep., para. 4.76, p. 77.

[106] Note also para. 5.13 above, pp. 29-30 and note 68.

[107] B/CM, paras. 6.62-6.65, pp. 79-82, at para. 6.64.

"[the 1990 Minutes] records the Parties' implicit consent to seisin of the Court in any manner allowed by the Statute and Rules ... once the May 1991 deadline had expired ..."[108]

5.41 The case which should be recalled in this connection is the *Asylum Case*. There the Parties agreed by the Act of Lima to refer the dispute to the Court for decision.[109] They also provided that, having been unable to reach an agreement on the terms in which they might refer the dispute jointly to the International Court of Justice, "proceedings before the recognized jurisdiction of the Court may be instituted on the application of either of the Parties". This language shows what is missing in this case: the express authorization given by a previous agreement to either Party to define the terms of the dispute by means of its unilateral application. Why was this course not followed in this case?[110]

F. The general context of the 1990 Minutes[111]

5.42 The essence of Bahrain's position is that the 1990 Minutes were valuable as recording Qatar's acceptance of the Bahraini Formula but that in substantive terms they did not go beyond this. Bahrain took, and still takes, the view that the 1990 Minutes, as eventually adopted, were a diplomatic and face-saving device for Qatar which, despite the rejection of the item when

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[108] Q/Rep., para. 4.101, p. 86. Emphasis added.

[109] *ICJ Reports 1950*, pp. 266-389.

[110] Qatar argued in note 222 to Q/Rep., para. 4.75, p. 76, that "if the language 'either of the two parties' had been retained [in the 1990 Minutes], 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". This hypothetical dilemma arises only because Qatar argues that the Bahraini Formula can stand on its own outside a special agreement and its very nonsensicality and impossibility demonstrate the falseness of the Qatari approach to the Bahraini Formula.

[111] The Bahraini Counter-Memorial contains a sub-section bearing this title which deals with the Qatari argument that Bahrain's interpretation of paragraph 2 of the 1990 Minutes does not make sense in the general context of the Minutes as a whole; B/CM, paras. 6.68-6.74, pp. 82-84.

proposed earlier in December 1990 for inclusion in the Summit Meeting's agenda, had insisted on bringing the item forward at a time when everyone's attention was principally directed towards the much more urgent problems in the Gulf arising from Iraq's invasion of Kuwait.

5.43 Qatar returns to this aspect of the matter in a section on "The Circumstances surrounding the Agreement".[112] It repeats, in paragraph 4.83, the assertion that "the Mediator himself thought that the time had come for the dispute to be submitted to the Court". But the only evidence for this far-reaching assertion is a footnote which refers the reader to an earlier paragraph, paragraph 3.57. The latter merely expresses the assertion in a different form, mentioning that "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". Even assuming that this is an accurate representation of what King Fahd said, such a statement is not the same thing as saying that the time had come to permit one Party alone to commence proceedings.

5.44 The recollection of the Bahraini Foreign Minister, who was present at the Summit Meeting of the Gulf Cooperation Council on 23 December 1990, is that, although there was discussion of the next steps to be taken and repeated reference was made to the desirability of the continuance of the mediation for a period, the mention of recourse to the International Court of Justice was never in terms of one or the other party having the right unilaterally to commence proceedings.[113]

5.45 The Qatari Reply further contends that the 1990 Minutes were aimed at escaping from the deadlock confronting the two parties:[114]

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[112] Q/Rep., paras. 4.82-4.84, pp. 80-81.

[113] See paras. 7 and 12 of the statement by the Bahraini Foreign Minister, B/CM, Annex I.25, Vol. II, pp. 162 and 164.

[114] Q/Rep., paras. 4.84, p. 80.

> "In order to escape from the deadlock, a new approach was introduced by [the 1990 Minutes] which consisted in linking Qatar's acceptance of the 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."[115]

5.46 This line of argument is not persuasive. Lack of agreement, it is true, there was. But the means by which Qatar suggests that the Parties agreed to overcome this would, if accepted, have meant that Bahrain placed itself completely in Qatar's hands. Acceptance by Qatar of the Bahraini Formula did not put an end to all the differences between the Parties regarding the content of the Special Agreement. The admissibility of the Bahraini claims in respect of Zubarah could still have been challenged by Qatar if the scope of the dispute was to be defined by a unilateral application by Qatar - as Qatar appears to believe to be possible even now.[116] Nor would the confidentiality of the mediation proceedings, including any proposals made by either side, have been as protected as it would have been had Qatar subscribed to Article V of the Bahraini draft and thus withdrawn its assertion that it was entitled to introduce into the case any materials that it wished.[117]

5.47 Nothing whatsoever in the discussions leading up to the adoption of the 1990 Minutes warrants the suggestion that that text had:

> "the function of an *ad hoc* agreement containing a compromissory clause making it possible for each Party to submit an application to the Court."

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[115] *Id.* pp. 80-1.

[116] See below, paras. 7.12-7.17, pp. 70-73.

[117] See below, paras. 7.01-7.11, pp. 65-70.

In so far as words appeared initially in the Saudi draft and later in the Omani draft that might have created that impression, Bahrain had objected to them and secured their replacement by other words. It is absurd to suggest that the replacement words must carry exactly the same meaning as the words for which they were substituted. And the acceptance by Qatar of the Bahraini Formula, without seeking any modification of the opening words "The Parties request the Court" further confirms the continuing acceptance by both sides that the submission of the matter to Court would take place only upon a joint basis.

5.48 Finally, reference should be made to the complaint made by Qatar that Bahrain has refrained in its Counter-Memorial from answering the question asked by Qatar in its Memorial:

> "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 [the 1990 Minutes] is to resume negotiations to make a special agreement?"[118]

Bahrain did, in fact, answer the question at para. 6.72, page 83 of its Counter-Memorial. However, as Qatar now presses the point again, Bahrain is quite willing to respond to it. The provision in question does not support the Qatari interpretation; rather the reverse. It recognises that withdrawal of the case in the event of settlement would be a matter for joint action, the more so if (as was expected) the submission of the case was one for joint action. It was appreciated that, whatever stage proceedings might have reached, Saudi Arabia's good offices could achieve a negotiated settlement. This position was recognised by the Amir of Qatar in his letter of the 18th June 1991 to the King of Saudi Arabia (which Bahrain did not see until it received Qatar's Memorial)[119] when he said:

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[118] Q/Rep., para. 4.80, p. 79.

[119] See above, para. 1.11, p. 4 and note 6.

"This measure will not prevent the continuation of your honourable efforts aiming at arriving to the friendly settlement contained in your last proposals, as the said agreement stipulated to continue the good endeavours of the Kingdom of Saudi Arabia during the submission of the dispute to the International Court of Justice and to withdraw the matter in case of the achievement of a brotherly settlement acceptable to both Parties."[120]

SECTION 3. The 1990 Minutes are not a binding agreement

A. The 1990 Minutes are no more than a record of a stage in diplomatic negotiations

5.49 Bahrain adheres to the argument that it developed in its Counter-Memorial, paragraphs 6.76-6.82, pp. 85-88. Qatar responds by asserting, first, that:

> "it is obvious that the Doha Agreement [the 1990 Minutes], although entitled 'Minutes', [are] not the equivalent of minutes of a meeting."[121]

In approaching the matter in this way, Qatar is in effect attempting silently to reverse the burden of proof. It is not for Bahrain to show that the 1990 Minutes are the equivalent of the minutes of a meeting. It is for Qatar to show that the 1990 Minutes, being described as "Minutes" and taking the same form as a series of earlier documents so described, are properly to be regarded as falling within an entirely different legal order, namely, that of a binding treaty.

5.50 When Bahrain equated the 1990 Minutes with the earlier signed Minutes of the Tripartite Committee it did so because each of the documents

[120] For the Amir of Qatar's letter, see Q/M, Annex II.35, Vol. III, p. 220.

[121] Q/Rep., para. 4.46, p. 63.

so described shared the common characteristics that: (a) they reflected the course and outcome of the meeting that preceded them; (b) they related to the same subject matter; (c) they took the same form as the 1990 Minutes; (d) they were signed in the same way by the Foreign Ministers of each of the countries concerned; and (e) they were each called "Minutes".[122] A document which shares all these features with a series of preceding documents may properly be assumed to share their legal quality unless and until it is unequivocally established that all those concerned in signing it intended to accord to it some different quality.

5.51 Qatar next attempts to deal with the Bahraini reference to the *Aegean Sea Case*.[123] Qatar suggests that Bahrain is "really trying ... to draw a parallel between [the 1990 Minutes] and the Brussels Communiqué ..." and then seeks to distinguish the two situations by claiming that because the conduct prescribed by the 1990 Minutes was of a "legal", not a political, nature, the intention to pursue such conduct was "therefore legally binding".[124] As to this, the premiss is questionable. It assumes what has to be proved, namely, that the "provisions are of a legal, not a political nature". Moreover, the conclusion does not follow from the premiss. The fact that a provision may be "legal" (whatever that may mean) does not mean that it is, "therefore, legally binding". Apart from these weak theoretical contentions, the Qatari Reply contains nothing to shake the clear and compelling comparison that is drawn in the Bahraini Counter-Memorial between the insufficiency of the Brussels Communiqué to found the jurisdiction of the Court in the *Aegean Sea Case* and the insufficiency of the 1990 Minutes in the present case.

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[122] B/CM, para. 6.29-30, pp. 63-4.

[123] B/CM, paras.7.2-7.4, pp. 99-100.

[124] Q/Rep., para. 4.51, p. 65.

5.52 The third point made in this connection by the Qatari Reply is that:

> "the wording of [the 1990 Minutes] 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."[125]

Bahrain is not inclined to dispute the contention that the 1990 Minutes record an agreement. But that does not mean that the agreement so recorded was an agreement in law or was legally binding. The Qatari Reply appears to consider that because a text may "enunciate legal rights" it must necessarily "produce legal effects". The proposition is self-serving. The premiss "enunciate legal rights" itself assumes what has to be proved, namely, that the rights are "legal" in character. The correctness of the use of the adjective "legal" depends upon whether the Parties intended legal consequences to flow. The mere fact that the conduct in question is conduct which could have legal consequences if such consequences were intended does not automatically lead to the existence of such consequences - particularly when there is evidence (as there is in this case) that such consequences were not in the minds of the relevant responsible representatives.

5.53 The Qatari Reply goes on to say that "the intention of the Parties to be bound appears from the text itself".[126] Bahrain says otherwise. The text in question has to be seen in its proper context, as one in a series of Minutes reflecting an evolving and as yet uncrystallized legal process. It is in the nature of negotiations for a Special Agreement that points of agreement are recorded as the negotiations tackle successive parts of the draft. Yet neither Party is legally "bound" by such agreements in any definitive sense. Each point "agreed" is agreed only provisionally, in the sense that each Party remains free, at the end of the whole negotiating process, to review the text as a whole and to decide whether it will put its signature to the package as a whole. This is the normal nature of agreed

[125] Q/Rep., para. 4.52, p. 65.

[126] Q/Rep., para. 4.56, p. 66.

minutes in a negotiation of this sort, and it had been the nature of all the signed minutes of the meetings of the Tripartite Committee theretofore. If Qatar intended to depart from the established pattern of the Minutes, it should have made its intention so plain that no doubt on that score could have existed in the minds of the representatives of Bahrain. But Qatar did not make its intentions plain; and, if it had, that revelation would have been quite sufficient to occasion further objection on the part of the Foreign Minister of Bahrain and a refusal to sign the Minutes. The Court will recall in this connection the manner in which the Chamber in the recent *El Salvador/Honduras* case accepted the statement of the El Salvadorean Minister of Foreign Affairs as evidence of the intention of El Salvador not to extend the jurisdiction conferred on the Court to cover delimitation of the maritime areas. [127]

B. The 1990 Minutes were not regarded by the Parties as constituting an international agreement

5.54 In the Bahraini Counter-Memorial,[128] Bahrain indicated that until Qatar decided to try to make capital out of the 1990 Minutes it had not given any indication that it regarded them as constituting a binding international agreement. In particular, Qatar had not taken the steps required of it by its own Constitution in relation to the conclusion of treaties.

5.55 Qatar seeks to answer this point, first, by saying that:

> "Bahrain was clearly put on notice of Qatar's view that [the 1990 Minutes were] a binding international agreement by virtue of steps undertaken by Qatar to implement that Agreement."[129]

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[127] *ICJ Reports 1992*, paras. 377-378. See above, para. 5.25, p. 36.

[128] B/CM, paras. 6.83-6.89, pp. 89-91.

[129] Q/Rep., para. 4.21, p. 52.

5.56 The only indication provided by Qatar of the "notice" thus given takes the form of a footnote cross-reference to paragraph 3.70 of its Reply. This turns out to be the paragraph in which Qatar mentions that on 6 May and 18 June 1991 the Amir of Qatar addressed letters to King Fahd of Saudi Arabia indicating Qatar's intention to start proceedings and that the same intention was conveyed by the Amir to the King at a meeting on 5 June 1991. Clearly, a "notice" conveyed to the King of Saudi Arabia is not a notice given to Bahrain. Qatar recognises this and is therefore obliged to speculate that "it is most unlikely that this intention was not communicated to Bahrain by Saudi Arabia".[130] Bahrain denies that it ever received such information.[131]

5.57 There is a further objection to the Qatari contention. Suppose (which Bahrain denies) that the notice given in May/June 1991 by Qatar to the King of Saudi Arabia had actually reached Bahrain. What legal effect could be attached to it? Qatar is, in effect, arguing that the notice then given showed that Qatar regarded the 1990 Minutes as being a treaty, despite the fact that the Minutes had not been dealt with in the manner prescribed for treaties in the Qatari Constitution. Thus Qatar appears to be arguing that a notice is sufficient and effective if it is given not only six months after the event (i.e. the signature of the Minutes) but also even after the expiration of the period laid down in the self-same text for the action to be taken under it!

5.58 There is here a striking inconsistency between what Qatar demands of Bahrain and what it regards as appropriate to itself. A few pages later Qatar asserts that:

> "when the two States were engaged in the drafting of the [1990 Minutes]...Qatar heard nothing about any reservation which Bahrain

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[130] Q/Rep., para. 3.70, p. 40. See above, para. 1.09, pp. 3-4.

[131] See statement of the Bahraini Foreign Minister, B/CM, Annex I.25, Vol. II, para. 15, p. 165. His recollection is consistent with Saudi Arabia's practice throughout the mediation. See above, para. 1.11, p. 4 and note 6 and Annex I.5, at p. 129.

might have had concerning the binding character of the instrument."[132]

As Bahrain has already pointed out, there was no reason why it should, in the circumstances, have declared that it did not regard the latest in a series of legally non-binding Minutes as itself being non-binding. But that is less the point here than the fact that Qatar recognises that the appropriate moment for giving notice of one's view regarding a change in the legal status of a series of instruments is at the moment of the conclusion of the relevant text, not at some subsequent date so long afterwards that action pursuant to the alleged legal obligation is no longer possible.[133]

5.59 Qatar also contends that "Bahrain is wrong...in law" in arguing that the Qatari Constitution must be read as laying down the way in which treaties are concluded, as opposed to providing for the application of treaties in municipal law. [134] Well, if Bahrain is wrong as a matter of Qatari law, it is wrong only because the wording of the relevant Qatari constitutional provision does not mean what it says. The first sentence of Article 24 - as presented by Qatar itself - states clearly and unequivocally:

"The Amir concludes treaties by a decree and communicates same to the Advisory Council attached with appropriate explanation."[135]

This sentence is self-evidently not concerned with incorporation of treaties, a matter which is covered separately by the next sentence:

"Such treaties shall have the power of law following their conclusion,

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[132] Q/Rep., para. 4.57, p. 67.

[133] See above, paras. 5.53-5.55, pp. 51-52.

[134] Q/Rep., para. 4.20, p. 52.

[135] *Id.*

ratification and publishing in the Official Gazette."[136]

5.60 For Qatar to contend that the application of its Constitution is "in any event... a purely internal matter"[137] is entirely beside the point. Bahrain is not seeking relief under any provision of Qatari constitutional law. Bahrain is only saying that, as a foreign State conducting relations with Qatar, it is entitled to look to Qatar's Constitution for guidance as to what, in Qatari eyes, is or is not a treaty; and when, in relation to a given document, Qatar acts as if it were not a treaty, by not following the constitutional requirements for a treaty, Bahrain should be able safely to rely on that behaviour as indicative of Qatar's view that the document is not a treaty.

5.61 The extent to which Qatar is obliged to scrape the bottom of its barrel of arguments relating to the relevance of constitutional factors is illustrated by the extraordinary proposition that:

> "interpretation of another State's Constitution may easily be considered as an interference in that State's internal affairs."[138]

If that should be the case, why does the Vienna Convention on the Law of Treaties (1969) presuppose, in Article 46, a knowledge by co-contracting States of one another's "internal law"? Why has the United Nations published a volume[139] containing the relevant constitutional provisions of its member States which is prefaced by a quotation from a Report of the International Law Commission that "precise knowledge of constitutional provisions of other countries is essential to those who in any country are

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[136] *Id.*

[137] Q/Rep., para. 4.23, note 146, p. 53.

[138] Q/Rep., para. 4.29, p. 57.

[139] *Laws and Practices concerning the Conclusion of Treaties* (1952) (UN Legislative Series, ST/LEG/SER.B/3).

engaged in negotiating treaties"?[140] Were both these items an incitement to one State to interfere in the internal affairs of another?

C. Even if the text of the 1990 Minutes were to be construed as a treaty, the requirements necessary for its effective operation as a treaty were not satisfied: the Bahraini constitutional point

1. The Qatari allegation that the 1990 Minutes are an agreement in simplified form

5.62 In dealing with this section of Bahrain's Counter-Memorial[141] the Qatari Reply insists again that the 1990 Minutes are a treaty in simplified form. Qatar makes no response to the Bahraini observation that by deliberate omission the Vienna Convention on the Law of Treaties makes no provision for the special treatment of treaties in simplified form.[142] Nor does Qatar deal with the careful analysis in the Bahraini Counter-Memorial,[143] of the limited circumstances in which consent to be bound by a treaty can be expressed by signature alone. Qatar evidently believes that it can dispose of the difficulty simply by disregarding it and restating its own original position:

> "Bahrain can surely not deny the existence of a well recognised 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."[144]

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[140] *Ibid.*, p. iii.

[141] B/CM, paras. 6.91-6.104, pp. 92-98.

[142] *Ibid.*, para. 6.92, note 183, p. 93.

[143] *Ibid.*, paras. 6.93-6.95, pp. 94-96.

[144] Q/Rep., para. 4.26, p. 55.

The answer that Bahrain gives to this assertion has been clearly stated in the Bahraini Counter-Memorial:

> "...even though the Ministers may have possessed full powers, Qatar would still have to prove that it was agreed that signature would have had the effect of binding the parties immediately. And no such agreement is revealed anywhere in the 1990 Minutes."[145]

There is no need to say more.[146]

2. The Qatari allegation that Article 37 of Bahrain's Constitution is irrelevant

5.63 The Qatari Reply again insists that:

> "*prima facie* Article 37 [of the Bahraini Constitution] spells out conditions for the introduction of treaties into municipal law"

and complains that "Bahrain has been careful not to answer this argument".[147] The fact is that the argument is as little valid here as it is in relation to the same point that Qatar makes regarding its own Constitution.[148] On their faces, the constitutional provisions of both countries deal in their first sentences with the process of concluding treaties

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[145] B/CM, para. 6.95, pp. 95-96.

[146] Article 7 of the Vienna Convention on the Law of Treaties provides that: "a person is considered as representing a State... for the purpose of expressing the consent of the State to be bound by a treaty if ... it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes ...". In Article 7(2), the Convention provides specifically that a Minister of Foreign Affairs is considered as representing his State "for the purpose of performing all acts relating to the conclusion of a treaty" by virtue of his functions and without having to produce full powers. Yet, as Bahrain also pointed out in para. 6.95 of its Counter-Memorial, "there is nothing in the terms of Article 7(2)(a) that accords to a Foreign Minister full powers to give immediate effect to his signature to a treaty if he does not intend to do so or is prohibited by his Constitution from so doing".

[147] Q/Rep., para. 4.30, p. 57.

[148] See above, para 5.59, pp. 54-55.

and only secondarily with their implementation in domestic law.

5.64 A further point made by Qatar is this: if Bahrain concedes that the 1987 Agreement is a treaty and that the procedures of Article 37 of the Bahrain Constitution were not followed in respect of it, why should there be a need for such procedures in relation to the 1990 Minutes?[149] The answer is simple: the 1987 Agreement was imperfect and conditional. By its terms, it would only become fully operative when completed by an agreement resulting from the negotiations to be conducted in the Tripartite Committee. Such an agreement has not yet been reached.

[149] Q/Rep., paras. 4.31-4.32, pp. 57-58.

CHAPTER VI

THE RELATIONSHIP BETWEEN THE 1987 AGREEMENT AND THE 1990 MINUTES

6.01 In the light of what has already been said in this Rejoinder, it is hardly necessary to repeat in the present chapter the arguments that have been developed under this title in the Bahraini Counter-Memorial.[150] However, in view of the points made by Qatar in its Reply under the heading of "Consent in the Doha Agreement"[151] a few additional words on the subject of consent may be desirable.

6.02 First, the terms of para. 3.11 of the Qatari Reply, quoted below, now create some measure of uncertainty about the relationship between the 1987 Agreement and the 1990 Minutes:

> "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' is wholly unfounded."

What exactly is Qatar saying? Is it that the 1987 Agreement was by itself sufficient to found the jurisdiction of the Court? If so, one is bound to ask such questions as these: why did Qatar wait for four years before filing its Application; how could the 1987 Agreement be sufficient if, as the record clearly shows, the Parties were not agreed upon the subject-matter of the dispute; and why was so much time spent in the Tripartite Committee in trying to agree the terms of a Special Agreement?

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[150] B/CM, paras. 7.1-7.23, pp. 99-106.

[151] Q/Rep., paras. 4.85-4.103, pp. 81-86.

6.03 If, on the other hand, Qatar is not saying that the 1987 Agreement was by itself sufficient to found the jurisdiction of the Court, what is its contention? In particular, how does it progress from the bare terms of the 1987 Agreement to the claimed entitlement, subsequently established, unilaterally to start the proceedings by an Application?

6.04 Qatar also presents the 1990 Minutes as confirming the existence of an exchange of consents between the Parties both as to the submission of their disputes to the Court and with respect to the definition of the subject-matter of those disputes.[152] Qatar then alleges that "the Bahraini Counter-Memorial has not discussed these questions...to any extent".[153] Bahrain must admit to being baffled as to why Qatar should wish to make an allegation which is so obviously contradicted by the Bahraini Counter-Memorial, both in its general lines and in detail.

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[152] Q/Rep., para. 4.86, p. 81. Qatar gives no detailed reference for the assertion that it has "shown that the 1990 Minutes confirmed the existence of an exchange of consents as to the submission of the disputes to the Court and the definition of their subject matter". Note 235 to para. 4.86 of the Qatari Reply merely states "see, in general, Qatari Memorial, chapter 4." It is true that this chapter contains an extended discussion of the theoretical aspects of the Court's jurisdiction, in which Bahrain saw no need to take part (see B/CM, para. 4.2, p. 21). It is in vain that Bahrain has searched that chapter for evidence that it "shows" that in Dohah in 1990 the parties exchanged their consents to submit the disputes to the Court and defined the subject matter of those disputes. The Bahraini Counter-Memorial has, however, discussed at length the absence of consent by the parties to a unilateral submission. In fact, over a third of its text (Chapter VI thereof) is devoted to demonstrating precisely this point. As regards the question of the Bahraini Formula defining the subject matter of disputes, Bahrain has likewise shown that this Formula was only ever suggested as the question for Article II of the Special Agreement, and was not intended (nor, indeed, was it appropriate) for a unilateral submission. The inconsistency of Qatar's application with the idea of a single fully dispositive case was shown at paras. 6.56-6.61, pp. 76-79, of the Bahraini Counter-Memorial. Note also, in particular, *ibid.*, paras. 6.31-6.32, pp. 64-65.

[153] *Id.*

SECTION 1. The consent of the Parties to refer the "disputes" to the Court[154]

6.05 Qatar then goes on to assert, yet again, that the consent of both States dealt not only with the reference of the disputes to the Court but also with the moment from which the Court could be seised.[155] There is nothing new in this assertion. It proceeds, as does the whole of the Qatari case, upon the mistaken view that the words "the parties may submit the matter to the International Court of Justice" means either of the Parties. In fact the reference in the 1990 Minutes to the period of six months was an indication that at the end of that period, notwithstanding the continuance of the Saudi Arabian mediation, Saudi Arabia would regard the Parties as free jointly to submit the case to the Court.

SECTION 2. The consent of the Parties to the subject-matter of the "disputes" to be submitted to the Court[156]

6.06 Qatar is also anxious to present the 1990 Minutes as containing an agreement in which there was an exchange of consideration between the two sides. Qatar argues that in return for Qatar accepting the Bahraini Formula for the definition of the question, Bahrain agreed that Qatar might unilaterally submit the dispute[157] to the Court after May 1991.[158] This proposition, of much importance to Qatar, founders upon contradictory statements of fact made by Qatar within the space of two paragraphs. In

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[154] The title of this sub-section is taken from Q/Rep., p. 81.

[155] Q/Rep., para. 4.87, p. 81.

[156] The title of this sub-section is taken from Q/Rep., p. 82.

[157] The Qatari Reply writes of "disputes" in the plural (para. 4.91, p. 83). It should be observed, however, that this is a departure from the sense of the language in the 1990 Minutes which speaks of submitting "the matter", in the singular, to the Court. See above, para. 5.19, pp. 33-34.

[158] Q/Rep., para. 4.91, pp. 82-83.

paragraph 4.90, Qatar states that:

> "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."[159]

This is an accurate reflection of what transpired at the meeting only in so far as it can properly be read as a declaration by Qatar that was not at that time made conditional upon a reciprocal undertaking by Bahrain entitling Qatar to start proceedings unilaterally.

6.07 Thus what Qatar says in paragraph 4.90 of its Reply contradicts what it says in the next paragraph:

> "...in the Agreement [the 1990 Minutes] this acceptance of the Bahrain formula was a *quid pro quo* for Bahrain's undertaking to allow submission of the disputes to the Court after May 1991."[160]

The latter is not an accurate representation of the understanding in the 1990 Minutes because the Amir of Qatar had made his declaration of acceptance of the Bahraini Formula at the opening of the Dohah session,[161] prior to, and independently of, the formulation of the 1990 Minutes. There is not an iota of evidence to support the idea that there was an exchange of promises in the manner now put forward by Qatar.

6.08 In paragraph 4.92 on page 83 of the Reply Qatar asks:

> "how can it be asserted that [the 1990 Minutes] did no more than record Qatar's acceptance of the Bahraini formula, when the first

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[159] Q/Rep., para. 4.90, p. 82.

[160] Q/Rep., para. 4.91, p. 83.

[161] See para. 6.06 above and Q/Rep., para. 4.90, p. 82.

Omani draft shown to Qatar did not even include the reference to the Bahraini formula, which was subsequently added by Qatar itself?"

The answer lies in the facts set out above, coupled with the fact - which Qatar persists in disregarding - that the Saudi draft of the Minutes set out the formula in full. The inescapable fact is that Qatar made its declaration accepting the Bahraini Formula but was not successful in its attempt, as reflected in the original forms of the Saudi and Omani drafts, to persuade Bahrain to accept Qatar's right unilaterally to place the case before the Court.

SECTION 3. Seisin of the Court

6.09 Qatar appears to be convinced that Bahrain does not appreciate the distinction between "jurisdiction" and "seisin".[162] Nothing could be further from the truth. Bahrain understands the distinction full well. It understands that there can be no effective seisin without a prior effective basis of jurisdiction, save in the case of *forum prorogatum* (which is not pleaded here); it understands too that where the jurisdiction of the Court is unilaterally invoked on the basis of some prior existing ground of compulsory jurisdiction, the application is the act of seisin; and it recognizes too that when there is an agreement between two Parties that an existing dispute will be submitted by them to the Court, the seisin of the Court is effected by the notification to the Court of the joint agreement. But in every such case there is a valid and effective ground of jurisdiction. Here there is no such ground. An act of seisin cannot replace a basis of jurisdiction.

6.10 Finally, it should be noted that Qatar asserts: "Even when the idea of a special agreement was being contemplated, the question of seisin was not discussed".[163] That is precisely the point that needs to be made. The idea of individual seisin, though theoretically possible, is so out of accord with

[162] See Q/Rep., paras. 4.96-4.103, pp. 84-86.

[163] Q/Rep., para. 4.102, p. 86.

the practice of States in submitting cases to the Court following the conclusion of a compromis, that it can be effective only when most clearly authorized; and that is certainly not the case here.

PART THREE

CLOSING CONSIDERATIONS

CHAPTER VII

DISADVANTAGES FOR BAHRAIN OF BEING MADE DEFENDANT

SECTION 1. The question of Article V

7.01 It is not necessary for Bahrain in this concluding Part to review the Qatari treatment of all points made by Bahrain in Chapter VIII of the Bahraini Counter-Memorial. There is, however, one point on which the position may not yet have been presented to the Court sufficiently fully and clearly. That is the issue of "Article V". This, it will be recalled, is the Article in the Bahraini draft Special Agreement of 19 March 1988 which provided as follows:

> "Neither party shall introduce into evidence or argument, or publicly disclose in any manner, the nature or content of proposals directed to a settlement of the issues referred to in Article II of this Agreement, or responses thereto, in the course of negotiations or discussions between the parties undertaken prior to the date of this Agreement, whether directly or through any mediation."[164]

7.02 Bahrain mentioned this proposal in the Annex to its letter to the Court of 18 August 1991. There, at pp. 18-19, it stated that this Article had been made one of the points of disagreement between the Parties and said that:

> "although this proposal is essentially declaratory of customary international law ... the Government of Qatar has not accepted it."

[164] B/CM, Annex 1.9, vol. II, p. 49, at p. 51.

7.03 It may no doubt be argued that if the proposal made by Bahrain were simply a reflection of customary international law it would not, strictly speaking, require restatement in the Compromis and its inclusion or non-inclusion should not be a stumbling block to securing agreement. Unfortunately, however, the matter cannot be resolved as simply as that. In the main text of the Annex to the above-mentioned letter of 18 August 1991 to the Court, Bahrain also said:

> "the position of the Government of Qatar on the original Bahraini proposal is set out in relevant detail in an extract from a Memorandum of Comment by Qatar dated 27 March 1988,"[165]

relevant extracts from which were appended as Attachment 9. The relegation to an Attachment of the pertinent parts of Qatar's reaction appears to have led Qatar to mistake the nature of Bahrain's concern. It is, therefore, necessary to recall the content of that Attachment.

7.04 The Government of Qatar reacted to the original Bahraini proposal in two memoranda dated 25 and 27 March 1988. A translation of the former is annexed to the Qatari Memorial in its entirety, a translation of the latter only partially.[166] Bahrain was given a copy of the memorandum of 27 March 1988 before the second meeting of the Tripartite Committee, but never saw the memorandum of 25 March 1988 until it received the Qatari Memorial. The relevant part of the comment from the memorandum of 27 March 1988 was annexed to the Bahraini Letter to the Court of 18 August 1991.

7.05 Because the essentials of Qatar's 1988 comments differ in significant respects from the comments which are made in Qatar's Memorial,[167] it is

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[165] Annex to Bahraini letter to the Court of 18 August 1991, p. 18.

[166] Q/M, Annex II.23, Vol. III, p. 147 and Annex II.24, p. 158. See also note 74 to para. 5.18 above on p. 33.

[167] See Q/M, paras. 5.83-5.89, pp. 130-132.

necessary to recall in pertinent detail the nature of Qatar's original objection. Qatar did not object because the proposed Article V was a restatement of existing customary international law, but because Qatar considered that the effect of the Article would be to prevent the introduction by Qatar of evidence of the proposals and counter-proposals made during the Mediation Process. In other words, Qatar made it clear that no considerations of existing law would inhibit it from producing evidence of the Mediation negotiations. It was with a view to restraining this cavalier unconcern with the requirements of the law of evidence that Bahrain insisted on the retention of Article V.

7.06 Qatar was not originally primarily concerned with the possibility that Article V might exclude evidence of matters occurring before the Mediation Process. This was an elaboration subsequently developed in paragraph 5.86 of the Qatari Memorial. The original Qatari reaction focused on the Mediation Process:

> "... The meaning of this is that the Saudi mediation is taken entirely out of account and is considered as though it had never occurred.
>
> It is clear that the gist of this provision ... is to veil from the Court the position by which the Parties may have bound themselves during the Saudi mediation,...
>
> ... All the positions, undertakings and procedures which the two Parties have adopted and continue to adopt with regard to their difference are merely the fruits of the Process of Saudi mediation, and it is totally unacceptable that Bahrain should seek, by virtue of Article 5 ..., to cut the link between the process of mediation and the judicial process which is contained in the presentation of the difference to the International Court of Justice...
>
> ... In the principles of international law there is nothing that permits one of the parties to an international dispute to prohibit the other parties from offering to the competent judicial authority the exhibits, memoranda and papers in general which were exchanged between them both during negotiations, or contacts which had previously taken

place to refer the dispute to this judicial body, and which are connected with the dispute...

... Qatar ... does not consent at all to the exclusion of considerations of this nature. There is no doubt that they have the greatest importance because they amplify the essence of the difference and its developments, as well as the various stages and the contacts and proposals and positions which occurred during these stages, and in particular in connection with the stage of the Saudi mediation..."[168]

7.07 In contrast with Qatar's 1988 Memorandum, the Qatari Memorial, however, expresses Qatar's dissatisfaction with Article V in much wider terms, saying that it:

"was not limited only to proposals made during the Mediation with Saudi Arabia. Nor was it limited only to proposals to settle the substance of the disputes made by the Mediator, but it could have covered any proposal, even on procedural matters. In this context, this text could have applied to any proposal and response thereto (which therefore could even include agreements) made between the Parties before the date of the finalization of the special agreement, under discussion at that time. The *dies ad quem* is indicated but not the *dies a quo*."[169]

7.08 By thus drawing attention to aspects of Article V that spread beyond those which had been criticized and rejected by Qatar in 1988, the Qatari Memorial drew attention away from the feature of Qatar's original reaction which was most objectionable and which could not be accepted by Bahrain. This was that Qatar was claiming that as a matter of international law it was entitled to reveal details of the Mediation Process and that it proposed to do so. It is this feature of Qatar's position that has led Bahrain to insist so much upon Article V. It is not that Bahrain is seeking merely to restate a rule of customary international law. Bahrain is seeking to persuade Qatar to

[168] Bahraini Letter to the Court of 18 August 1991, Attachment 9(b). For Qatar's translation see Annex I.2, p. 85. See also Q/M, Annex II.24, vol. III, pp. 161-165.

[169] Q/M, para. 5.86, p. 131.

undertake that it will not break a rule of international law by violating a basic element in the negotiating process.

7.09 Evidently it is not enough that Bahrain should have merely given references to the pertinent precedents. It is necessary to remind Qatar of their significance by actually quoting the texts. In the *Chorzow Factory* case the Permanent Court of International Justice said:

> "... the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement."[170]

The same point was made in a slightly different way in the *Nottebohm Case*:

> "It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse to such negotiations or to such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted."[171]

In a similar vein, the distinguished French jurist, the late Professor Reuter has observed:

> "si la négociation échoue les parties n'ont pas à craindre de se voir opposer dans une discussion de droit les projets d'accommodements qu'elles auraient consenti aux intérêts adverses dans une phase des

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[170] PCIJ, Series A, No. 17, at p. 51. See also *id.* Series A, No. 9, p. 19.

[171] *ICJ Reports 1955*, pp. 19-20.

négociations."[172]

7.10 Faced thus by Qatar's clear declaration in 1988 of its intention to violate the privacy of the negotiations, it was and remains impossible for Bahrain to agree to come before the Court save on the basis of the inclusion of Article V.

7.11 The persistent disagreement[173] between Bahrain and Qatar regarding Article V is in itself the most cogent item of evidence contradicting the Qatari suggestion that, since Qatar has agreed to the Bahraini Formula, the 1990 Minutes recorded an agreement that proceedings could henceforth be instituted unilaterally by either Party. Bahrain would never have accepted in December 1990 that Qatar and Bahrain could start proceedings without the constraint of Article V, any more than Qatar did in fact accept that the proceedings could be commenced subject to Article V. Indeed, the Qatari Application speaks for itself, containing no reference to Article V.

SECTION 2. The question of Zubarah

7.12 The other important substantive item adversely affected by the unilateral quality of Qatar's application is Bahrain's concern that the proceedings before the Court must cover all the issues outstanding between the Parties. These include Bahrain's claims relating to Zubarah - an issue which is effectively excluded by the form of Qatar's action.[174] Qatar responds to this by insisting that Bahrain has a right to file a separate claim before the Court.[175]

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[172] *Recueil des Cours*, 1961, Vol. 103, p. 632.

[173] Q/Rep., para. 4.113, p. 90.

[174] See B/CM, paras. 8.4-8.14, pp. 108-113.

[175] Q/Rep., paras. 4.114-4.117, pp. 90-91.

7.13 Whatever may now be Qatar's willingness to submit to the jurisdiction of the Court in respect of any separate proceedings that Bahrain may wish to commence in respect of Zubarah (and this is a matter of considerable doubt), that fact cannot in any way cure the defect in Qatar's present Application. The validity of this Application must be determined solely by reference to the facts as they stand at the moment of the Application. Indeed, Qatar has accepted the correctness of this statement of law in observing that:

> "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..."[176]

It went on to say (albeit in relation to another matter, namely, Bahrain's further offer of a Special Agreement):

> "Consequently, this step, taken after the filing of Qatar's Application on 8 July 1991, can have no relevance to the present case."[177]

7.14 This position has not been changed by Qatar's insistence that the Bahraini Formula "gives each Party an equal right to present its own claims to the Court...".[178] It is not correct to say 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 these claims."[179]

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[176] Q/Rep., para. 1.10, p. 4.

[177] *Id.*

[178] Q/M, para. 5.80, p. 129, repeated in Q/Rep., para. 4.116, p. 91.

[179] Q/Rep., para. 4.116, p. 91.

This assertion takes Dr. Al-Baharna's words entirely out of context. His remarks were made during a discussion of the manner of formulating the question to be put to the Court - (Article II) - in a "neutral" manner, but within the framework of a joint submission.[180]

7.15 The question of Zubarah appears to be one of the reasons why Qatar has attempted to base the Court's jurisdiction on a claimed right to file a unilateral application, instead of reaching a special agreement with Bahrain. It is necessary in this respect to recall the position taken by the representatives of the Parties at the sixth and final meeting of the Tripartite Committee. There, the following exchange took place. Qatar's representative stated:

> "if the nature of the difference concerning Zubarah was connected with sovereignty over it, it would not be acceptable that this should be listed with the matters to be raised to the ICJ. If, however, the content was connected with private (or: 'special') rights in Zubarah, then the State of Qatar would have no objection to this."[181]

The delegation of Bahrain replied:

> "that their claim connected with Zubarah which would be referred to the ICJ would be the strongest possible claim without any limitation. The matter of deciding it would be left to the Court."[182]

In short, Qatar wanted to control and limit the claims that Bahrain was allowed to invoke in respect of Zubarah. It was this pretension which caused a two year deadlock.

7.16 Qatar believes it has now found a way of achieving its design, namely, by submitting its own claims and reserving the power to object to

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[180] See para. 4.18 above, pp. 18-19.

[181] B/CM, Annex I.18, Vol. II, p. 112.

[182] *Ibid.*, p. 113.

the admissibility of Bahrain's claim of sovereignty over Zubarah, once that claim is submitted to the Court.[183] Such a plan is, however, incompatible with Qatar's professed acceptance of the Bahraini Formula. The essence of that formula is that each party is free to frame its own claims, without interference from the other side, and thus giving up in advance any possible objections to the admissibility of each claim.

7.17 It is not an answer to Bahrain's complaint, that Zubarah has been left out of the case as brought by Qatar, to say that Bahrain is free to bring a counter-claim to cover that subject. The concept of counter-claim is related essentially to claims for damages; it does not seem appropriate to boundary disputes or claims relating to territory. Moreover, there could be difficulties regarding the satisfaction of the condition that the counter-claim be directly connected with the principal claim.[184] In short, the use of counter-claim is an indirect and uncertain way of dealing with an issue that is a part of the dispute between the Parties and thus should be dealt with in the same way as the other parts of the same dispute.

SECTION 3. General considerations

7.18 The Court will certainly appreciate by now that the unilateral institution of proceedings by Qatar in 1991 was quite contrary to what Bahrain expected, namely, a resumption of negotiations towards the conclusion of the Special Agreement. At the moment of the institution of the said proceedings Bahrain and Qatar had been engaged for a period of some thirteen years in a process of mediation being conducted by the King of Saudi Arabia. There had been extended exchanges between the two sides directed towards the substantive settlement of the dispute and, in the Tripartite Committee, specifically directed at one object and one alone - the

[183] See paras. 2.02-2.03 above, p. 7.

[184] See Article 80 of the Rules of the Court.

conclusion, in implementation of the 1987 Agreement, of a Special Agreement between the two sides with a view to submitting their dispute jointly to the Court. Agreement could not be reached on two main points: the formulation of the question to be put to the Court, particularly in so far as Bahrain's claims to Zubarah were concerned, and the means of ensuring respect for the confidentiality of the mediation proceedings by an undertaking to refrain from introducing evidence of proposals made during the Mediation process (i.e. "Article V").

7.19 In December 1990 Bahrain was adamant in refusing to establish a basis on which Qatar could unilaterally commence proceedings against Bahrain after the lapse of a further period of six months. Bahrain twice rejected expressions in the draft Minutes which, if accepted, could have been read as opening the way for one Party alone to commence proceedings.[185] With the Parties having started down the track of preparing an agreement for a joint submission to the Court, Bahrain saw no reason for abandoning that course, especially having regard to the fact that the issue of Zubarah and the question of "Article V" had not been resolved. That remains the position of Bahrain today.

7.20 Qatar pretends that the scope of its offer to refrain from contesting the Court's jurisdiction if Bahrain wishes unilaterally to start parallel proceedings against it is a satisfactory alternative to the achievement of a properly negotiated agreement.[186] It is not. So far as the issue of Zubarah is concerned, Qatar, though willing to see it fall within the scope of application of the Bahraini Formula, has not shown itself prepared to concede its admissibility in the same way as Bahrain has conceded the admissibility of the issues raised by Qatar.[187] So far as the question of Article V is

[185] B/CM, paras. 6.49-6.55, pp. 73-76.

[186] Q/Rep., para. 4.108, p. 88.

[187] See above, para. 2.03, p. 7.

concerned, Qatar has not shown itself willing to subscribe to an undertaking not to produce evidence of proposals made in the course of negotiations and the mediation. Though Qatar contends that Bahrain's "proposed draft appeared excessive and unreasonable"[188], the fact is that Qatar rejects the proposed Article V because Qatar wishes to retain an unrestricted freedom to introduce evidence of the proposals made in the course of the mediation, even if the introduction of such evidence will violate international law.[189]

7.21 By themselves, these reasons are quite sufficient to justify Bahrain in its opposition to the Qatari Application. But there is a further consideration which the Court, in its appreciation of such considerations as the dignity and sensitivity of States, will readily understand. It does not seem right that Qatar should be permitted at its own choice to repudiate the whole course of negotiation between the two sides. No such prospect was opened up by the 1987 Agreement or the 1990 Minutes and Bahrain declines to subscribe to any device which will permit Qatar to abandon the idea of an agreed joint submission as the proper means of approaching the Court.

7.22 It matters to Bahrain that neither Party should be seen to be either plaintiff or defendant; that pleadings should be filed simultaneously in an orderly manner; that the unpredictable complications of separate applications, followed by the exercise of a discretion by the Court as to whether and in what manner the cases should be joined, should be avoided; that there should be agreement that the issue of Zubarah is as much admissible as any other aspect of the dispute; and that there should be a specific renewal by the Parties of their commitment to maintaining the confidentiality of negotiations and the mediation process. These are genuine concerns and cannot be

[188] Q/Rep., para. 4.113, p. 90.

[189] See above, para. 7.08, pp. 68-69.

brushed aside.[190]

7.23 Nor can the basic point be brushed aside that the focus of a contentious case commenced by application is largely set by the applicant. Bahrain's point is not that the Court will be unable to maintain the formal equality of the Parties - of course it will - but rather that there remains a substantial difference of tone between a case started by unilateral application and one begun by notification of a joint agreement. This difference may be eliminated if the Parties make their individual submissions on the basis of a clear agreement, as in the *South-Eastern Greenland* and *Asylum* cases. But no such agreement was reached here. The absence of such agreement is emphasised by the absence from the Qatari Application of a key substantive element, namely the Zubarah question, and of a key procedural element, namely Article V, both of which elements would have had to be present if any substantial equality of the Parties (as in these two precedents) was to be achieved.

7.24 Bahrain's willingness to join in a submission to the Court on an agreed basis is evidenced by the renewed presentation of a draft joint agreement for consideration by Qatar. Bahrain invites the Court to note that, notwithstanding the availability of ample time in which to discuss this draft, Qatar has given no indication whatsoever of willingness to enter into further negotiations. Qatar evidently wishes to have things all its own way. That is contrary to the whole spirit of the Mediation Process and is something that Bahrain cannot accept.

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[190] Qatar has quoted a provision in the Manila Declaration to the effect that "recourse to judicial settlement of legal disputes ... should not be considered an unfriendly act between States". (Q/Rep., para. 4.110, p. 89. The reference given in the Q/Rep., para. 1.08, note 4 on p. 3 should be General Assembly Resolution 37/10). That may be so in some circumstances, but it is unlikely that those who subscribed to that Declaration had in mind recourse unilaterally commenced in circumstances such as those prevailing in the present case. In the sub-paragraph almost immediately preceding the one cited by Qatar (Part II, para. 5 (b)), the Resolution affirms that:

> "it is desirable that [States] ... (ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognise as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute..."

CHAPTER VIII

FORMAL SUBMISSIONS

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

(Signed)
Husain M. Al Baharna
Minister of State for Legal Affairs
and Agent of the State of Bahrain

LIST OF DOCUMENTARY ANNEXES

Annexes 1.1 - 1.11

Annex 1.1

Agreed Minutes signed at the end of the first meeting of the Tripartite Committee, held in Riyadh, 17 January 1988; translation into English by Bahrain.

See text above, note 35 to para. 4.15.

[LETTERHEAD OF THE MINISTRY OF FOREIGN AFFAIRS
OF THE KINGDOM OF SAUDI ARABIA]

MINUTES OF MEETING

Within the framework of the good offices of the Custodian of Two Holy Mosques, King Fahd bin Abdul Aziz, which led to an agreement between the State of Bahrain and the State of Qatar to form a committee composed of representatives from each of them and from the Kingdom of Saudi Arabia, the committee met in Riyadh on 28.5.1408 corresponding to 17.1.1988, composed of:

1. The delegation of the State of Bahrain:

   HE Shaikh Mohammed bin Mubarak al Khalifa, Minister of Foreign Affairs (Chairman)

   HE Dr Husain Mohammed Al Baharna, Minister of State for Legal Affairs (member)

2. The delegation of the State of Qatar:

   HE Shaikh Ahmed bin Saif al Thani, Minister of State for Foreign Affairs (Chairman)

   HE Dr Hassan Kamil, the Advisor to HH the Amir of the State of Qatar (member)

3. The delegation of the Kingdom of Saudi Arabia:

   HRH Prince Saud al Faisal, Minister of Foreign Affairs of the Kingdom of Saudi Arabia (Chairman)

   HE Shaikh Abdul Rahman Mansouri, Under-Secretary in the Ministry of Foreign Affairs for Political Matters (member)

This was in order to consider the procedures by which the commitment of the State of Bahrain and the State of Qatar to refer the difference between them both to the International Court of Justice would be implemented.

It was agreed that another meeting of the Committee would take place in the City of Riyadh on Saturday 15.8.1408 AH corresponding to 2.4.1988 AD provided that each party will submit the draft which it proposes for the formulation of the special agreement to refer the difference to the ICJ to the Foreign Ministry of the Kingdom of Saudi Arabia on 19.3.88 provided that the Ministry in its turn will refer the draft of each state to the other at once for consideration and the expression of comments thereon before the decided upon meeting.

(signed)

Ahmed bin Saif al Thani
Minister of State for Foreign Affairs for the State of Qatar

Mohammed bin Mubarak al Khalifa
Minister of Foreign Affairs of the State of Bahrain

Saud al Faisal
Minister of Foreign Affairs of the Kingdom of Saudi Arabia

Done in Riyadh on 28.5.1408 corresponding to 17.1.1988

Annex 1.2

Qatar's translation of the Qatari Memorandum of 27 March 1988 commenting on Bahrain's draft Special Agreement and the original Arabic text.

Paragraphs omitted from Qatar's translation have been inserted by Bahrain in italics. The omitted passages have been indicated in the margin of the Arabic text.

See text above, note 36 to para. 4.16, note 74 to para. 5.18 and note 168 to para. 7.06.

TRANSLATION

MEMORANDUM

Doha: 9th Sha'aban, 1408 H.,
27 March 1988

Comments of the Government of the State of Qatar on the Draft Special Agreement presented by the Government of the State of Bahrain for submitting the Dispute between them to the International Court of Justice

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The Government of the State of Qatar received the said Draft on the afternoon of Wednesday 23 March 1988, and studied it very carefully in view of the cruciality and significance of its subject-matter.

Accordingly, and as provided by the agreement reached by the Tripartite meeting held in Riyadh on 28/5/1408 A.H. (Corr. 17/1/1988) that each of the two Governments should give its comments on the other Government's draft prior to the meeting of the Tripartite Committee on 2 April 1988 as agreed upon, the Government of the State of Qatar would like to give herebelow some comments on the said Bahraini Draft.

However, before giving any comments, the Government of the State of Qatar would like to indicate the following:

1. Comments for the time being will be restricted to the important substantive provisions of the Draft as stipulated in Articles II and V, rather than to procedural matters.

2. The substantive Articles II and V of the Draft are clearly contrary to what our three States have agreed upon, and to the common practice of drafting similar special agreements for submitting international disputes to the International Court of Justice.

This is set out in detail below:

First: With regard to Article II:

(1) What was agreed between our three states was to prepare a joint Special Agreement to refer the matters of the difference existing between us to the ICJ for a decision in accordance with international law. It is quite clear - and this is the formulation used for special agreements in similar circumstances - that this necessitates that the special agreement should contain a submission of the matters of difference and the request that it be decided.

But instead of this, the Bahraini draft, at Article II (item 1), reads as follows:

> "1. The parties request the Court
>
> (a) to draw a single maritime boundary between the respective maritime areas of Bahrain and Qatar; such boundary to pass between the easternmost features of the Bahrain archipelago including most pertinently the Hawar Islands, Fasht ad Dibal and other adjacent or neighbouring features and the coast of Qatar, and to preserve Bahrain's rights in the pearling banks which lie to the north east of Fasht ad Dibal, and in the fisheries between the Bahrain archipelago and Qatar.
>
> (b) to determine the rights of the State of Bahrain in and around Zubara."

It is quite clear from this text that the draft of the Government of Bahrain stipulates, in Para (a), Item 1 of Article II, the following:

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

Thus, the question is not, for the two Parties of the disputed issue actually existing between them over the said locations, to submit this dispute to the Court for a decision, but it is, rather, an admission by the State of Qatar that the dispute does not exist, and that it itself requests the Court - in support of Bahrain - to agree to Bahrain claims to these locations.

(2) In the same paragraph (a), the draft of the Government of Bahrain determines that - in addition to the rights it claims with regard to the fishing in the areas between the Bahrain archipelago and Qatar - Bahrain has rights in the pearling banks which lie to the northeast of Dibal Shoal. The draft even stipulates that the two parties, Bahrain and Qatar, request the Court to preserve for Bahrain all those alleged rights.

(3) Paragraph (b) of Article II of the Bahrain draft states that the State of Qatar confirms, together with the State of Bahrain, that the latter has rights in and around Zubara, without even spelling out the meaning of the phrase "around Zubara".

What makes this statement more astounding is that, in addition to the fact that all legal and historical facts establish decisive and clear cut evidence of the invalidity of Bahrain claims to rights in Zubara, this claim has never been raised by Bahrain at any stage of the Saudi mediation to resolve disagreements between the two countries. Moreover, the memorandum of the Government of Bahrain of 27.8.1986 - in reply to the memorandum of the Government of Qatar submitted to the Ministerial Council of the Cooperation Council for the Arab States of the Gulf on 6.7.1986 - on Bahrain's memo submitted to the Ministerial Council on 29.6.1986 - lists in the first page Item (2) the subjects it considers as disputed between the two countries and identifies them as "their maritime boundaries, and sovereignty over Hawar Islands and other islands and locations lying within the maritime territory and the maritime area of the State of Bahrain." There is no mention of a Bahraini claim to Zubara.

This is what concerns Article II of the Bahraini draft. However, before giving any comments on Article V of this draft, the Government of the State of Qatar would like to make clear that the Qatari draft, in accordance with what was agreed upon between our three States and in accordance with the conventional procedure for drafting similar special agreements, ensured the presentation of the disputed matters to the Court and requested it to make a decision vis-a-vis these matters in accordance with international law. For example, concerning the issue of sovereignty over Hawar islands, which is one of the fundamental disputed matters between the two States, Qatar and Bahrain, the Qatari draft stated in the first paragraph of its Article II that the Parties ask the Court to determine according to international law, "To which of the two States does sovereignty over Hawar islands belong?" It did the same concerning the other disputed matters between the two States, mainly those relating to their maritime boundaries as well as to the two issues of the Dibal and Jaradah shoals and the issue of the medium line, as clearly presented in paragraphs 2 and 3 of the above-mentioned second article. The Qatari draft has, in setting forth the disputed matters included in it, depended on the official historical documents and correspondence relating to this dispute as well as on the correspondence exchanged among our three States within the framework of the Saudi mediation, and in particular the letters of the Custodian of the Two Holy Mosques, King Fahd, exchanged between him and the Parties on the occasion of the incident of Fasht ad-Dibal. These letters dealt with a plan to settle this incident which the two Parties accepted and are still implementing. This plan includes the procedures which we should follow concerning all disputed matters.

In paragraph 4 of the same Article II, the Qatari draft provides that the Parties ask the Court to decide, in the light of its decision on the said disputed matters, what should be the course of the boundary or boundaries between the maritime areas appertaining respectively to the State of Qatar and the State of Bahrain. It is known to all that the agreement between Qatar and Bahrain to resolve the existing dispute between them by submitting it to the ICJ was the result of the brotherly and diligent efforts made by the Kingdom of Saudi Arabia within its kind mediation. In fact, we fully appreciate and are deeply grateful for such efforts which, we are sure, are also appreciated by other interested parties throughout the world. Therefore, we felt that the preamble of the Qatari draft should contain clear reference to that particularly because the principles of that Mediation which the Parties undertook to abide by include many very important issues, amongst which is the first principle

relating to the determination of the disputed matters and their nature and to considering such matters as an integral whole which should be resolved completely and together. This is in addition to the important obligations and commitments contained in the other principles and which will be considered as important throughout the duration of the case before the Court.

Secondly: with regard to Article V of the Bahraini draft

This Article reads as follows:

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

It is quite clear from this text that the Bahrain draft prohibits reference in front of the court - in the course of submitting any evidence or arguments - to any negotiations, discussions, proposals or answers arising from them which could have taken place between "the parties", prior to the date of the Special Agreement on solving the subjects stated in Article Two of the agreement already commented upon. The prohibition covers the negotiations, discussions, proposals or answers arising from them through the Saudi mediation. This means completely excluding the Saudi mediation from consideration and regarding it as non-existent.

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

The Government of the State of Qatar finds the text of the aforesaid Article Five totally unacceptable for many reasons, most important of which are the following:

(1) All the positions, undertakings and measures which the two Parties have adopted, and are still adopting, regarding their dispute are but the outcome of the Saudi mediation. It is utterly unacceptable that Bahrain, under Article Five of its draft, should demand that the mediation process be disconnected from the judicial process, in spite of the fact that the second process is but an outcome of the first one.

(2) It cannot be said that the role of the Saudi mediation comes to an end with the submission of the dispute between the two countries to the Court. This role requires that Saudi Arabia follow up measures of the implementation of the principles of its mediation and work according to its recommendations accepted by the two

Parties, until these measures lead, legally and practically, to settling that dispute.

(3) There is nothing more supportive of the validity of the soundness of the above view than the following:

(a) In his message of 28th Rabi Aakher, 1408 H, corresponding to 19th December, 1987, to the Amir of the State of Qatar, King Fahd, the Custodian of the Two Holy Mosques, asked for views on his proposals which he considers as the basis for resolving the dispute.

The fourth and last of these proposals states as follows:

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

The Amir of the State of Qatar replied on 1st Jumada Al Oula, corresponding to 21st December, 1987, expressing full agreement of the State of Qatar to these proposals.

Naturally, the Custodian of the Two Holy Mosques must have sent a similar message including the same proposals to the State of Bahrain which must have agreed to these proposals.

(b) A draft agreement had been proposed for the setting up of a joint committee comprising representatives of our three countries to approach the ICJ and finalise the requirements necessary for submitting the dispute to the Court in accordance with its procedures and instructions, so that a final and binding decision to both Parties be given. The agreement should have been signed at the meeting of the delegations of the three countries in Riyadh on 17.1.1988, to discuss the measures through which the commitment of the State of Bahrain and the State of Qatar to submit their dispute to the ICJ shall be put into effect. However, the signing did not take place, because Bahrain demanded the deletion of the provision in the 1st Article of that draft which states that the purpose of setting up the said committee is to "approach the ICJ". Qatar opposed deletion of that basic provision from that draft, and confirmed its consent to sign the agreement, provided that its text remains as already agreed upon. It is clear from the minutes of that meeting with Bahrain, while insisting on the above mentioned deletion, had stressed the necessity of signing the agreement with its provisions. These included the provision of the third para of Article One which states: "The Kingdom of Saudi Arabia will continue its good offices to guarantee the implementation of these terms".

As can be seen, this Article in the said agreement merely reiterates the text of the fourth proposal of the proposals included in the aforementioned message of King Fahd, the Custodian of the Two Holy Mosques.

(c) There is nothing in the principles of international law that warrants one of the Parties to an international

dispute to prohibit the other party to submit to the Competent Court the documents, memos and papers in general which were exchanged between them during the negotiations or contacts that took place before submitting the dispute to the court, and which are relevant to the dispute. The only exception are unsigned papers which are, consequently, not binding to anyone.

(d) Naturally, it is possible for two parties to an international dispute referred to arbitration to agree on excluding, when the dispute is under consideration, some documents relating to the negotiations, contacts, proposals and replies to them, which took place prior to submitting the dispute to arbitration. But this can only be by agreement.

The State of Qatar, for the reasons already shown, does not at all agree to excluding such references which are undoubtedly highly important since they clarify the origin of the dispute, its developments, the stages through which it passed, and the contacts, proposals and positions that took place during those stages, particularly those related to the stage of the Saudi mediation.

(e) And last but not least, it is worth pointing out that the text of Article Five of Bahrain's draft 'Special Agreement' is clearly copied, word for word, from Article Five of the 'Special Agreement' signed on March 29th, 1979 between Canada and United States, concerning determination of the maritime boundaries between the two countries in the region of Maine Gulf (I.C.J. Recueil of 1984, p 254).

The Government of the State of Qatar need not remind that the circumstances of the dispute between Canada and the U.S.A. are totally different from those of the dispute between the States of Qatar and Bahrain. One of the most important aspects of such difference is that the Qatari-Bahraini dispute arose from decisions issued by a third State, namely the United Kingdom. In addition to the fact that the Court has to evaluate these decisions as to the circumstances under which they were taken, the authority of the powers that issued them, the actual reactions and legal consequences resulting from them, it is necessary that this 50 year old dispute must be presented in its correct context. This can only be done through the comprehensive presentation, without any reservation, of the details of the old and new history of the dispute, and all the negotiations, contacts, agreements, actions, proposals and reactions relating to the dispute from its beginning until it was submitted to the Court.

These are the comments of the Government of the State of Qatar on the draft 'Special Agreement' submitted by the Government of the State of Bahrain.

It is clear from them that the main articles of substance (Two and Five) in the Bahrain draft are based on extremely strange provisions, which, in brief, mean the imposition on the State of Qatar of express admission of the non-existence of the dispute which actually exists between it and the State of Bahrain over the areas effectively disputed between the two countries since a long time ago, and of conceding all Bahrain's claims

as well as abstaining from including in the evidence and arguments presented by it any documents whose dates precede the date of the Special Agreement.

In the face of all this, the Government of the State of Qatar cannot but totally reject the Bahraini draft, and couple this rejection with the strongest possible protest.

Before concluding this Memo, the Government of the State of Qatar would like to state that, following its agreement with the Government of the State of Bahrain, thanks to the Saudi mediation, to commit themselves to submit their dispute to the I.C.J. for settlement in accordance with International Law, both sides are required to their utmost to facilitate measures to put that commitment into effect so that the desired purpose be achieved. That purpose is to put an end to their long standing dispute by the best possible means in order that a serene atmosphere of amity and cooperation prevail their close fraternal relations. This is a matter that the State of Qatar is very keen about, because it is being necessitated by the higher interests of not only our two countries but also of the member States of the Cooperation Council and our entire Nation.

This is the understanding of the Government of the State of Qatar on the said final agreement between our three countries. On the basis of that understanding, it was concerned to prepare the draft Special Agreement in the right way, consistent with the traditional practice in formulating such agreements and in such a manner as to preserve the full rights of both parties.

The Government of the State of Qatar, in submitting its draft Special Agreement stands prepared to discuss any comments on it, so that a joint formula be agreed upon which would meet the appropriate purpose intended by the 'Special Agreement' and the submission on its basis of the dispute to the I.C.J.

الرقم : و خ / ش خ ٢ / ٢ / ١٧ - ٧٤١

مذكرة بملاحظات حكومة دولة قطر
على مشروع الإتفاق الخاص المقدم
من حكومة دولة البحرين بشأن
إحالة الخلاف بينهما الى محكمة العدل الدولية

تلقت حكومة دولة قطر المشروع المذكور بعد ظهر يوم الأربعاء ٢٣ مارس ١٩٨٨ . وقد قامت بدراسته بما تقتضيه دقة وأهمية موضوعه من عناية . ويهم حكومة دولة قطر أن تبادر بأن تبدي ملاحظاتها عليه وفقا للإتفاق الذي تم في الإجتماع الثلاثي الذي عقد بالرياض بتاريخ ٢٨ / ٥ / ١٤٠٨هـ الموافق ١٩٨٨/١/١٧ م والذي يقضي بأن تبدي كل من الحكومتين ملاحظاتها على مشروع الحكومة الأخرى قبل انعقاد الإجتماع الثلاثي المتفق عليه في ٢ ابريل ١٩٨٨ .

ويعني حكومة دولة قطر ، قبل إبداء ملاحظاتها ، أن تشير الى أمرين ، هما :

(١) أنها رأت أن تقصر ملاحظاتها في الوقت الحاضر على أهم أحكام المشروع الموضوعية ، دون أحكامه الإجرائية .. وهي أحكام المادتين الثانية والخامسة .

(٢) أن المشروع فيما تضمنه من أحكام موضوعية في المادتين الثانية والخامسة منه جاء مخالفا مخالفة واضحة لما تم الإتفاق عليه بين دولنا الثلاثة ، ولما جرت عليه صياغة الإتفاقات الخاصة المماثلة بشأن إحالة المنازعات الدولية الى محكمة العدل الدولية .

وفيما يلي تفصيل ذلك :

أولا - عن المادة الثانية :

(١) ان ما جرى الإتفاق عليه بين دولنا الثلاثة هو إعداد إتفاق خاص مشترك لإحالة موضوعات الخلاف القائم بيننا إلى محكمة العدل الدولية للفصل فيها وفقاً للقانون الدولي . وواضح تماما - وهو ما تجري عليه صياغة الإتفاقات الخاصة في الأحوال المماثلة - ان هذا يقتضى أن يتضمن الإتفاق الخاص عرضاً للموضوعات محل الخلاف ، وطلب الفصل فيه . لكن مشروع دولة البحرين ، بدلاً من ذلك ، يقضي في مادته الثانية بما يلي :

OMITTED FROM QATARI TRANSLATION

"(أ) أن ترسم خط حدود بحري واحد بين المناطق البحرية لكل من البحرين وقطر ، على أساس أن يمر هذا الخط الحدودي بين أقصى شرقي المواقع التابعة لأرخبيل البحرين بما في ذلك ، بصفة خاصة ، جزر حوار وفشت الديبل وغيرها من المواقع القريبة أو المجاورة وبين ساحل قطر ، مع الحفاظ على حقوق البحرين في مغاصات اللؤلؤ الواقعة في الشمال الشرقي من فشت الديبل ، وكذلك حقوق صيد الأسماك في المناطق الواقعة بين أرخبيل البحرين وقطر .

(ب) أن تقرر حقوق دولة البحرين في الزبارة وما حولها ."

وواضح من هذا النص أن مشروع حكومة البحرين ، يقرر في النقرة الأولى من البند الأول من المادة الثانية منه مايلي :

(١) بدلا من أن يعرض المشروع البحريني - كما ينبغي ، وكما فعل المشروع القطري ، وكما يجري عليه العمل في جميع الإتفاقات المماثلة - الخلاف القائم فعلا بين الدولتين على السيادة على جزر حوار وعلى فشت الديبل وجرادة ، وعلى وضع هذين الفشتين القانوني من حيث إعتبارهما جزيرتين أم ضحضاحين ، وما يترتب على ذلك من أن لهما أو ليس لهما مياه إقليمية ، بدلا من ذلك .. يفصل المشروع البحريني بنفسه مسبقا في الخلاف المذكور مقررا أن جزر حوار وفشت الديبل وغيرها من المواقع القريبة أو المجاورة الموجودة بين ساحلى البلدين تتبع أرخبيل البحرين . بل أن الأمر لايقتصر على هذا، إذ يذهب مشروع البحرين الى حد أنه يتضمن بالنص الصريح أن دولة قطر تشارك دولة البحرين في الطلب المقدم الى المحكمة لرسم خط حدود بحري واحد بين المناطق البحرية لكل من البلدين على أساس تبعية المواقع المشار إليها للبحرين !! .

وبذلك لا يكون الأمر أمر إحالة من الطرفين لموضوع خلاف قائم فعلا بينهما بشأن المواقع المذكورة الى المحكمة لتقضي فيه بقرار منها ، بل موضوع تسجيل أمام المحكمة لإقرار من دولة قطر بأن هذا الخلاف لاوجود له ، وأنها تطلب هي نفسها من المحكمة - تأييداً للبحرين - إقرار ماتطالب به من تبعية تلك المواقع لها .

٢- في ذات الفقرة (أ) المتقدمة الذكر ، يقرر مشروع دولة البحرين مايعني أن لها - بالإضافة الى الحقوق التي تدعيها بالنسبة لصيد الأسماك في المناطق الواقعة بين أرخبيل البحرين وقطر - حقوقا في

مغاصات اللؤلؤ الواقعة في الشمال الشرقي من فشت الديبل . بل أن المشروع يقرر أن يطلب الطرفان ، البحرين وقطر ، من المحكمة الحفاظ للبحرين على كل تلك الحقوق المزعومة .

٣- تنص الفقرة (ب) من ذات المادة الثانية المشار إليها من مشروع دولة البحرين على أن تقرر دولة قطر ، مع دولة البحرين ، أن للأخيرة حقوقا في الزيارة وما حولها دون تحديد للمقصود من عبارة "وما حولها". ويزيد في غرابة هذا النص أنه ، بالإضافة الى أن كل الحقائق التاريخية والقانونية تقيم الدليل ساطعا حاسما على بطلان ماتدعيه البحرين من حقوق في الزيارة ، فإن هذا الإدعاء لم تثره البحرين في أي مرحلة من مراحل الوساطة السعودية لفض الخلافات بين الدولتين .بل أنه بالرجوع الى مذكرة حكومة دولة البحرين المؤرخة ١٩٨٦/٨/٢٧ ردا على مذكرة حكومة دولة قطر المقدمة الى المجلس الوزاري لمجلس التعاون لدول الخليج العربية في ١٩٨٦/٧/٦ حول ماجاء بمذكرة دولة البحرين المقدمة الى المجلس بتاريخ ١٩٨٦/٦/٢٩ ، يبين أن تلك المذكرة تعدد في الصحيفة الأولى منها (البند ثانيا) الموضوعات التي تعتبرها محل خلاف بين البلدين ، وتحددها بأنها " حدودهما البحرية والسيادة على جزر حوار وغيرها من الجزر والمواقع الواقعة ضمن الإقليم البحري والمنطقة البحرية لدولة البحرين " . وليس هناك أي إشارة إلى الإدعاء البحريني بشأن الزيارة .

هذا عن المادة الثانية من مشروع البحرين . وقبل الإنتقال الى الملاحظات على المادة الخامسة من هذا المشروع ، يعني حكومة دولة قطر

أن توضح أن المشروع القطري - التزاما بما تم الإتفاق عليه بين دولنا الثلاثة وعملا بالإسلوب التقليدي المتبع في صياغة الإتفاقات الخاصة المماثلة - حرص على أن يعرض موضوعات الخلاف على المحكمة وطلب البت فيها بما تراه مطابقا للقانون الدولي . وعلى سبيل المثال ، فبالنسبة لموضوع السيادة على جزر حوار - وهو أحد موضوعات الخلاف الأساسية بين دولتي قطر والبحرين - ينص المشروع القطري في الفقرة الأولى من المادة الثانية منه على أن الطرفين يطلبان من المحكمة أن تقرر ، طبقا للقانون الدولي ، " لأي من الدولتين تكون السيادة على جزر حوار ؟ " وقد اتبع نفس النهج فيما يتصل بموضوعات الخلاف الأخرى بين الدولتين والمتعلقة بحدودهما البحرية بما في ذلك موضوعا فشتي الديبل وجرادة وموضوع الخط المتوسط ، كما هو واضح من الفقرتين الثانية والثالثة من المادة الثانية المذكورة . والمشروع القطري إذ حدد موضوعات الخلاف على النحو الذي ورد به ، إنما استمد ذلك من الوثائق والمراسلات الرسمية التاريخية المتعلقة بهذا الخلاف والمتبادلة منها بوجه خاص بين دولنا الثلاثة خلال الوساطة السعودية ، وعلى الأخص رسائل خادم الحرمين الشريفين الملك فهد المتبادلة بينه وبين الطرفين بمناسبة حادث فشت الديبل حيث تناولت تلك الرسائل خطة تسوية هذا الحادث التي وضعها ووافق عليها الطرفان ونفذت ومازالت تنفذ فعلا ، متضمنة الإجراءات الواجبة الإتباع بالنسبة لكل من المناطق المتفق على أنها متنازع عليها .

وقد خلص المشروع القطري في البند الرابع من ذات المادة الثانية منه إلى أن الطرفين يطلبان من المحكمة أن تقرر ، في ضوء ما تقرره بالنسبة لموضوعات الخلاف المذكورة، ماهو المسار الذي يتعين أن يكون

عليه الحد أو الحدود بين المناطق البحرية لكل من دولتي قطر والبحرين.

ومعلوم للكافة أن إتفاق دولتي قطر والبحرين على حل الخلاف القائم بينهما عن طريق إحالة هذا الخلاف إلى محكمة العدل الدولية ، إنما تم نتيجة للجهود الأخوية المثابرة التي بذلتها المملكة العربية السعودية عبر وساطتها الكريمة ، تلك الجهود التي كانت وستظل محل تقديرنا الكلي وعرفاننا العميق بل محل تقدير العالم أجمع . ولذلك رأينا وجوب أن تتضمن ديباجة المشروع القطري إشارة واضحة الى ذلك ، ولاسيما أن مبادىء تلك الوساطة التي التزم الطرفان بالعمل بها تتناول مسائل كثيرة بالغة الأهمية ، بينها ما جاء في المبدأ الأول من تلك المبادئ من تحديد لموضوعات الخلاف وطبيعتها ، ووصفها بالتكامل بحيث ينبغي أن تحل سوية حلاً شاملاً ، بالإضافة إلى ما جاء في المبادئ الأخرى من إلتزامات وتعهدات تحتفظ بأهميتها كاملة طوال المدة التي سيستغرقها نظر الدعوى أمام المحكمة .

OMITTED FROM QATARI TRANSLATION

ثانيا - عن المادة الخامسة من مشروع البحرين :

تنص هذه المادة على مايلي :

" يمتنع الطرفان عن تضمين الأدلة أو الحجج المقدمة من أى منهما، أو أن يكشفا بأى وجه من الوجوه ، مايتعلق بطبيعة أو نص المقترحات الموجهة لحل الموضوعات المشار إليها في المادة (٢) من هذه الإتفاقية ، أو الردود المترتبة عليها ، أثناء المفاوضات أو المناقشات بين الأطراف التى تم إجراؤها قبل تاريخ هذه الإتفاقية سواء قدمت هذه المقترحات أو

الأدلة أو الحجج بصورة مباشرة أو عن طريق أية وساطة . "

ويبين بجلاء من هذا النص أن مشروع دولة البحرين يحظر الإشارة أمام المحكمة - في معرض تقديم أية أدلة أو حجج إليها - الى أي مفاوضات أو مناقشات أو مقترحات أو ردود مترتبة عليها تكون قد جرت " بين الأطراف " ، قبل تاريخ إتفاق إحالة النزاع الى المحكمة ، بشأن حل الموضوعات المبينة في المادة الثانية السابق التعليق عليها من مواد الإتفاق ، بما في ذلك ما جرى من تلك المفاوضات أو المناقشات أو المقترحات أو الردود المترتبة عليها عن طريق الوساطة السعودية . ومعنى ذلك هو إسقاط الوساطة السعودية كلية من الحساب ، وإعتبارها كأن لم تكن .

وواضح أن مؤدى هذا الحكم من أحكام المشروع البحريني ، فضلا عما ينطوي عليه من تعارض مع كل ما أعلنته البحرين من تقدير للوساطة السعودية ونتائجها ، أن تحجب عن المحكمة مواقف يكون قد إلتزم بها الطرفان خلال الوساطة السعودية ويكون من شأنها أن تكشف عن حقائق ثابتة تنيرها عند نظر الخلاف المعروض عليها . وبين تلك المواقف ، مثلا ، موافقة الدولتين على موضوعات الخلاف ، تلك الموافقة التي تضمنتها - كما سبق بيانه - وثائق الوساطة .

وترى حكومة دولة قطر أن نص المادة الخامسة المذكورة ليس مقبولا بتاتا لأسباب عديدة أهمها مايلي :

١ - أن كل المواقف والتعهدات والإجراءات التي إتخذها الطرفان

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ومازالا يتخذانها بشأن خلافهما ، إنما هي نتائج لعملية الوساطة السعودية . وليس مقبولا بتاتا من أن تطالب البحرين ، بمقتضى نص المادة الخامسة من مشروعها ، بقطع الصلة بين عملية الوساطة والعملية القضائية المتمثلة في عرض الخلاف على محكمة العدل الدولية ، وذلك رغم أن هذه العملية الثانية ليست إلا ثمرة للعملية الأولى .

٢ ـ أنه لا يمكن القول بأن دور الوساطة السعودية ينتهي بعرض الخلاف بين البلدين على المحكمة. بل أن هذا الدور يقتضي متابعة السعودية لإجراءات تطبيق مبادئ وساطتها والعمل بتوصياتها التي قبلها الطرفان، وذلك حتى تؤدي هذه الإجراءات ، قانونا وفعلاً ، الى التسوية المنشودة لذلك الخلاف.

٣ـ ليس أقوى في التدليل على صحة ما تقدم مايلي :

أ- في الكتاب الموجه من خادم الحرمين الملك فهد الى أمير دولة قطر بتاريخ ٢٨ ربيع الآخر ١٤٠٨هـ الموافق ١٩ ديسمبر ١٩٨٧، طلب إبداء الرأي في مقترحاته التي يعتبرها أساساً لحل الخلاف .

وقد نص الإقتراح الرابع والأخير من تلك المقترحات على مايلي :

"رابعا : تستمر المملكة العربية السعودية في إستعمال

مساعيها الحميدة لضمان تطبيق هذه الشروط " .

وقد أجاب أمير دولة قطر ، بتاريخ ١ جمادي الأولى ١٤٠٨هـ الموافق ٢١ ديسمبر ١٩٨٧م ، بما يقرر موافقة دولة قطر الكاملة على تلك الإقتراحات .

وبطبيعة الحال ، لا بد أن يكون خادم الحرمين الشريفين قد وجه كتابا مماثلا متضمنا ذات المقترحات لدولة البحرين ، وأن تكون قد أبدت موافقتها على هذه المقترحات .

ب - كان قد أعد مشروع إتفاقية بشأن تشكيل لجنة مشتركة تضم ممثلين عن دولنا الثلاث لغرض الإتصال بمحكمة العدل الدولية وإستكمال المتطلبات اللازمة لرفع موضوع الخلاف إليها طبقا لأنظمة المحكمة وتعليماتها ، تمهيدا لصدور حكم نهائي ملزم للطرفين . وكان المفروض أن توقع هذه الإتفاقية عند إجتماع وفود الدول الثلاثة في الرياض بتاريخ ١٩٨٨/١/١٧ لبحث الإجراءات التي سيتم بموجبها تنفيذ إلتزام دولة البحرين ودولة قطر بعرض خلافهما على محكمة العدل الدولية . بيد أن هذا التوقيع لم يتم لأن البحرين طلبت حذف الحكم الوارد في المادة الأولى من ذلك المشروع والذي يقضي بأن الغرض من تشكيل اللجنة المذكورة هو " الإتصال بمحكمة العدل الدولية " ، وإعترضت قطر على حذف ذلك الحكم الأساسي من المشروع مؤكدة موافقتها على التوقيع على الإتفاقية بشرط الإبقاء على نصها كما سبق أن تم الإتفاق عليه . وبالرجوع

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الى المناقشات التي سجلها محضر الإجتماع ، يتبين أن البحرين كانت ، مع إصرارها على الحذف المشار إليه ، تصر على ضرورة توقيع الإتفاقية بما تضمنته من أحكام . وبينها حكم الفقرة (ثالثا) من المادة الأولى التي تنص على مايلي : " تستمر المملكة العربية السعودية في استعمال مساعيها الحميدة. لضمان تطبيق هذه الشروط " .

وواضح أن هذه المادة من الإتفاقية المذكورة إنما تردد نص الإقتراح الرابع من الإقتراحات التي تضمنها كتاب خادم الحرمين الشريفين الملك فهد السابق الإشارة إليه .

ج- ليس في قواعد القانون الدولي مايسمح لأحد طرفي نزاع دولي أن يحظر على الطرف الآخر أن يقدم للقضاء المختص المستندات والمذكرات والأوراق بوجه عام المتبادلة بينهما خلال المفاوضات أو الإتصالات التي تكون قد سبقت عرض النزاع على هذا القضاء والتي يكون لها علاقة بالنزاع . ولايستثنى من ذلك إلا الأوراق غير الموقعة والتي لاتلزم أحدا ، بالتالي .

د- صحيح أنه - بطبيعة الحال - يمكن لطرفين في نزاع دولي محال الى التحكيم أن يتفقا على أن تستبعد عند نظر هذا النزاع بعض مستندات تتعلق بالمفاوضات والإتصالات والإقتراحات والردود عليها التي تكون قد سبقت عرض النزاع على التحكيم. ولكن ذلك لايصح إلا بالإتفاق . وحكومة دولة قطر - للأسباب السابق إيضاحها - لا توافق إطلاقا على استبعاد مراجع من هذا القبيل لا شك أن لها أكبر الأهمية لأنها تفصح

عن أصل الخلاف وتطوراته وما مر به من مراحل وما تم خلال هذه المراحل من إتصالات وإقتراحات ومواقف ، وبخاصة المتعلق منها بمرحلة الوساطة السعودية .

هـ- وأخيرا وليس آخرا ، تجدر الإشارة الى أن من الواضح أن نص المادة الخامسة من مشروع الإتفاق الخاص البحريني منقول حرفيا عن المادة الخامسة من الإتفاق الخاص الموقع في ٢٩ مارس ١٩٧٩ بين كندا والولايات المتحدة والمتعلق بقضية تحديد الحدود البحرية بين الدولتين في منطقة " خليج مين " (حكم محكمة العدل الدولية ، مجموعة أحكامها لعام ١٩٨٤ ، الصفحة ٢٥٤) .

وحكومة دولة قطر لاتحسب أنها بحاجة الى التذكير بأن ظروف الخلاف الكندي الأمريكي يختلف إختلافا كليا عن ظروف الخلاف القائم بين دولتي قطر والبحرين . وبين أهم أوجه هذا الإختلاف أن الخلاف البحريني القطري نشأ بسبب قرارات صادرة عن دولة ثالثة هي المملكة المتحدة ، ولذلك ، وفضلا عن أنه لابد للمحكمة أن تقيم هذه القرارات من حيث الظروف التي صدرت فيها وصلاحيات الجهة التي أصدرتها وردود الفعل الواقعية والأثار القانونية المترتبة على تلك القرارات ، فإن الأمر يقتضي بالضرورة أن يعرض هذا الخلاف الذي امتد خمسين سنة في إطاره الصحيح . ولا شك في أن ذلك لايتأتى إلا بعرض شامل ودون تحفظ لتفاصيل تاريخه القديم والحديث ، وما دار بشأنه خلال هذا التاريخ الطويل من بدئه حتى عرض

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الخلاف على المحكمة من مفاوضات واتصالات واتفاقات وتصرفات واقتراحات وردود عليها .

• • •

تلك هي ملاحظات حكومة دولة قطر على مشروع الإتفاق الخاص المقدم من حكومة دولة البحرين . ويبدو جليا منها أن هذا المشروع يقوم على أحكام موضوعية بالغة الغرابة مؤداها - بإيجاز - أن يفرض على دولة قطر الإقرار بصريح النص بعدم وجود الخلاف القائم فعلا بينها وبين دولة البحرين بشأن المناطق المتنازع عليها بين الدولتين منذ أمد طويل ، وبالتسليم بكل إدعاءات البحرين ، فضلا عن الإمتناع عن تضمين الأدلة أو الحجج المقدمة منها أي مستندات يكون تاريخها سابقا على تاريخ الإتفاقية الخاصة .

وإزاء ذلك ، لايسع حكومة دولة قطر إلا أن تعرب عن رفضها الكلي للمشروع البحريني وأن تقرن هذا الرفض بأشد الإحتجاج .

وقبل أن تختتم هذه المذكرة ، تحرص حكومة دولة قطر على أن تذكر أنه ، بعد أن تم الإتفاق بينها وبين حكومة دولة البحرين ، بفضل الوساطة السعودية الكريمة على الإلتزام بإحالة خلافهما على محكمة العدل الدولية للفصل فيه وفقا للقانون الدولي ، فإن هذا الإتفاق يقتضي أن تبذل كل منهما كل مافي وسعها لتيسير إجراءات وضع هذا الإلتزام

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موضع التنفيذ حتى تتحقق الغاية المنشودة منه ألا وهي إنهاء ذلك الخلاف الذي طال أمده بأفضل الوسائل بلوغا لما ينبغي من وجوب أن يسود علاقاتهما الأخوية الوثيقة جو الصفاء الكامل الكفيل بالحفاظ على هذه العلاقات واطراد نموها ، وهو أمر تحرص عليه حكومة دولة قطر كل الحرص ليس فقط لأنه أمر تتطلبه المصالح العليا لدولتينا بل أيضا المصالح العليا لدولنا أعضاء مجلس التعاون وأمتنا جمعاء .

ذلك هو مفهوم حكومة دولة قطر من الإتفاق النهائي المذكور الذي تم بين دولنا الثلاثة . ولذلك ، وانطلاقا من هذا المفهوم فقد عنيت بإعداد مشروع الإتفاقية الخاصة بالأسلوب المألوف المطابق لما يجري عليه العمل في صياغة مثل هذه الإتفاقيات والذي يحفظ حقوق الطرفين كاملة .

وحكومة دولة قطر وهي تتقدم بمشروعها للإتفاقية الخاصة المطلوبة ، تعرب عن أتم استعدادها لمناقشة أية ملاحظات تبدى عليه ابتغاء التوصل الى صيغة مشتركة يتفق عليها تحقيقا للغرض الصحيح المقصود من وضع " الإتفاق الخاص " وعرض الخلاف على أساسه على محكمة العدل الدولية .

الدوحة في ٩ شعبان ١٤٠٨هـ
الموافـــق ٢٧ مارس ١٩٨٨م

Annex 1.3

Bahraini Note Verbale of 20 June 1992 and translation into English by Bahrain, together with the draft Special Agreement in English and Arabic attached thereto.

See text above, note 8 to para. 1.13.

NOTE VERBALE

[LETTERHEAD OF THE MINISTRY OF FOREIGN AFFAIRS OF THE STATE OF BAHRAIN]

No. 9437-115/10/1

20.6.1992

The Ministry of Foreign Affairs of the State of Bahrain presents its compliments to the Ministry of Foreign Affairs of the State of Qatar and would refer to the unilateral application which the State of Qatar has submitted to the International Court of Justice on 8 July 1991, to the Order of the Court dated 11 October 1991 and the Bahrain Counter-Memorial which was presented to the Court on 11 June 1992. As the State of Qatar will be aware, the State of Bahrain denies absolutely that, at the present time, the Court has jurisdiction to decide all or any of the matters which Qatar has referred to it, for the reasons set out in the Counter-Memorial.

Nevertheless, the State of Bahrain, as it has repeatedly and publicly made clear, believes strongly that the Court should consider all the matters of difference between the two states, which were set out in particular in the signed Minutes of the sixth meeting of the Tripartite Committee which took place in Jiddah on 6-7 December 1988, in the event of failure to reach a negotiated settlement either directly or through the mediation of the Custodian of the Two Holy Mosques, King Fahd bin Abdul Aziz al Saud - and this would be by virtue of a joint submission presented by the two parties through an agreed and signed special agreement.

To this end, the State of Bahrain is pleased to enclose a draft special agreement to refer the matter of the differences between the State of Bahrain and the State of Qatar to the International Court of Justice in a joint manner. The draft of the agreement has been prepared in the English Language and is accompanied also by a translation into the Arabic language. The State of Bahrain considers that the form of special agreement covers all the matters of difference between the two states completely, and in an appropriate, customary and comprehensive manner.

The State of Bahrain expresses its wish to sign the agreement on condition that the State of Qatar ceases its judicial action which it commenced with the submission of a unilateral application to the International Court of Justice on 8th July 1991, and invites the State of Qatar to accept and sign the agreement in the form attached. The State of Bahrain expresses the hope that the response of the State of Qatar to this offer will not be long delayed. This offer will accordingly be deemed to have lapsed if it has not been accepted within the period ending six

weeks before the date to be fixed for the commencement of the oral proceedings concerning the questions of jurisdiction and admissibility, taking into account the practical considerations concerning the current judicial proceedings. Nevertheless, the State of Bahrain is prepared to discuss the question of the above offer, if the State of Qatar believes this to be necessary, in a meeting of the Tripartite Committee under the auspices of the Kingdom of Saudi Arabia in its capacity as mediator.

The Ministry of Foreign Affairs of the State of Bahrain has sent a copy of this note and of the draft special agreement to the Kingdom of Saudi Arabia. The Ministry of Foreign Affairs of the State of Bahrain takes this opportunity to express to the Ministry of Foreign Affairs of the State of Qatar its assurances of its highest consideration.

STATE OF BAHRAIN
MINISTRY OF FOREIGN AFFAIRS

دولة البحرين
وزارة الخارجية

Ref. .....
Date .....

الرقم ١/١٠٠/١١٥-٩٤٣٧
التاريخ ٢٠/٦/١٩٩٢م

تهدى وزارة خارجية دولة البحرين اطيب تحياتها الى وزارة خارجية دولة قطر • وتود الاشارة الى الطلب المنفرد الذى تقدمت به دولة قطر الى محكمة العدل الدولية فى ٨/٧/١٩٩١م ، والى امر المحكمة المؤرخ فى ١١/١٠/١٩٩١م ، والى مذكرة دولة البحرين المضادة التى قدمتها الى المحكمة فى ١١/٦/١٩٩٢م • وكما تعلم دولة قطر فأن دولة البحرين وللأسباب الواردة فى مذكرتها المضادة ترفض رفضا قاطعا ان يكون للمحكمة فى الوقت الحاضر اختصاص فى الفصل فى جميع أو أى من الامور التى احالتها اليها دولة قطر •

وعلى الرغم من ذلك فأن دولة البحرين ، كما اوضحت باستمرار وبشكل علنى ، تعتقد بجزم انه يجب ان تنظر محكمة العدل الدولية فى جميع أمور الخلاف بين الدولتين المبينة على وجه الخصوص فى المحضر الموقع لاجتماع اللجنة الثلاثية السادس الذى عقد فى جدة بتاريخ ٦-٧ ديسمبر ١٩٨٨م ، فى حالة عدم وجود تسوية تفاوضية سواء مباشرة او من خلال الوساطة الخيرة لخادم الحرمين الشريفين ، الملك فهد بن عبدالعزيز آل سعود ، وذلك بموجب طلب مشترك يتقدم به الطرفان من خلال اتفاقية خاصة موقعة ومتفق عليها •

ولهذا الغرض فانه يسر دولة البحرين ان ترفق طيه مسودة اتفاقية خاصة من اجل تقديم قضية الخلافات بين دولة البحرين ودولة قطر الى محكمة العدل الدولية بصورة مشتركة • وقد تم اعداد مسودة

STATE OF BAHRAIN
MINISTRY OF FOREIGN AFFAIRS

دولة البحرين
وزارة الخارجية

Ref. .....
الرقم .....

Date .....
التاريخ .....

الاتفاقية باللغة الانجليزية ومرفق طيه ايضا ترجمة عنها باللغة العربية • وتعتقد دولة البحرين ان شكل الاتفاقية الخاصة يغطي تماما جميع امور الخلاف بين الدولتين باسلوب مناسب ومتعارف عليه وبصورة شاملة •

وتعرب دولة البحرين عن رغبتها في التوقيع على الاتفاقية شريطة ان توقف دولة قطر الدعوى القضائية التي بدأتها بتقدمها بطلب منفرد الى محكمة العدل الدولية بتاريخ ١٩٩١/٧/٨م ، داعية دولة قطر الى قبول وتوقيع الاتفاقية بصيغتها المرفقة • وتعرب دولة البحرين عن أملها في ان لا يتأخر رد دولة قطر على هذا العرض كثيرا ، وعليه فانها سوف تعتبر هذا العرض منتهيا اذا لم يقبل خلال ستة اسابيع قبل التاريخ الذي قد تحدده المحكمة لبدء جلسات المرافعات الشفوية الخاصة بمسائل الاختصاص والقبول واضعة نصب عينها الاعتبارات العملية الخاصة بسير الدعوى القضائية الحالية • ومع ذلك فان دولة البحرين مستعدة لمناقشة موضوع العرض المذكور ، ان رأت دولة قطر ضرورة لذلك ، في اجتماع يعقد للجنة الثلاثية تحت رعاية المملكة العربية السعودية الشقيقة باعتبارها الدولة الوسيط •

وقد بعثت وزارة خارجية دولة البحرين بصورة عن هذه المذكرة ومسودة الاتفاقية الخاصة الى المملكة العربية السعودية الشقيقة •

وتنتهز وزارة خارجية دولة البحرين هذه المناسبة لتعرب لوزارة خارجية دولة قطر عن فائق تقديرها واحترامها •

الى وزارة خارجية دولة قطر

SPECIAL AGREEMENT BETWEEN THE GOVERNMENT OF THE STATE OF BAHRAIN AND THE GOVERNMENT OF THE STATE OF QATAR TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE

The Government of the State of Bahrain and the Government of the State of Qatar

Recognising that they have been unable to resolve by mediation or negotiation the differences between them concerning the delimitation of their respective maritime areas and other matters

Desiring to reach an early settlement of these differences,

Have agreed as follows:

Article I

The Parties shall submit the question posed in Article II to the International Court of Justice

Article II

1. 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. The above request refers to the following matters of difference: The Hawar Islands (including Janan); Zubarah; Fasht ad Dibal; Qit'at Jaradah; archipelagic baselines; and fishing and pearling areas.

2. The Court is requested to describe the course of the maritime boundary in terms of geodetic lines connecting geographic co-ordinates of points on Revised Nahrwan Datum. The Court is also requested, for illustrative purposes only, to depict the course of the boundary on a chart.

3. The Parties request the Court to appoint a technical expert nominated jointly by the Parties to assist it in respect of technical matters and, in particular, in preparing the description of the maritime boundary and the chart referred to in paragraph 2. The

Registrar is requested to provide the expert with copies of each Party's pleadings when such pleadings are communicated to the other Party. The expert shall be present at the oral proceedings and shall be available for such consultations with the Court as it may deem necessary for the purposes of this Article. If the Parties shall fail to agree upon the technical expert to be nominated by them, such expert shall be nominated and appointed by the Court in consultation with the Parties, on the application of either Party.

4. The Parties shall accept as final and binding upon them the judgment of the Court rendered pursuant to this Article and the Parties shall take all appropriate steps to implement the judgment of the Court forthwith.

Article III

1. Without prejudice to any question as to burden of proof, the Parties shall request the Court to authorise the following procedure with regard to the written pleadings:

(a) A Memorial to be submitted by each of Bahrain and Qatar not later than twelve months after the date of notification of this Special Agreement to the Court;

(b) A Counter-Memorial to be submitted by each Party not later than twelve months after the exchange of Memorials; and

(c) any further pleadings found by the Court to be necessary.

2. The written pleadings submitted to the Registrar by Bahrain and Qatar shall not be communicated to the other Party until the corresponding pleading of that other Party has been received by the Registrar.

Article IV

1. Between the date of this agreement and the delivery of the final judgment of the Court the Parties undertake to refrain from any activity likely to exacerbate the dispute in the areas subject to dispute. In particular, each Party will:

(a) refrain from the arrest or seizure of vessels or aircraft registered in the territory of the other Party;

(b) refrain from practising any media activity against the other either in relation to the disputed issues or to any other matter from the date hereof and until a final solution is achieved;

(c) refrain from practising any act that hinders the procedures or spoils the brotherly atmosphere which is needed to achieve the required goals.

2. In the event of any difficulty in the application of the previous paragraph, either Party may apply to the Court. Without prejudice to its powers under Article 41 of the Statute the Court, after having requested the Parties to provide any necessary clarification, may order any measures of protection which it deems necessary to protect the interests of the Parties as reflected in the provisions of paragraph 1 of this Article, and the Parties agree to accept and carry out such measures.

Article V

Neither Party shall introduce into evidence or argument, or publicly disclose in any manner, the nature or content of proposals directed to a settlement of the issues referred to in Article II of this Agreement, or responses thereto, in the course of negotiations or discussions between the Parties undertaken prior to the date of this Agreement, whether directly or through any mediation.

Article VI

The Parties agree that the English language shall be employed for all written pleadings.

Article VII

This Special Agreement shall enter into force on the date of exchange of instruments of ratification in accordance with the respective constitutional requirements of the Parties.

Article VIII

(1) The Parties shall notify the Registrar of the Court of this Agreement by a joint letter in accordance with the provisions of Article 40 of the Statute of the Court.

(2) If such notification is not made in accordance with the previous paragraph within one month from the date on which this Agreement comes into effect, either of the Parties may inform the Registrar of the Court thereof.

Article IX

This Special Agreement shall be made in two original copies in the English language together with an Arabic translation. In the event of any difference, the original English text shall prevail. Each Party shall retain one original copy.

This Special Agreement was made in the corresponding to the ..... day of ..... . this ..... day of .....

اتفاقية خاصة بين حكومة دولة البحرين وحكومة دولة قطر لتقديمها الى محكمة العدل الدولية :

ان حكومة دولة البحرين وحكومة دولة قطر ، ادراكا منهما بعدم تمكنهما من حل الخلافات القائمة بينهما عن طريق الوساطة أو التفاوض فيما يتعلق بتحديد المناطق البحرية الخاصة بكل منهما اضافة الى امور اخرى ٠

ورغبة منهما فى سرعة التوصل الى حل هذه الخلافات ، فقد اتفق الطرفان على مايلى :

المادة (١)

يتقدم الطرفان بالسؤال المطروح فى المادة رقم (٢) الى محكمة العدل الدولية ٠

المادة (٢)

١- يطلب الطرفان من المحكمة أن تقرر أيا من الامور المتعلقة بالحقوق الاقليمية او الحقوق القانونية او المصالح الاخرى والتى قد تكون مختلفا عليها بينهما ، وعليها ان ترسم خط حدود بحري واحد بين المناطق البحرية لقاع البحر وباطن ارضه والمياه التى تعلو قاع البحر لكل منهما ٠ ويتطرق الطلب المذكور اعلاه الى الامور التالية المختلف عليها : جزر حوار (بما فيها جنان) ، الزيارة ، فشت الديبل ، قطعة جرادة ، خطوط الاساس الارخبيلية ، ومناطق مغاصات اللؤلؤ وصيد الاسماك ٠

٢- يطلب الطرفان من المحكمة أن تصف مسار الحدود البحرية على هيئة خطوط جيوديسية تصل بين احداثيات جغرافية للنقاط وذلك بطريقة قياس نقطة اساس نهروان المعدلة • كما يطلب الطرفان من المحكمة ، لاغراض توضيحية فقط ، ان تصف مسار الحدود على خريطة •

٣- يطلب الطرفان من المحكمة ان تعين خبيرا فنيا يتم ترشيحه من قبل الطرفين لمساعدة المحكمة فيما يتعلق بالامور الفنية وخاصة فى اعداد اوصاف الحدود البحرية والخريطة المشار اليها فى الفقرة (٢) • ويقوم المسجل بتزويد الخبير بنسخ من المرافعات المقدمة من قبل كل من الطرفين عندما تكون هذه المرافعات قد تم تبادلها بينهما • ويحضر الخبير اجراءات الجلسات الشفوية ويكون مستعدا لتقديم المشورة للمحكمة وفقا لما تراه ضروريا لاغراض هذه المادة • وفى حالة اخفاق الطرفين فى التوصل الى اتفاق على تسمية الخبير الفني ، تقوم المحكمة ، بناءا على طلب اي من الطرفين ، بتسمية وتعيين الخبير بعدالتشاور مع الطرفين •

٤- يقبل الطرفان وبشكل نهائى وملزم حكم المحكمة الصادر طبقا لهذه المادة • ويتخذ الطرفان كافة الخطوات المناسبة للتنفيذ الفوري لحكم المحكمة •

المادة (٣)

١- يطلب الطرفان من المحكمة ، مع عدم الاخلال باية مسألة تتعلق بعبء الاثبات ، اجازة اتخاذ الاجراءات التالية فيما يتعلق بالمرافعات المكتوبة :

أ- ان تتقدم كل من دولة البحرين ودولة قطر بمذكرة في موعد اقصاه ١٢ شهرا من تاريخ اخطار المحكمة بهذه الاتفاقية الخاصة ٠
ب - ان يتقدم كل طرف بمذكرة مضادة في موعد لايتجاوز ١٢ شهرا من تاريخ تبادل المذكرات ٠
ج - اية مرافعات اخرى تراها المحكمة ضرورية ٠

٢- لايجوز للمسجل ارسال المرافعات المكتوبة المقدمة اليه من قبل دولة البحرين ودولة قطر الى اى منهما قبل استلامه للمرافعة المقابلة من الطرف الآخر ٠

المادة (٤)

١- يتعهد الطرفان بالامتناع عن اية انشطة من شأنها ان تؤدي الى تفاقم النزاع في المناطق موضع النزاع وذلك في الفترة ما بين تاريخ ابرام هذه الاتفاقية وتاريخ اصدار المحكمة لحكمها النهائي ٠ ويتعهد كل طرف ، على وجه الخصوص ، بما يلى :

أ- الامتناع عن ضبط أو حجز السفن أو الطائرات المسجلة في اقليم الطرف الاخر ٠
ب - الامتناع عن ممارسة أى نشاط اعلامي ضد الطرف الاخر سواء فيما يتعلق بمواضيع النزاع أو أية أمور اخرى من تاريخه وحتى التوصل الى الحل النهائي ٠
ج - الامتناع عن القيام باى تصرف يعرقل سير الاجراءات او يعكر الجو الاخوي اللازم لتحقيق الاهداف المطلوبة ٠

٢- فى حالة ظهور اية صعوبات فى تطبيق الفقرة السابقة يجوز لأي من الطرفين اللجوء الى المحكمة ، وللمحكمة ، مع عدم الاخلال بسلطاتها طبقا للمادة ٤١ من نظامها الاساسي ، ان تطلب من اي من الطرفين تزويدها بأية ايضاحات ضرورية وان تأمر بأية تدابير وقائية - وفقا للفقرة (١) من هذه المادة - تراها ضرورية لحماية مصالحهما مع التزامهما بقبول وتنفيذ هذه التدابير ٠

المادة (٥)

يمتنع الطرفان عن تضمين الأدلة او الحجج المقدمة من اي منهما ، أو ان يكشفا بأي وجه من الوجوه ، ما يتعلق بطبيعة أو نص المقترحات الموجهة لحل الموضوعات المشار اليها فى المادة الثانية من هذه الاتفاقية ، أو الردود المترتبة عليها ، أثناء المفاوضات أو المناقشات بين الأطراف التى تم اجراؤها قبل تاريخ هذه الاتفاقية سواء تدمت هذه المقترحات او الأدلة أو الحجج بصورة مباشرة أو عن طريق أية وساطة ٠

المادة (٦)

يتفق الطرفان على ان تكون اللغة الانجليزية هى اللغة المستخدمة فى جميع المرافعات المكتوبة ٠

المادة (٧)

تصبح هذه الاتفاقية سارية المفعول اعتبارا من تاريخ تبادل وثائق التصديق وفقا للمتطلبات الدستورية لكل من الطرفين ٠

المادة (٨)

١- يخطر الطرفان مسجل المحكمة بهذه الاتفاقية بواسطة رسالة مشتركة بموجب احكام المادة ٤٠ من النظام الاساسي للمحكمة ٠

٢- واذا لم يتم الاخطار بموجب الفقرة السابقة خلال شهر واحد من تاريخ سريان مفعول هذه الاتفاقية ، فلأى من الطرفين ان يبلغ مسجل المحكمة بذلك ٠

المادة (٩)

حررت هذه الاتفاقية الخاصة من نسختين اصليتين باللغة الانجليزية مع ترجمة عربية ، وفى حالة نشوء أي خلاف تكون الحجية للنسخة الانجليزية الأصلية ، ويحتفظ كل طرف بنسخة أصلية منهما ٠

حررت هذه الاتفاقية الخاصة بتاريخ ٠٠٠٠٠٠٠٠٠٠٠٠ هجرية الموافق ٠٠٠٠٠٠٠٠٠٠٠٠٠٠٠ ميلادية ٠

Annex 1.4

Qatari translation of an extract from the minutes of the first meeting of the Tripartite Committee. Q/TCM Bundle, p. 20.

See text above, note 48 to para. 4.24.

Prince Saud:

Word for word minutes will be prepared to cover the details of the discussions and what has been said in the meeting. Other minutes will be prepared but will only include what has been agreed to. I would like to conclude by saying that we are not dealing with an easy problem; border problems are always difficult. But we should be guided by the spirit of our superiors. I would like to add that discussing matters not covered by the Five Points or in the exchanged letters would be something the Kingdom does not want to be involved in.

Annex 1.5

Qatari translation of an extract from the minutes of the second meeting of the Tripartite Committee. Q/TCM Bundle, p. 83.

See text above, note 6 to para. 1.11 and note 131 to para. 5.56.

agreement between the two parties is required. It would be unwise to mention the role played by a third party.

Dr. Hassan Kamel:

If agreement has been reached on certain topics, then nothing else could be deducted or added.

Dr. Hussain Baharna:

With reference to article 5 of the Bahraini proposal, the Qatari Government claimed that this article implies nullifying Saudi mediation. This is not true. The object of article 5 was to indicate the concessions made by the two parties with a view to achieving an agreement, whether such concessions were made before, or during, the Saudi mediation, unless proposals lead to an agreement. Commitments made by Qatar indicate that this deprives Qatar of its right to present its arguments and historical documents.

Dr. Hassan Kamel:

We had agreed on certain matters without which the Court could not settle the dispute. Things change if we inform the Court about a certain material fact.

Prince Saud:

I hope we shall not enter into a vicious circle. If we achieve an agreement on questions to be put before the court, and if such an agreement includes all points at issue, then there remains no problem. I should like to confirm that, throughout the period of Saudi mediation, Saudi Arabia did not deliver to either Bahrain or Qatar documents belonging to the other party. Its role was limited to proposing certain ideas, with the express purpose of avoiding any exploitation of Saudi mediation to strengthen either party's position at the expense of the other party. Let us, now, turn to the points to be put before the Court as such is our subject matter. I am sure that we could achieve an agreement if this point is settled.

Annex 1.6

Qatari translation of an extract from the minutes of the fifth meeting of the Tripartite Committee. Q/TCM Bundle, pp. 204-206.

See text above, note 40 to para. 4.18.

Therefore, our acceptance of mentioning the names of some subjects and leaving the others is a concession on our part.

This is not the first time I say this, and I am still saying that this is Bahrain's third proposal and this is regarded a concession on its part. The environment in which Bahrain dealt with the matter is a brotherly one, while Qatar wants to draft the texts that it alone wants.

Prince Saud :

We have agreed not to mention the past, and we must discuss the new proposal. The work of this Committee is not of a legal nature that seeks to favour the opinion of one party at the expense of the other party. We now have one formula which we want to discuss. I hope that after the time that we have spent we will accept this formula and consider comments and inquiries by the two parties.

Dr. Hassan Kamel :

To be accurate I preferred to prepare a paper, which was distributed at the end of the morning session, for consideration by our brethren in Bahrain. It contains our comments and inquiries about the new proposal. After obtaining clarifications for that, we will be ready to express views on this proposal. The paper reads as follows :

We are all aware that the duty of our Tripartite Committee is to draft a mutually acceptable text for the special agreement under which we will refer the matters of dispute between our two States to the I.C.J. These matters were agreed by us by accepting the first principle of the framework for mediation which states that:

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

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 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.

Please allow me to start this discussion by presenting our preliminary comments on that draft.

(1) According to the draft, each State is entitled to request the Court to decide any of the following matters:

a) Territorial rights:

It is evident that the proposed text entitles any of the parties to claim sovereignty over any area or part of the land or maritime territory of the other party. This unlimited right is,undoubtedly, unacceptable. In fact as a matter of principle it is not admissible for any State to allow another State to have such an open-ended right on its entire territory. It is of great importance, for this reason, to clarify what is meant by this text.

b) Other title or interest which may be a matter of difference:

Such an open, ambiguous and broad text would allow the presentation to the Court of any claim, including claims relating to new matters not previously agreed as being disputed between the parties, or even discussed as such, and which the other party may know nothing about. This would expand the Court's jurisdiction to include any legal matters whatsoever, regardless of their history, nature, elements, and objectives and subsequently any dispute relating even to future action.

Moreover, the Court, according to the proposed text, will have jurisdiction to decide on claims which are not based on law, but rather on mere "interests". The word "interest" in this context seems to be vague, and what is meant by it is not understood.

In addition, the phrase "may be a matter of difference" could include not only the issues defined in the framework for mediation but also any other possible differences including possible future differences. Although the two parties may agree to submit to the Court matters not mentioned

in the framework for mediation, this naturally requires a new special agreement.

It is clear from the foregoing that the said text is too broad to be accepted in its present form, and it is necessary to clarify what is meant by it.

(2) The draft states the following "to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

It is noted that the text:

a) Imposes on the Court to decide by "a single maritime boundary", that is a single line, the continental shelf, the economic zone and the territorial waters. It is well known that the main duty of the Court is to define the right course of the maritime boundaries of the two States in the light of its decision on the other matters, and not simply to draw it. Accordingly, the Court may find it necessary to draw more than one line.

b) The draft refers to "maritime areas of the seabed, subsoil and superjacent waters". It is not clear what is meant by such a detail, and it may be reasonable to consider whether it would not be adequate to substitute the above phrase by the phrase "maritime delimitation" which covers all aspects of the maritime claims of both parties.

These are the main inquiries which we would like to address to the government of the State of Bahrain, hoping to receive answers that would clarify the meaning of the provisions of the new Bahraini draft. This would enable us to start immediately our discussions on the said draft.

H.E. Shaikh Mohammad Bin Mubarak:

I would like to express my thanks to H.E. Sh. Ahmad and to H.E. Dr. Hassan Kamel for accepting to discuss Bahrain's paper. As said at the beginning, our objective is to reach the envisaged outcome, thanks to the goodwill and sincere efforts of our brothers, as well as to the initiatives and meetings of the Heir Apparents of the two countries. All of these elements have contributed to reaching a common understanding. This question has been drafted and communicated to H.H. The Amir of

Annex 1.7

Qatari translation of an extract from the signed minutes of 7 December 1988. Q/TCM Bundle, p. 282

See text above, note 46 to para. 4.23.

"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."

And after listening to Bahrain's reply to the queries raised by the Qatari delegation, and exchanging views, the Qatari delegation proposed an amendment of the Bahraini draft so that it would read as follows :

The Governments of the State of Qatar and the State of Bahrain submit to the International Court of Justice, under its Statute and the Rules of Court, for decision in accordance with international law, the existing dispute between them concerning sovereignty, territorial rights or other title or interest, and maritime delimitation.

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

1- Hawar Islands, including Janan Island

2- Dibal shoal and Qit'at Jaradah

3- Archipelago base lines

4- Zubarah

5- Fishing and Pearling areas and any other matters related to maritime boundaries.

(2) The two parties agreed on these subjects. Qatar's delegation proposed that the agreement which would be submitted to the Court should have two annexes, one Qatari and the other Bahraini. Each State would define in its annex the subjects of dispute it wants to refer to the Court. The Bahraini delegation stated that the Qatari proposal that there be two separate annexes would be studied along with the Qatari amendment of the general formula of the proposed Bahraini question. Therefore, the Bahraini delegation asked for enough time to study the proposed amendment.

Annex 1.8

Supplementary Opinion by Professor A.K. Aboulmagd.

See text above, note 69 to para. 5.14.

The Law Office of
Dr. A. Kamal Aboulmagd
Attorney at Law

مكتب
الدكتور / أحمد كمال أبو المجد
المحامي بالنقض

Date:

تحريراً في

SECOND SUPPLEMENTARY OPINION

INTRODUCTION

On May 18, 1992 I submitted to the Agent of the Government of Bahrain, His Excellency Dr. Hussein El Baharna, a first supplementary opinion on the interpretation of certain documents relating to the dispute between the State of Qatar and the State of Bahrain. Subsequent to the submission by the State of Qatar of its reply on questions of jurisprudence and admissibility dated September 28, 1992, I was requested to comment on the Supplementary Opinion of my colleague and friend Professor Ahmed Sadek El Kosheri, attached to the Qatari reply.

Since most of the arguments advanced by Professor El Kosheri have already been discussed and answered in my previous opinions, I will confine my answer in this second supplementary opinion to those arguments that are advanced for the first time and to Dr. El Kosheri's direct comments on my last opinion.

For the record, I would like to confirm at the outset that I remain firmly convinced that what I said in my first opinion, and reconfirmed in paragraph 1.3 of my first Supplementary Opinion, is true. The proper interpretation of paragraph No. 2 of the Minutes (of December 25, 1990), the one that conforms both to the rules of the Arabic language and to the established rules of interpretation of legal texts and provisions is that the consent and agreement of the two parties continue to be required, and that no waiver of such requirement was given by consent recorded in the said minutes. The word "al tarafan" in the Arabic document means "the two parties together" and cannot be correctly construed as meaning "either party".

A. THE ARABO-ISLAMIC TRADITION AND THE EMERGENCE OF THE 1990 MINUTES

1. In his Supplementary Opinion Dr. El Kosheri makes a sharp retreat from his previous position with regard to what he calls "Arabo-Islamic tradition". He now seems to reduce his reference to that tradition to a mere indication "that the model provided by the Quran constitutes the ultimate criterion to determine the true meaning of a particular linguistic usage" (paragraph 14 D of his Supplementary Opinion). I cannot agree more, but I fail to see how either Professor El Kosheri or Professor Ayyad have, in either their original or their supplementary opinions, been able to show how Quranic usage favors the interpretation of the December 25, 1990 Minutes which they advocate.

2. I continue to disagree completely with Dr. El Kosheri's contention that the Arabo-Islamic canons of interpretation do not allow reference to the "travaux preparatoires", a contention that Dr. El Kosheri does not substantiate by reference to any authority. Dr. El Kosheri, at paragraphs 19 and 20 of his supplementary opinion, continues to support what he calls the basically objective approach prevailing in the Arabo-Islamic tradition. He dismisses the relevance of the quotation I made from Ibn Al Qayem (Illam Al Muakim, Vol. III, p.90) on the basis that the famous Hanbali Scholar was talking about exceptional cases in which the parties wanted to hide the true nature of their transaction or because there was no real consent (paragraph 20 of his second opinion).

3. A careful reading of Ibn Al Qayem, however, shows that this was not the case. The whole chapter of 32 pages is entitled "What counts in contracts is the intentions and objects"

"العبرة فى العقود بالمقاصد والنيات "

Ibn Al Qayem then presents in full detail the arguments of two different schools of interpretation, the one relying completely on the words and the other relying on the subjective intention of the speaker (or drafter). He defines the problem as follows:

> " Should we rely on the apparent meanings of <u>words and contracts</u> even if it is shown that the intentions and objectives are different therefrom or should we consider and accommodate the intentions and objectives?"

هل الأعتبار بظواهر الألفاظ والعقود وإن ظهرت المقاصد والنيات
بخلافها أم للقصود والنيات تأثير يوجب الالتفات اليها ومراعاة جانبها؟

He then gives a categoric answer stating that:

> "The rules and principles of the <u>Sharia</u> all lead to the conclusion that the intentions are to be taken into consideration."

وقد تظاهرت ادلة الشرع وقواعده على أن القصود فى
العقود معتبرة

On page 119 Ibn Al Qayem applies the above general principle to the interpretation of contracts under the title "What counts in contracts is the intention rather than the mere wording"

" العبرة فى العقود بالقصد دون اللفظ المجرد "

He engages himself in a most detailed discussion of the various hypothetical situations where there is discrepancy between the intention of the party in a contract and the wording recording the contract. He specifically discusses the case of a party who claims to have meant something different from the wording (sigha) he used and points out that, if the context or the presumption substantiate his contention, then he should not be bound by the wording.

" فأن اقترن بكلامه قرينة تدل على ذلك لم يلزمه أيضا لأن السياق والقرينه بينه تدل على صدقه "

In the present case, both the context and the presumption support Bahrain's interpretation of the word "al-tarafan" in the Minutes of December 25, 1990. Bahrain's resort to the preparatory works which show how the final wording emerged is but one way of implementing the method of interpretation suggested by the Hanbali author, Ibn Al Qayem. The non-substantiated sweeping statement made by Dr. El Kosheri does not help at all in this respect.

B. NO STATEMENT MAY BE ATTRIBUTED TO A SILENT PARTY

4. In paragraphs 23 and 24 of his supplementary opinion, Dr. El Kosheri relies heavily on the word "yagouz" (which means "it is permissible ...") in the second paragraph of the document of December 25, in order to reach the unjustified and unsubstantiated conclusion that this word authorizes either party to refer the dispute unilaterally to the Court. I see nothing in the text (or the context) to suggest that the permission applies to either of the parties on its own, as opposed to both parties acting together. But he then contends in paragraph 24 that the absence of specific reference to further negotiation of the special agreement after the five month period had elapsed would be construed as excluding any need to undertake any such action. To support this contention, he uses the maxim "no statement may be attributable to a silent party", but he omits the second part of the rule, namely that if a party is expected to express his opinion or position, his silence is in itself an opinion or position. If, therefore, it is the case that up to the time of the meeting of December 25, 1990, the parties considered their submission to the Court would be by means of a joint special agreement, then one would expect any change to that position to be reflected in the minutes. There is no such change, and therefore the expression "no statement may be attributable to a silent party" rebounds against Dr. El Kosheri, as I showed in my first opinion. If it was the understanding of the parties at that time that a joint action was required in order to engage the Court, it is the deviation from that course of action which would require specific mention.

C. THE THREE SETS OF MINUTES IN SIMILAR FORMAT

5. In paragraph 11 C of Dr. El Kosheri's Supplementary Opinion, he reiterates (but does not substantiate) the arguments that the use of the words "it was agreed" in the past tense in the context of the document of December 25, 1992 gave it for an Arab lawyer the character of a formal agreement and not a mere declaration of intent. This argument is unacceptable both linguistically and legally.

(a) Linguistically, the words "it was agreed" refer to the occurrence of an agreement without any specific reference to the nature of the agreement. In the context of minutes of a meeting, which is the context at hand, the use of the past tense is simply meant to record what was agreed at the meeting. By itself, the past tense tells the reader nothing about the legal status of either the minutes in question or any agreement recorded therein.

(b) Legally, the use of the past tense "it was agreed" does not by itself determine the subject of the agreement or the extent of its binding nature. Both the subject and the extent of the binding force are to be determined in the light of the provisions that follow the words "it was agreed" and the context of the whole provision. If Dr. El Kosheri were correct, it would be virtually impossible to record in a document written in Arabic any purely political or social agreement which was of non-legal nature. This is because whatever is recorded must normally be in the past tense: "it was agreed ...", "it was said ...", "it was minuted ...". I would also reiterate what I said at paragraphs 2.15 - 2.16 of my Opinion attached to the Bahriani Counter-Memorial. I see no need to revise my view in any way.

(c) The same verb "agree" was used in the signed minutes of January 17, 1988 and December 7, 1988. As I stated in my first opinion at paragraph 2.16:

> "The format and general layout of all three sets of minutes are broadly similar, and I can see nothing on the face of any of the three to indicate that it was intended to be an agreement of a different nature from the other two."

Again, nothing in the Qatari Reply or the opinions of its experts leads me to revise my view in any way.

D. THE VIEWS OF THE EXPERTS OF BOTH SIDES ON "THE PROCEDURES ARISING THEREFROM"

6. A thorough examination of the opinions of the experts lends heavy weight to the view I endorsed at paragraph 4.2 of my Supplementary Opinion, namely that the only possible interpretation is that these words refer to the procedures arising from or resulting from the Bahraini Formula, i.e., to the further steps to be taken to implement and finalize the special agreement of the parties and submit the case jointly to the court. Professor El Kosheri takes the view that commas would need to have separated "the several antecedents" (whatever that might mean) and points out that there are no commas in the Arabic original (Qatari Reply, Vol. II, p. 96 at para. 41). No such rule covering commas exists in Arabic. Although it is not strictly relevant, he states that punctuation "plays a vital role" in the Quran; but in fact there is no punctuation in the Quran, and he is thus completely mistaken on this point.

7. Even if we were to assume, for the sake of argument, that "the procedures arising therefrom" could refer back to the Court, this interpretation is faced with two major objections:

(a) The wording would be meaningless and lack useful effect. As Mr. Amkhan, an expert for Bahrain, has rightly pointed out in his opinion (BCM, Vol. II, p. 253-4) the 1987 agreement contained a provision that the two parties would "have the dispute submitted to the Court in accordance with its regulations and instructions". I understand that both Bahrain and Qatar are in agreement that the 1987 agreement was one of the agreements reconfirmed in the first operative paragraph of the 1990 minutes. I also noticed that Professor El Kosheri does not comment on this argument in his Supplementary Opinion.

(b) If the interpretation by Qatar's experts were correct, would the minutes not simply have said in a plain language: "the parties may ... submit the matter to the ICJ in accordance with ... the court's procedures" ? It is obvious that the proceedings/procedures cannot arise from the act of submission itself. See Professor Badawi's comments at pages 280-2 of Vol. II of the Bahraini Counter-Memorial.

8. Most unacceptable is Dr. El Kosheri's interpretation of the words "and the procedures or proceedings relating thereof or therefrom" "wa al ijraat al mutaratibati alayha". He bypasses the argument deriving from the fact that the word "tarh" (=

submit) is masculine in the Arabic language, whereas the word "therefrom" is feminine in the Arabic language, which makes reference to the only feminine antecedent which is the Bahraini formula the only correct interpretation of the text. His argument is that the word "tarh" implies necessarily a certain action in view of submission to the court!! The fact, however, is that the text does not include a word referring to any such implied action, and the feminine word "alayha" cannot, by any means, be referring to a non existing word of the text.

9. At paragraph 8 of his statement (page 81 of Vol. II of the Bahraini Counter-Memorial), Dr. Al Baharna confirmed that he inserted the wording in order to refer to the further procedures (or steps/arrangements) which were necessary to implement the Bahraini Formula. Dr. Al Baharna has made it clear that he was referring to further consultations aimed at concluding the special agreement. It is thus to these consultations, as the steps/arrangements/procedures which were to follow, that the Arabic words refer. Qatar's experts have failed to supply any convincing alternative explanation.

A. Kamal Ab

Dr. Kamal Aboulmagd

Annex 1.9

Supplementary Opinion by Mr. Adnan Amkhan.

See text above, note 69 to para. 5.14.

RESPONSE TO PROFESSOR EL-KOSHERI'S SUPPLEMENTARY OPINION OF 16 SEPTEMBER 1992

BY

ADNAN AMKHAN

A. INTRODUCTION

1. The Agent of Bahrain in the *Case Concerning Maritime Delimitation and Territorial Questions* between Qatar and Bahrain, His Excellency Dr. Husain M. Al-Baharna, has invited me to respond to Professor El-Kosheri's Supplementary Opinion of 16 September 1992,[1] in which certain observations are made on my review of his first Opinion.[2]

With all due respect to Professor El-Kosheri, this response, which has been kept as short as possible, will show that his Supplementary Opinion is inconsistent with his first Opinion and that it contains a number of unsupported and highly debatable assertions.

2. However, before turning to Professor El-Kosheri's Supplementary Opinion, I would like to confirm that it is my firm opinion that the only plausible construction of the second paragraph of the Minutes of 25 December 1990 is that it envisaged a possible joint submission to the Court by the two parties acting together.

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[1] Professor El-Kosheri's Supplementary Opinion is attached to Vol. II as Annex III.1 to the Reply submitted by Qatar on 28 September 1992, pp. 77-99.

[2] See Bahraini Counter-Memorial of 11 June 1992, Vol. II, pp. 217-256.

B. GENERAL OBSERVATIONS

3. At the outset it should be noted that Qatar and Professor El-Kosheri have now accepted the argument in my first Opinion to the effect that the legal nature of the 25 December Minutes and the interpretation thereof is to be determined *exclusively* according to the principles and rules of contemporary international law. There is no attempt to rely on any "Arabo-Islamic legal tradition" in the Qatari Reply of 28 September 1992.

4. In his Supplementary Opinion, Professor El-Kosheri has changed his view. He now argues that the expression "Arabo-Islamic tradition" was not used by him in his first Opinion in terms of an applicable legal system, but as a 'recourse to the relevant linguistic traditions in a certain socio-cultural community for guidance in the proper construction of a text drafted thereunder' (para. 15 of the Supplementary Opinion, pp. 86-87).

This is a major shift since his first Opinion, in which he uses the phrase "Arabo-Islamic legal tradition" when dealing with legal propositions. Professor El-Kosheri's shift of view has two notable effects.

5. First, it renders superfluous and irrelevant Part I of Professor El-Kosheri's first Opinion (pp. 255-278), which formed the major part of his argument. In this part, which Professor El-Kosheri himself chose to entitle "Response to the First Group of *Purely Legal Questions*"[3], he dealt with topics such as the binding

[3] Emphasis added.

force of contracts under "Arabo-Islamic legal traditions", the assimilation of treaties to contracts under traditional Islamic law, the simplified form of agreements and the analysis of a purely traditional Islamic legal concept of *sigha*. One cannot discuss these "purely legal questions" in a vacuum. This can only be done in the context of a particular legal system, and the only reference made by Professor El-Kosheri in this connection is to "Arabo-Islamic tradition" or "Arabo-Islamic legal traditions".

6. To take one important example. Professor El-Kosheri, in his attempt generally to deny any relevance to earlier drafts which show the evolution of the Minutes of 25 December 1990, reached the following conclusion in his first Opinion, which forms the crux of his argument on the *travaux préparatoires*:

> "As previously stated on various occasions (*supra*., paras. 19-30, and para 61) the Arabo-Islamic legal traditions (which are deeply rooted in both Bahrain and Qatar) do not confer any legal weight on the intention of the parties as manifested by the preparatory works covering a prior negotiation phase, since the interpretation of an agreement has to be based exclusively on the final text which embodies the concordant declaration of the parties. Accordingly the two drafts [the Saudi and Omani drafts] in question should be considered as having no *legal significance* whatsoever and no bearing on the interpretation of the final agreement as expressed in the signed Minutes dated 25 December, 1990" [4] (Para. 71 of Professor El-Kosheri's first Opinion, Qatari Memorial, Vol. II, p. 296).

As was shown in my first Opinion of 20 May, the above statement states inaccurately the rules of legal interpretation in both traditional Islamic law and modern Arab legal systems. The argument in my first Opinion that contemporary Arab international lawyers, Islamic law and the law of modern Arab States all allow recourse to *travaux préparatoires* as evidence of the

[4] Emphasis added.

common intention of the parties was set out in particular at paras. 13-31 thereof. Professor El-Kosheri makes no comment at all on my statements concerning Arab public international lawyers or the law of the modern Arab States; and with regard to the traditional Muslim scholars, he only seeks to question the views of 'Ibn al-Qaiyyem. It therefore really is not possible for Professor El- Kosheri to assert in para. 17 of his Supplementary Opinion that " ... in this case, where the text appears on its face to allow separate action, under Arabo-Islamic canons of interpretation one would not take into account earlier drafts of the same text".

7. Furthermore, one can only ask, in the light of what Professor El-Kosheri says in his Supplementary Opinion, how the statement at para. 71 of his first Opinion quoted above can be considered to be a matter of purely linguistic interpretation. The answer is quite simply that it cannot, since it is directly related to matters of legal interpretation, which can only be put forward when one in talking in the context of a particular legal system.

8. The second effect of Professor El-Kosheri's statement that he is only ever concerned with linguistic interpretation is the inconsistency it discloses in relation to the Qatari Reply of 28 September. There Qatar argues that in establishing the meaning of *al-tarafan* 'the real problem is a legal problem, *not a purely linguistic one*' (para. 4.64, p. 71).[5] Moreover, Qatar observes that 'the *purely linguistic* arguments cannot be decisive' (para. 4.72, p. 74).

[5] Emphasis added.

It is difficult to know how to comment upon such a manifest inconsistency between the Qatari Reply and the approach of Qatar's eminent Expert to this central problem of legal interpretation, other than simply to point it out.

9. The main premise upon which Professor El-Kosheri builds all his arguments and conclusions in the Supplementary Opinion has been set out as follows:

> "What provides the word in the text with its true meaning or value according to widely accepted rules on interpretation is its "connotation", i.e., its normal socio-cultural context, which was referred to in my first Opinion as "the Arabo-Islamic tradition" (para. 14 of the Supplementary Opinion).

The first point to be noted in this regard is that the expression "socio-cultural tradition" was not mentioned at all in Professor El-Kosheri's first Opinion, neither was it mentioned in the Qatari Memorial. Nevertheless, Professor El-Kosheri criticizes Bahrain's Consultants for not commenting on the so-called 'socio-cultural context' allegedly evoked in his first Opinion (para. 34 of the Supplementary Opinion).

The second point in this regard is that ideas such as "connotations" of a word and its wider "socio-cultural context" necessarily entail subjective elements of interpretation.

In advocating this new approach to interpretation, Professor El-Kosheri seems to be moving into areas of vagueness and subjectivity.[6] This is in

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[6] Jackson explains the distinction between the denotations of a word and its connotations by saying that: "connotations are far more indeterminate than denotations ... connotations may be subject to considerable variation from one generation to the next ... connotations may be rather subjective and not shared in the same way by all speakers of a language: our individual experience of language and its relation to the world is to some extent unique and idiosyncratic". Jackson, H., *Words and Their Meaning*, (1988), p. 59, Longman: London.

marked contrast to his first Opinion, where Professor El-Kosheri was adamant that interpretation according to the so-called "Arabo-Islamic legal traditions" 'should not go beyond the text itself taken as a whole or its necessary and objectively assessed implications ...' (para. 26 of Professor El-Kosheri's first Opinion). He reiterated that ' ... interpretation of an agreement has to be based *exclusively* on the final text which embodies the concordant declaration of the parties' (*Ibid.*, para. 71 of).[7]

10. Professor El-Kosheri suggests that I have said things that I did not in fact say concerning subjective interpretation. For example, he says in para. 18 of his Supplementary Opinion that I favoured the adoption of a subjective interpretation, 'thus giving weight to what one party alleges was its real understanding of a document', and that I have done this in order to disregard the objective approach which he allegedly favours. The fact is that I did no such thing. All I was concerned with was to show that Professor El-Kosheri's treatment of rules of interpretation in the so-called "Arabo-Islamic legal traditions" was flawed, and that what is important in legal interpretation is to ascertain and accurately to identify the common intention of the parties.[8]

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[7] Emphasis added.

[8] See paras. 20-31 of my first Opinion. As I pointed out, in Islamic and Arab laws,"interpretation has been defined as the procedure for identifying the common (joint) intention of the two contracting parties ... Furthermore, what is clear is that nowhere is it to be found that reference to *travaux préparatoires* in interpreting contracts is not admissible. The common intention of the parties can be deduced from all material evidence available to the court, including in particular the *travaux préparatoires*" (paras. 25 & 31 of my first Opinion).

C. SPECIFIC COMMENTS

11. Turning to more specific points of Professor El-Kosheri's Supplementary Opinion, it should be recalled that he observes that 'in order to understand the meaning of the Doha Agreement as an Arabic document' it is necessary to have 'recourse to the relevant linguistic traditions in a certain socio-cultural community'. And this, he emphasises, 'represents the correct linguistic approach' (para. 15 of the Supplementary Opinion).

In the light of this linguistic 'socio-cultural' approach to interpretation, Professor El-Kosheri embarks again upon the interpretation of one single word in the 25 December Minutes. The word which he holds, in his Supplementary Opinion, to 'be the key word as compared to the other words' in the second paragraph of the Minutes is "*yagouz*" (hereinafter *yajūz*). He adds that Bahrain's Consultants were silent on this important issue. But the fact is that the purely linguistic interpretation and examination of Professor El-Kosheri's statements, including that of the word "*yajūz*", was covered in Professor Badawi's linguistic analysis of the crucial sentence and was also comprehensively dealt with by Bahrain's linguistic Consultant, Dr. Holes.[9]

12. In paragraphs 25-30 of his Supplementary Opinion Professor El-Kosheri attempts to construe the "key word" "*yajūz*" in the 25 December Minutes. As mentioned earlier, he would have us interpret this "key word" in the light of the "socio-cultural tradition" -evidentally the Islamic and Arab social and

[9] See Bahraini Counter-Memorial, Vol. II, pp. 264-6, 293, 295-6.

cultural traditions to which Bahrain and Qatar adhere. Instead, he proceeds by positing that the Arabic word "*yajūz*", which he translates into English as "may", has 'the same connotation' (para. 26). Then he interprets the word "*yajūz*" in the light of a broad definition of the English word "may" from an American Professor who was, presumably, writing about legal definitions in the English language.

One wonders what happened to the "Arabo-Islamic socio-cultural traditions" and the connotations of the "key word" thereunder. Professor El-Kosheri's argument on the basis of the above definition of the word "may" is neither persuasive nor consistent with his basic premise.

13. As regards the interpretation of *al-Tarafan*, Professor El-Kosheri is again speculative and indeed inconsistent with his basic premise, because he attempts to deny the conjunctive nature of the action contemplated by resorting to a traditional Islamic law concept of "*Al-Ibaha*" (para. 32 of his Supplementary Opinion), which has no relevance to legal or linguistic rules of interpretation of contracts. "*Al-Ibaha*" is a concept used in traditional Islamic jurisprudence in the context of what is lawful and unlawful. In other words, *Al-Ibaha* is the name given to the principle which asserts that human conduct is lawful before God unless specifically proscribed: it operates in the behavioural and moral sphere. Not surprisingly, therefore, Professor El-Kosheri is not able to give any authority in support of his assertion in this context.

14. In para. 34 of his Supplementary Opinion, Professor El-Kosheri states that the

plural can mean the singular in Koranic usage, because 'the plural form' is used 'to express an action that could be taken by only one person, acting disjunctively'. He goes on to state that Bahrain's experts 'have not taken into account the supporting legal literature on this point, which I referred to in my first Opinion of January 1992, particularly the long quotation from Savvas Pacha'. I cannot speak for Bahrain's other experts, but the reason I did not refer to Professor El-Kosheri's quotation from Savvas Pacha in my first Opinion is that it is completely irrelevant to the matter at issue. The quotation is a reflection on the meaning of the verse "Oh ye who believe! Fulfil your undertakings!"[10] in the Koran, which have been taken as a maxim by Muslim scholars, and which has much in common with the Western legal concept of *pacta sunt servanda*.

15. Savvas Pacha appears to be saying something with which few would disagree: the obligation to fulfil contractual undertakings applies not only to the community of believers as a whole, but to every individual believer; likewise, it applies to each and every contractual undertaking which a believer assumes. The quotation from Abou Al-Wafa in para. 40 of Professor El-Kosheri's first Opinion would appear to be making the same point. I cannot see what possible light either quotation sheds on the interpretation of the 1990 Minutes.

16. In his Supplementary Opinion as was the case in his first Opinion, Professor El-Kosheri seems to confuse two separate, although not unrelated, issues,

[10] Koran V:1 (Pickthall's translation).

namely, the rules of Arabic grammar and the question of legal and linguistic interpretation. For example, after explaining what he considers 'the latest scientific methods' of interpretation, Professor El-Kosheri points out that the Koran 'remains always the central authoritative pivot and the final point of reference as to what is grammatically right or wrong in Arabic' (para. 42 (3) of his Supplementary Opinion).

17. As to the Koran being the authoritative reference for testing Arabic grammatical models and constructions, this is undisputed. But the disputing parties in the present case are not in disagreement as to the grammatical correctness of the 25 December 1990 Minutes. Their disagreement is centred on the true legal interpretation of a correctly constructed sentence, i.e., the second paragraph of the 1990 Minutes.

18. It is axiomatic, however, that interpretation, whether linguistic or legal, is a system of thought unique to the discipline within which it is applied, and even within the same discipline, approaches to questions of interpretation of ideas, language and words can vary widely. The interpretation of Arabic language and words is no different in this respect. Thus, differences and disagreements between Muslim scholars and jurists are well known. Moreover, these controversies were not peculiar to jurists, but were known to exist among Koranic exegetes as well.[11]

[11] See, e.g., al-'Ak (Kālid 'Abd al-Rahmān), *'Usūl al-Tafsir wa Qawā'iduh*, 2nd ed., 1987, Dār al-Nafā's: Beirut.

19. One of the fundamental reasons for the above-mentioned disagreements centred on the interpretation of language. Ibn Khaldūn, for example, in his famous and authoritative work *al-Muqaddimah*, referred to one of the reasons for the disagreement which existed amongst early jurists. He attributed their differences to disagreements on interpreting the authoritative texts (notably the Koran). He continued: '[t]he texts are in Arabic. In many instances, and especially with regard to legal concepts, there are celebrated differences among them as to the meaning implicit in the words'.[12]

20. More recently, Dr. al-Turki, Director of the Islamic University of Muhammad bin Sa'ūd in Saudi Arabia, observed that the reasons for disagreement among Muslim jurists are numerous: "Islam was revealed in Arabic. And many of the differences in adducing rules and interpreting them were due to the *differences in language and its interpretation.*"[13]

21. Therefore, Professor El-Kosheri's proposition that Arabic language is understood in the same manner by all Arab speakers and that its rules of interpretation are uniform and linear, because the Koran provides the correct grammatical reference, is highly debatable. In any event, neither he nor Professor Ayyad has produced any evidence based on the Koran which

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[12] Ibn Khaldûn, *The Muqaddimah: An Introduction to History*, p. 3, vol. 3, 1958, (translated from the Arabic by Franz Rosenthal), Routledge & Kegan Paul: London.

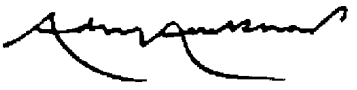
[13] al-Turki ('Abdullah bin 'Abd al-Muhsin), Director of the Islamic University of 'Imām Muhammad bin Su'ūd, *'Asbāb 'Ikhtilāf al-Fuqahā'*, pp. 2-3, 1977, Maktabat al-Riyyad al- haditha: Riyyad.

indicates that the sentence in the second paragraph of the 25 December 1990 Minutes allowed either party to proceed with a unilateral application.

D. CONCLUSION

22. In conclusion, I remain convinced that my first Opinion of 20 May 1992 represents the correct view on all the legal issues examined therein.

Adnan Amkhan



Old College,
University of Edinburgh,
7 December 1992.

Annex 1.10

Supplementary Opinion by Professor E. Badawi.

See text above, note 62 to para. 5.09 and note 69 to para. 5.14.

SUPPLEMENTARY LINGUISTIC OPINION

by Dr El Said M. Badawi,
Professor of Arabic Language and Linguistics
and Director of the Arabic Language Institute,
The American University in Cairo, Egypt

A. General

1. On 22 May 1992 I submitted an Opinion on interpreting the minutes of a meeting held between the Ministers of Foreign Affairs of the State of Bahrain and the State of Qatar and the Kingdom of Saudi Arabia, dated 25 December 1990. This Opinion was included in Volume II, Annex II, pp.257-284 of the Counter-Memorial submitted to the International Court of Justice by the State of Bahrain on 11 June 1992.

2. This Opinion of mine was responded to by Professor A. El Kosheri and Professor Shukry Ayyad, experts for the State of Qatar, in their Supplementary Opinions dated 16 September 1992 and 17 September 1992 respectively and annexed to Volume II of the Reply submitted by the State of Qatar on 28 September 1992 to the International Court of Justice and appearing on pp.77-115 of that volume.

3. In their Supplementary Opinions the two eminent professors not only made certain assertions with which I do not agree but, perhaps more significantly, declined to respond to important arguments advanced in my previous Opinion.

4. The following is in answer to these two Supplementary Opinions, in this order: first Professor Ayyad's, and secondly Professor El Kosheri's. I also deal, at paragraphs 21-22, with certain linguistic arguments contained at paragraph 4.73 of the Qatari Reply.

5. Page references in this present Opinion are to the respective volume of the pleadings before the Court in which the earlier Opinions occur. The first Opinions of Professors El Kosheri and Ayyad are in Volume III of the Qatari Memorial, and their second (or supplementary) Opinions are in Volume II of the Qatari Reply. My first Opinion and the Supplementary Opinion of Dr Holes are in Volume II of the Bahraini Counter-Memorial.

B. Comments on Professor Shukry Ayyad's Supplementary Opinion

6. A large section of Professor Ayyad's Supplementary Opinion is devoted to grammatical discussions, some of which are the repetition of arguments advanced in his previous Opinion (and subsequently answered) and some are self-justifying in the face of criticism levelled against him by the Bahraini experts, but none of this grammatical discussion has a direct bearing on the interpretation of the minutes under discussion.

7. I will, therefore, deal only with three points which I believe address real issues in the wordings and interpretation of the Minutes. These are:

(i) The meaning of al tarafān ("the two parties") in the various Arabic documents.

(ii) The role of the verb yataqaddam ("move forward/move towards") in the crucial sentence.

(iii) The absence of response to certain key issues in my previous Opinion.

8. Treatment of these is as follows:

(i) The use of the word al tarafān ("the two parties") throughout the documents attached to the Qatari Memorial

9. In my previously submitted Opinion I presented the results of a survey I carried out on the use of the word al tarafān throughout over fifty Arabic documents generated by the two States during their negotiation and which were attached to the Qatari Memorial with an English translation completed by the Qatari side. The result of that survey as presented in my Opinion was as follows:

> "In all these occurrences the word al tarafān is used in the basic sense of the dual and whenever there is a question of action it always applies jointly and uniformly to the two parties. Not even once does there occur a single qualification to alter this uniform use of the word al tarafān". pp.268-9.

10. In his Supplementary Opinion Professor Ayyad challenged this conclusion of mine by describing it as "simply not true". (p.111).

11. In support of this view, Professor Ayyad cited first an example from the above-mentioned documents (pp.111-2) and rendered it into English using his own translation, thus:

> "The `two' parties pledge to abstain from all information activities directed against the other party ..."

12. With no further argument or additional evidence, other than his own translation, he concluded that:

> "These clauses used the plain dual form where what is intended is "each party". p.112.

13. Then he added:

> "No other evidence could be more detrimental to Professor Badawi's allegation, nor to his supposition (p.11-2) that if unilateral action had been intended, the crucial sentence in the 1990 agreement should `inevitably' have used an explicit expression such as ayyun min al tarafayn (either of the two parties.)"

14. Professor Ayyad used two more examples from the above documents (see below) but was content with a

mere translation of his own. He made no attempt to analyse them in any way.

15. In fact, Professor Ayyad's own translation of the three examples offers no support for his claim.

16. We can, with justification, turn Professor Ayyad's argument around by simply saying: what was in fact "intended" by the wording of the first example was to pledge joint action uniformly and jointly by the "two parties". But there is more to the sentence than just that. The act of pledging in the sentence has to be jointly concluded by the <u>two parties</u>, not merely by each one on its own. There was no suggestion that one party might pledge and the other might not. In fact the <u>togetherness</u> is of the essence if such a pledge, to be undertaken by the two parties to refrain from all propaganda activities against one another, could be worth anything. The fact that such a pledge could also be described by using an alternative form of words which might incorporate the words "each one" is immaterial here. Whatever form of words is used must make it clear that the pledge applies to <u>both</u> parties, or it would change the meaning. I note, however, that Professor Ayyad makes no suggestion that the words "either party" (or "each one" used in the sense of "either party") might have a role to play in any such wording.

17. The same idea of togetherness and uniformity of treatment is at the heart of the other two sentences cited by Professor Ayyad. The first is:

> " ... especially those [letters] which were exchanged between Your Majesty and the `two' parties", (p.112) (Professor Ayyad's translation) [Emphasis supplied]

18. This referred to correspondence not just between the King and <u>one party</u>, but between the King and <u>both</u> parties. There was no suggestion that the King might have exchanged letters with one party and not with the other.

19. In the third example,

> "... by which the rights of the `two' parties are held intact" (p.112)

20. it is clear that whatever holds the rights of the two parties intact should act uniformly for <u>both</u>, not just for one or the other. A similar idea could also be phrased differently, by using the expression "each party" so long as the meaning "both" was safeguarded, but not by using the words "either party" (or "each party" in a situation where they would be taken to carry the sense of "either party").

21. It would not be necessary to say more, but for the fact that paragraph 4.73 of the Qatari Reply

attempts to make the same point on the basis of undertakings contained in the Mediation Principles of 1978 and the letter from King Fahd to the Amir of Qatar of 19 December 1987. These examples are (in Qatar's translation):

(i) "The Parties shall undertake to refrain ... from engaging in any propaganda activity against each other ..." (paragraph 3(a) of the Mediation Principles).

(ii) "The Parties shall undertake to refrain from carrying out any act that would impede the course of negotiations ... " (ibid, paragraph 3(b) - this is referred to, but not quoted in paragraph 4.73 of the Qatari Reply).

(iii) "The Parties shall undertake not to present the dispute to any international organisation" (ibid, paragraph 3(c)).

(iv) "The Parties undertake to refrain from to date from any media activities against each other" (paragraph (b) of the second item of the letter from King Fahd of 19th December 1987).

22. In all the above examples, the Arabic for "the Parties" is al-tarafān, and therefore both parties are intended. I would have thought it crystal clear

that in each case the undertaking is by both parties together, and that by no stretch of the imagination could it be argued that the text only contains an undertaking by one party and not by the other as well. It may well be possible to express a similar meaning in a form of words which uses the expression "each party" - but the form of words chosen would need to make it clear that the undertaking was by both parties together, otherwise it would change the sense. I note that there is no suggestion that a similar meaning could be conveyed using a form of words including "either party". I do not think that these examples or the views of Professor Ayyad discussed above help Qatar in its argument that paragraph 2 of the Minutes of 25th December 1990 allowed either party to submit the case to the Court on its own.

(ii) The role of the verb yataqaddam ("move towards/ move forward") in the crucial sentence

23. In his first Opinion, Professor Ayyad described the verb yataqaddam as both the "main verb" within the verbal group yataqaddam ... bitarḥ ("move towards submitting") and stated that it "has not lost its initial meaning by being used idiomatically in the phrase: yataqaddam al ṭarafān bitarḥ al mawḍūç" (p.321-322) ("the two parties move towards submitting the matter").

24. Subsequently, in my first Opinion, I objected to his editing out the value of the verb yataqaddam ("move towards/move forward") from the English translation, basing my objection on the fact that such an omission is not commensurate with his own analysis of the sentence. I also objected in particular to his describing the verb as the main one (my first Opinion p.279). Professor Ayyad justified his action in his opinion by stating that the verb yataqaddam "vanish[ed]" (!) from the translation p.114. He went further to restate his position as follows:

> "In my original opinion I have just hinted at the presence of this word `yataqaddam', because I could get along with my argument without its support". p.114.

25. Having described the verb yataqaddam ("move forward/move towards") as the main one within the verbal phrase, it is not justifiable to ignore its value when making an argument based upon that particular verbal phrase.

26. "To submit", therefore, remains an insufficient translation for the verbal group yataqaddam ... batarh. Professor Ayyad, after some protests, ends this time by offering "move forward" as a translation for the verb yataqaddam but denies that such an expression implies a protracted action, basing his denial on the claim that "there is no clue either in the text or in the situation to this

connotation", (p.114). Having come thus far it cannot be denied that there is a difference on the time axis between just "to submit" and "to move forward to submit".

27. As for the "temporal connotation ... imply[ing] a protracted span of time" (ibid), in the words of Professor Ayyad, it is definitely there in the crucial sentence. The sentence points to the Bahraini Formula and the steps/procedures commensurate with it as the basis according to which the two sides will jointly move forward to submit the case to the ICJ, if, after May 15, 1990, they decide to turn to it (see my first Opinion, pp.264-272).

28. The choice of the verbal group in "the two parties may move forward to submit the case to the ICJ" instead of the simple verb "the two parties may submit the case to the ICJ" heralds and harmoniously moulds in with the suggestion that further action was envisaged before submission.

(iii) <u>The absence of response to certain key issues in my previous Opinion</u>

29. Professor Ayyad, unlike Professor El Kosheri, recognised the existence in my Opinion of "a splendid graphic description of the sentence under discussion" pp.113-4. But instead of refuting the

basis upon which the schematic diagram was built or challenging the reasoning that led to its ultimate conclusions, he avoided the whole issue by simply accusing me of failing to put my own description to use, (p.114).

30. A simple review of my Opinion would show that, contrary to what Professor Ayyad has claimed, extensive use had been made of that schematic analysis of the crucial sentence all through the Opinion (Bahraini Counter-Memorial, Volume II, pp.264-272). Significance, therefore, will have to be attached to the failure of both Professors Ayyad and El Kosheri to challenge that analysis or seriously query it. Indeed, they seem to have been unable to produce any competing analysis.

31. Professor Ayyad has never claimed, as Professor El Kosheri did, that the feminine pronominal suffix ha refers to the masculine tarh or that a dual inflection may be added to the verb yataqaddam which precedes its dual subject, al tarafān. Yet his silence on these issues and his denial of assistance, being the language expert, to Professor El Kosheri, in the latter's defence of an untenable position, must surely suggest that he agrees with Bahrain's experts on these elementary but crucial points. Professor El Kosheri's insistence on holding his position on these issues in the face of

overwhelming evidence to the contrary cannot be accepted.

32.C. Comments on Professor A. El Kosheri's Supplementary Opinion.

My comments address the following issues:

(i) Misrepresentation of Bahrain's experts' views, mine included.

(ii) Taking a liberty with grammatical rules and alleging the significance of punctuation in the Koran and Modern Arabic.

(iii) The "key word" in the crucial sentence.

(iv) The lack of response to certain key issues.

Treatment of these is as follows:

(i) Misrepresentation of Bahrain's experts' views

33. I noted with surprise that Professor El Kosheri attributes to Bahrain's experts, including myself, views which were never expressed by them. I wish here to speak only for myself and so will give two examples of the more serious misrepresentations of my own views:

(a) Professor El Kosheri claims that the various experts now accept that it does not matter in English whether al tarafān is translated as "the parties" or "the two parties" (p.82, para 5 and p.83, para 8).

(b) He also claims that "it appears no longer disputed that al tarafān in the Arabic language does not imply per se conjunctive action" (p.93, para 31 and p.84, para 11.B).

34. All through my Opinion I made it absolutely clear that it is absolutely necessary when translating a dual noun into English that the word two should be used before the English plural (see, for example, my example of the "two tanks" on p.275). The only instance in which "two" would not necessarily be used before the English plural, when an Arabic dual is translated into English, would be when the context is indisputably clear that only "two" are intended (such as in a reference to "my parents"). Nowhere in my opinion did I give the slightest suggestion that "it does not matter (sic) in English whether 'al tarafān' is translated as 'the parties' or 'the two parties'."

35. Similarly I have maintained throughout my Opinion that whenever there is action attributable to a dual noun the action applies, in the absence of any qualification to the contrary, jointly and uniformly to the two parties (eg. ibid, pp.268/9).

36. What makes statements by Professor El Kosheri such as those quoted above more disturbing is the fact that he uses them as stepping stones to reach some of his unacceptable conclusions, viz. that the two states are free to apply separately to the ICJ.

(ii) Disregard for grammatical rules and the alleged significance of punctuation in the Koran and Modern Arabic

37. The use Professor El Kosheri makes of Arabic grammar is rather innovative:

(a) In his Supplementary Opinion he calls for adhering religiously to the rules of the Arabic grammar because, as he puts it:

> "All rules of Arabic grammar were established two centuries after the revelation of the Koran, ... as the main reference and ultimate test for the correctness of a given linguistic formulation in Arabic and to indicate what should be understood by the wording used in a certain document in Arabic" (p.86).

(b) He further narrows his terms of reference to the model provided by the Koran as, in his words:

> "the model provided by the Koran constitutes the ultimate criterion to

determine the true meaning of a particular linguistic usage". (ibid)

(c) However, in practice Professor El Kosheri shows very little respect for the rules of the very grammar to which he attaches so much importance. In this respect he not only keeps disregarding the established rules of grammar (eg. his insisting, among other things, on having the feminine pronominal suffix hā referring to the masculine noun tarḥ in violation of the grammatical rules of the language of both the Koran and Modern Arabic) but he also, with some originality, makes up his own grammatical rules as he goes along.

38. The latest example of this type of grammatical invention rule is his claim that:

> "The best antecedent rule does not apply as a rule of grammatical construction in the present context (ie. the rule on which Bahrain's consultants rely to show that the phrase "proceedings arising therefrom" relates to the Bahraini Formula), since the said rule requires for its operation that the several antecedents are separated by commas, and in the Arabic original text of the Doha Agreement there are no such commas". (ibid, p.96.)

39. Surprisingly, Professor El Kosheri cites as authority for this so-called rule an English text on legal drafting in the English language. He surprises us further by trying to apply that rule of

English not merely to the language of, say, Arabic newspapers but to nothing less than the language of the Koran itself. He says, "the rule applies a priori with regard to the language of the Koran where punctuation plays a vital role" (p.96, note 5).

40. The Koran was revealed to the Prophet Mohammed and recorded in the Arabic writing system of his time. The writing of the Koranic text has since passed through various stages but not at any stage, including the present time, have commas, question marks, periods, colons, semi-colons, exclamation marks or any similar signs ever been used anywhere in the Koran. To insert such punctation marks would involve interference with the text.

41. As for Modern Arabic, "the use of punctuation is attributed to Ahmed Zaki Pasha (1867-1934)", (states Said A. Nagy on page 52 of his MA thesis "The role of punctuation in Arabic writing in Egypt", American University in Cairo, 1990) "who, in 1912 or 1913, was the first one to introduce punctuation marks into Arabic according to the system practised in European languages". The results of the empirical research which Mr Nagy carried out for his thesis clearly show that the punctuation marks (including commas), when they are used at all, are often haphazardly applied. The rule suggested by Professor El Kosheri just does not exist.

(iii) The key word in the crucial sentence

42. Contradiction is noted in Professor El Kosheri's choice, at two different times, of what he considers as the key word in the crucial sentence.

43. In his Opinion submitted on 26 January 1992, Professor El Kosheri nominated the word "Aalyha" (his own spelling) as the most important one in the sentence. On page 274 he says:

> "However, for the correct understanding of the entire text , the focus should be more precisely on the final word: `Alayha' in order to determine what should be construed as being referred to in 'therefrom ... etc.'"

44. Professor El Kosheri moved from there to argue that the reference of the feminine pronominal suffix hā in the "focus word "ʿalayhā"" is to the masculine noun ṭarḥ ("submission"). If correct, such linkage may then be used to suggest that al'ijrā'āt ("the procedures/steps") in the crucial sentence are meant to be those of the Court (as Qatar claims) and not those resulting from adhering to the Bahraini Formula.

45. When this attempt by Professor El Kosheri to refer to a masculine noun as feminine was destroyed by the Bahraini consultants (eg. my first Opinion, pp.266-267 and 280-282) and the house of cards built upon

that linkage crumbled, Professor El Kosheri, in his Supplementary Opinion dated 16 September 1992, removed the word 'alayhā from centre stage in favour of yaqouz, a word receiving hardly any attention from Professor El Kosheri in his first Opinion. In his Supplementary Opinion he wrote a section on the word yaqouz itself. On page 91 he declared that:

> "This emphasis could only mean that the word yaqouz was considered as the key word as compared to the other words included in that sentence".

46. Professor El Kosheri even accuses the Bahraini consultants of ignoring the "key word" yaqouz:

> " ... in spite of the fact that a substantial part of the analysis in [his] first Opinion focused thereon". (p.89)

47. I went through Professor El Kosheri's first Opinion several times looking for this "substantial part" of his analysis but I could only find two minor references to yaqouz on pages 286 and 298. In neither of the places was yaqouz described as a key word or even assigned a key role.

48. On the other hand, Dr Holes in his Opinion (pp.295-6), contrary to what Professor El Kosheri has asserted, devoted more space to yaqouz than that assigned to it by Professor El Kosheri. For myself, I included it into my sentence scheme on pp.264-5.

49. But what I consider to be of great significance is Professor El Kosheri's effort to downgrade the role of 'alayhā in his Supplementary Opinion after having, in his first Opinion, accorded it a decisive role not only in the crucial sentence but the decisive role "for the correct understanding of the entire text". (Professor El Kosheri's first Opinion, p.274.)

(iv) The lack of response by Professor El Kosheri to certain key issues in my Opinion

50. At the heart of my Opinion was the conclusion that:

> "Joint application indicated by the crucial sentence is a function of several of its components balanced together in a state of interdependence in spite of the fact that the notion of "togetherness" is inherently associated with al tarafan in particular. Any attempt at altering or misinterpreting one component is bound to render the entire sentence meaningless". p.272.

51. This conclusion was the function of a contextual analysis of the semantic-grammatical components of the crucial sentence as constituting a single unit of meaning, which analysis was followed by supporting linguistic reasoning stretching from page 264 to page 272.

52. Professor El Kosheri never challenged this analysis of the crucial sentence. In fact, he went along with some of its conclusions. For example, he changed, without saying why, his translation for the verb group yataqaddam ... bitarh from just "to submit" as he regularly rendered it into English in his Opinion (eg. pp.274, 277, 286) to "move forward to submit" in his Supplementary Opinion (eg. pp.94, 95).

53. The latter translation of the verb group is important for the comprehensive analysis of the crucial sentence in which the element of time protraction is present. This suggests to me that the parties acknowledged that there were further steps to be taken by the parties after May 1991 before submission to the Court.

El Said Badawi
Professor
The American University in Cairo
Cairo

El Said Badawi

30 November 1992

Annex 1.11

Supplementary Opinion by Dr. Clive Holes.

See text above, note 62 to para. 5.09 and notes 68 and 69 to para. 5.14.

Second Supplementary Opinion

by Dr. C.D. Holes

Faculty of Oriental Studies & Trinity Hall
University of Cambridge
United Kingdom

1. On 7 August 1991 I gave an opinion on the meaning of the Minutes of a Meeting between the Foreign Ministers of the State of Bahrain, the State of Qatar and the Kingdom of Saudi Arabia, signed and dated 8.6. 1411 A.H., corresponding to 25 December 1990. This was attached as an annex to a letter from the Foreign Minister of Bahrain to the Registrar of the International Court of Justice of 18 August 1991. This first opinion was transmitted to the Government of the State of Qatar, and commented on by two experts appointed by that Government, Professors El-Kosheri and Ayyad in their opinions contained in Annex III to the Memorial of the State of Qatar of 10 February 1992. In a supplementary opinion dated 12 May 1992, and contained in Volume II, Annex II of Bahrain's Counter Memorial, I set out my views on their comments. In turn, the Qatari experts replied to this supplementary opinion in Volume II of Qatar's Reply, dated 28 September 1992. The present second supplementary opinion is a reply to the Qatari experts' reply of 28 September. In it, I shall attempt to elucidate, in as succinct and non-technical a manner as possible, the linguistic points at issue.

2. The crux of the matter is the interpretation of the meaning of the sentence in the Minutes which states that the 'two parties', Bahrain and Qatar, may 'submit the matter' to the ICJ in the event of their not being able to reach a satisfactory solution. The linguistic dispute between the Bahraini and Qatari experts revolves around whether the original Arabic of the sentence which licenses the 'two parties' to 'submit the matter' to the ICJ means that either of them may do so independently of the other (the Qatari view), or whether it means they may only do so jointly (the Bahraini view).

(I) THE CORRECT INTERPRETATION OF THE DISPUTED SENTENCE IN ITS CONTEXT

3. I turn first to the question of whether conjunctive or disjunctive action by 'the two parties' is envisaged by the Minutes. There are two main points to be made here:

(a) The distinction between 'conjunctive' (or 'joint') and 'disjunctive' (or 'independent') action

4. Out of context, some dual expressions, whether in Arabic or any other language, can often support a conjunctive or a disjunctive interpretation. The sentence 'Both men went to London' avers only that both men went: we do not know, in the absence of a context, whether they went together ('conjunctively') or separately ('disjunctively'). Yet even when a disjunctive use occurs, it is important to remember that the dual applies to both. 'Both men went to London' cannot be held to mean 'one of the two men went to London'. To say 'one of the two men went to London' is not a disjunctive use of the dual: it is a sentence with a singular, not a dual subject. Bahrain and its experts have always been consistent about these aspects of the dual, but the Qatari experts seem to think (Prof. El-Kosheri's Supplementary Opinion, para. 11B) that the onus is on the Bahraini side to 'prove' conjunctivity which Prof. El-Kosheri believes must be specially indicated linguistically. He appears to stretch this to the point where, unless conjunctivity has been proved (ibid., paras. 32-5), the dual can effectively mean one or other of the pair of tokens which make up the dual noun. This is an unsupportable assertion. In practice it is the conjunctive interpretation which is the normal interpretation in legal Arabic of *al-ṭarafān* 'the two parties', as I made clear in my original Opinion and its Appendices, and as I shall further elucidate below.

(b) Contextual and other factors which clarify the meaning of the word.

5. The interpretation of the meaning of the dual expression depends on four (sometimes overlapping) factors:

(1) Factors outside the text in which the word occurs.

(1.1) 'Knowledge of the world'

6. The sentence 'The two princes Charles and Edward attended Cambridge University' illustrates that it is perfectly possible for a dual noun and its verb to have a disjunctive interpretation. Some of us may know that the two princes did NOT attend at the same time, although there is nothing about the grammar of the English sentence (or its Arabic translation) which indicates this, as I pointed out in my first opinion. Imagine now an English-speaking Martian visiting the earth in 1992. He would not know, unless we told him, that the event described in the 'royal princes'

sentence was disjunctive, rather than conjunctive. But what the sentence WOULD tell the English-speaking Martian, without any shadow of a doubt, is that the TWO of them attended the university; the sentence could never be interpreted by an English speaker (or by an Arabic speaker reading an Arabic translation of it) as meaning that one attended and the other did not. Likewise, the sentence 'the two parties may submit ...' in the disputed sentence, whether we read it in English or Arabic, can only mean that it is the TWO parties, and not just the ONE, which 'may submit...'. Thus, the two parties are both necessarily involved in the action.

(1.2) Logic

7. On grounds of logic, an action like 'agree' is necessarily interpreted as conjunctive in ANY context when predicated of 'two (or more) parties', whereas some other kinds of actions like 'attend Cambridge University' may be conjunctive in a given context but cannot be assumed to be always necessarily so. In the disputed sentence in the Minutes of 25 December 1990, the 'two parties' are envisaged as submitting 'the matter' (in the singular, signifying there is only one 'matter'), NOT 'the matters' in the plural. Given that the text specifically grants permission to the TWO disputants (and NOT to 'either of the two') to submit a SINGLE 'matter' (not more than one) of joint concern, it is difficult to see how the intention behind the wording can be interpreted as having been fulfilled if, in the event, just ONE of them goes ahead and INDIVIDUALLY submits this single 'matter' without any reference to the other. This is a point which concerns what is logically entailed by the words used in the text. We now turn to what is normal in the text of Arabic legal documents.

(2) Textual factors

(2.1) Consistent usage in different texts

8. Any individual example of a specialised text (legal, scientific, medical, etc.) does not exist in a vacuum: it exhibits patterns of linguistic usage which are typical of its genre, and which will be found in other texts of the same type. A legal document of a particular kind, for example, is normally written in conformity with a set of accepted linguistic usages and associated meanings which are particular to that type of document, and which have gained general acceptance among lawyers. The meaning of the words of which an individual document is composed, in other words, must be interpreted in the same way as the same words in other documents of the same genre

are interpreted, unless there is any special or compelling evidence to the contrary. One of these linguistic conventions in the Arabic of legal documents, as I attempted to show by reference to two international bilateral agreements in Appendix D to my original opinion (which was submitted to the Court as Attachment 5 of the letter of the Bahraini Minister of Foreign Affairs of 18 August 1991), is that, where independent action by one or other of two parties is being licensed, the use of the ordinary dual 'the two parties' (as in a sentence containing a verb like 'submit': see (1.2) immediately above) is routinely avoided by using a phrase meaning 'either of the two parties'; otherwise, 'two parties' acting means exactly what it says - BOTH acting, not unilaterally and independently of each other, but together. The wording of the text of the Minutes of the Meeting of 25 December 1990 must therefore be interpreted in the way that the same wording in other documents of the same type would be interpreted: it licenses the TWO parties to (jointly) seek a solution to their problem at the ICJ. In his first opinion, Prof. El-Kosheri queried only one of the examples which I had cited from the bilateral agreements in Appendix D to my opinion (see the Qatari Memorial, Vol. III, pp. 290ff). I refuted his argument in my second opinion (see the Bahraini Counter-Memorial, Vol. II, pp. 294-5). Prof. El-Kosheri has not made any further comment on this point in his Supplementary Opinion.

9. On p. 111-2 of Volume II of the Qatari Reply, Prof. Ayyad attempts to rebut Prof. Badawi's, and my, grammatical analysis by showing (correctly) that the straightforward dual *al-ṭarafān* 'the two parties' and the expression *kullu ṭarafin* 'each party' are often used interchangeably with no discernible difference in meaning in certain sentences in legal documents where the action predicated of them is 'pledge(s) not to ...' *Ergo*, Professor Ayyad argues, since *kullu ṭarafin* 'each party' can mean the same as *al-ṭarafān* 'the two parties', in certain circumstances, it is not necessary for the phrase *'ayyun mina l-ṭarafayni* 'either of the two parties' (which in Professor Ayyad's view is identical in meaning to *kullu ṭarafin*) to be used in the disputed sentence in order for a disjunctive interpretation to be sustainable. In short, he is arguing that in many cases 'the two parties' equals 'each of the two parties'. In sentences like 'the two parties undertake...', I do not disagree. But he then goes on to imply that 'either of the two parties' equals 'each party'. This is self evidently not the case. The phrase *'ayyun mina l-ṭarafayni* ('either of the two parties') DISTRIBUTES permission to act to EITHER ONE OF THE PARTIES WITHOUT REGARD TO THE OTHER; but *kullu ṭarafin* ('each party') does not - it says that 'each' (or 'both') will have permission, i.e. it does not separately distribute permission, but rather CONJOINS permission so that it relates to both parties at once. The reason, in other words, why

in Prof. Ayyad's examples given at pp. 111-2 of Volume II of the Qatari Reply (and the examples referred to in the text of the Reply itself at Volume I, para. 4.7.3, pp. 75-6) *al-ṭarafān* 'the two parties' and *kullu ṭarafin* 'each/both party(ies)' can be interchanged is that both expressions envisage BOTH entities as acting, whereas '*ayyun min al-ṭarafayni*' ('either of the two parties') specifically indicates the possibility of one acting but not the other. Prof. Ayyad's examples are hence irrevelant to the issue: to prove his point, what he would need to provide are examples where *al-ṭarafān* ('both parties' or 'the two parties') and '*ayyun mina l-ṭarafayni*' ('either of the two parties') are interchanged in the same sentence without any change in meaning. He cannot of course do this, because they do NOT mean the same thing, in legal, or, for that matter, any other types of document.

(2.2) Consistent usage inside a given text

10. Any text must be internally coherent if it is to be meaningful. This is an assumption which all readers bring to any text they read. One aspect of internal coherence is lexical: if, in a text, there are repeated references to 'John', to 'Arsenal Football Club', or to King Fahad as the guardian of the 'the Two Holy Places', the reader assumes that it is the same 'John', the same 'Arsenal', the same 'Two Holy Places' which are being referred to on each occasion the word or phrase is used, and not some other 'John', some other 'Arsenal' or some other 'Two Holy Places'; and, more specifically in the last case, that 'Two Holy Places' always means 'two' and not 'one' in some cases and 'two' in others. As a rule, in other words, if the same lexical item, or the same phrase is used repeatedly in the same text it is assumed to have the same referent in the real world. If the phrase 'the two parties' is used three times in the same document, as it is in the Minutes of 25 December, it must be assumed that the reference is to the same two entities in all three cases, and means the same in all three cases. By the same token, if only 'one party' or 'either party' was the intended meaning in any of the three cases, then a different form of words would have been used to signify that.

11. The disputed sentence in the Minutes of the Meeting of 25 December 1990, has a quite unambiguous meaning in context, because of the Arabic legal-linguistic intertextual factors (2.1) and document-specific intratextual factors (2.2) I have mentioned above. This meaning is that the two parties are licensed by the wording to approach the ICJ jointly to settle their dispute, and they are not licensed so to do individually.

(II) OTHER POINTS ARISING OUT OF THE SUPPLEMENTARY OPINIONS OF QATAR'S EXPERTS

12. The disputed sentence runs in Arabic:

> *'wa yajūzu ba'da ntihā'i l-fatrati l-madhkūrati 'an yataqaddama l-ṭarafāni bi ṭarḥi l-mawḍū'i 'ala maḥkamati l-'adli d-dawlīyati binā'an 'ala ṣ-ṣīghati l-baḥraynīyati llati qabilatha dawlatu qaṭar...'*

13. This can be translated idiomatically as follows:

> 'After the said period, the two parties may submit the matter to the ICJ in accordance with the Bahraini Formula, which the State of Qatar has accepted.'

14. However, because of certain points raised by Qatar's experts concerning the verb *yajūzu* ("*yagouz*"), it is important to realise that the permission contained in the verb 'may' of the idiomatic English translation is carried by an impersonal verb in the Arabic text, and therefore a more literal (if slightly less elegant) translation is as follows:

> 'After the said period, it may be that the two parties submit the matter to the ICJ in accordance with the Bahraini Formula which the State of Qatar has accepted.'

15. It is my view, spelt out at length in my first supplementary opinion of 12 May 1992, that the Qatari experts' grammatical analysis of this sentence in the Memorial of 10 February 1992, and in particular of the underlined expressions *yajūzu...'an* '(it) may be... that ' and *yataqaddama l-ṭarafāni bi ṭarḥi l-mawḍū'i* 'the two parties submit the matter' is completely erroneous. Since Professor El-Kosheri merely repeats the same grammatical errors in his opinion of 28 September as he made in his previous opinion, perhaps I may be permitted to once more restate some basic facts about Modern Standard Arabic grammar and correct some of Professor El-Kosheri's inaccuracies:

16. (i) (Prof. El-Kosheri's para. 30) Syntactically speaking, the impersonal verbal expression which begins the sentence *yajūzu...'an* '(it) may be... that' governs the whole of the rest of the sentence: that is, it has the effect of putting the WHOLE, NOT

PART of the subsequent proposition, 'the two parties submit the matter...' into the realm of 'what may be/ what is permissible' (or, to adopt Professor Ayyad's preferred and felicitous formula, 'what is licensed'). Grammatically, *yajūzu...'an* in this sentence cannot arbitrarily be said to have the effect of 'licensing' just one side to 'submit the matter...' independently of the other, in violation of the normal rules of grammar: it licenses just that, and only that, which is in the subordinate clause which follows it, viz. that 'the two parties' may 'submit the matter...'. If the subordinate clause were to have the meaning which Prof. El-Kosheri would like to attribute to it, then the formula *'ayyun mina l-ṭarafayni* 'either of the two parties', commonly used for this meaning in legal documents, as I exemplified in the Appendix to my original opinion of 7 August 1991, would have been used in the subordinate clause after *yajūzu...'an*, rather than *al-ṭarafāni* 'the two parties'.

17. (ii) Prof. El-Kosheri, in his first opinion, and again in that of 28 September (para. 38. ff) makes great play of the fact that the verb which is predicated of 'the two parties' in the disputed sentence is in the singular, "thus implying", he says, "that either Bahrain or Qatar may move forward to submit its claims to the Court". He then goes on to further claim (para. 40) that, in order for a conjunctive interpretation of the action of the two parties to be entertained, a verbal phrase different from *yajūzu...'an* would have had to be used to begin the sentence. By simply repeating these fallacious linguistic claims often enough, Prof. El-Kosheri seems to thing he can make them seem more credible. Let us bring some grammatical facts to bear on the issue:

18. Firstly, singular number in the verb *yataqaddama* in the phrase *yataqaddama bi ṭarḥi l-mawḍūʿi* 'submit the matter' in the disputed sentence is required by a grammatical rule of all written Arabic, viz. that a verb which precedes its subject, as it does in this sentence, MUST be in the singular REGARDLESS OF WHETHER THAT SUBJECT BE SINGULAR, DUAL OR PLURAL. Where, therefore, the subject is dual, as here, the use of a singular verb has no bearing whatsoever on whether conjunctive or disjunctive action by the entities which make up this dual subject is envisaged: singular number is grammatically obligatory in the sentence type of which the disputed sentence is an example. In fact, as the first half of this present opinion has again made clear, there is every reason, linguistic and logical, to believe that the intended, and only correct interpretation of the action in the disputed sentence is conjunctive - but THIS IN NO WAY DEPENDS UPON THE GRAMMATICAL NUMBER OF THE VERB PREDICATED OF THE DUAL SUBJECT 'THE TWO PARTIES'.

19. Secondly, it is quite incorrect to submit that for conjunctive action to be envisaged, the phrase *yakūnu ʿala* (= Prof. El Kosheri's *yakoun Ala*) would have to be used. Far from entailing a conjunctive interpretation of the verb 'submit', the change to *yakūnu ʿala* would merely alter the sense of the sentence (as Professor El-Kosheri concedes) to 'the two parties have to submit...'. But this unnecessary change would again make no difference whatever to whether conjunctive or independent action was being envisaged. Contrary to Prof. El-Kosheri's claim, the reason for his (correct) observation that the verb 'submit' in the subordinate clause after *yakūnu ʿala* 'have to' would be in the dual is purely grammatical: in the different grammatical structure which would result from the change to *yakūnu ʿala*, the Arabic verb for 'submit' would come AFTER its subject 'the two parties', and would therefore agree with it in (dual) number. The reason for this is that verbs which come BEFORE their subjects DO NOT agree with them in number, but verbs which come AFTER them DO. Again, the grammatically compulsory use of a dual verb form in the subordinate clause after *yakūnu ʿala* would no more imply that conjunctive action was predicated of 'the two parties', than the grammatically compulsory use of a singular verb form in the *yajūzu* structure implies independent action: the singular/dual number of the verb is simply irrelevant to the interpretation in either case. One can surmise, however, why it is convenient for Prof. El-Kosheri's argument to suggest that *yakūnu ʿala* 'must' is necessary for a conjunctive interpretation of the verb 'submit': to a non-Arabist, there is a superficial plausibility in the simple equation dual verb = conjunctive action, singular verb = individual action. But this deduction, which the reader is possibly encouraged to make, is totally false.

20. (iii) Prof. El-Kosheri's further contention (para. 40) that the word *maʿan* 'together' would have to be added for conjunctivity to be indicated is also wrong; if it were added, it would add the extra element of 'simultaneity'. This is superfluous if all that is intended is mere conjunctivity in the sense of BOTH parties submitting the case to the ICJ (as is indicated by the wording of the agreed 'Bahraini Formula' ('the two sides request the ICJ to...')).

21. (iv) I would like to comment once again on Prof. El-Kosheri's interpretation of the phrase *wa l-ijrāʾāti l-mutarattibati ʿalayhā* 'and the procedures (or UN translation 'arrangements') arising therefrom' in his latest opinion (para. 41):

22. In my supplementary opinion of 12 May 1992, I commented that, grammatically speaking, the only possible Arabic noun which the 'procedures' could be 'arising from'

was 'the Bahraini Formula'. This is because in Arabic sentence structure a suffixed pronoun (here the feminine singular *-hā* in the word *ʿalayhā*) is construed as referring to the nearest antecedent noun which agrees with it in number and gender and to which it could by the normal standards of logic be referring. Here, the nearest grammatically feminine singular antecedent which fulfils these criteria is *aṣ-ṣīgha l-baḥraynīya* 'the Bahraini Formula'. Nonetheless, in his latest opinion, at para. 41 (Qatari Reply, Vol. II, pp. 96-7), Prof. El-Kosheri goes to almost any length to avoid accepting the linguistically correct and common-sense interpretation. He gives four reasons for rejecting the Bahraini side's construal of this sentence:

23. - His first reason is that *-hā* (feminine pronoun) cannot be referring to *ṣīgha* 'formula' (feminine noun) because there are no *'ijrā'āt* 'procedures/arrangements/steps' envisaged in that Formula. This is an argument based on logic (although I do not accept his reasoning), rather than on grammar. Yet if the Formula was intended as just one Article in a draft Special Agreement, would not further steps need to be taken in order for the other Articles to be finalised?

24. - As for his second reason for rejection, which is based on a "rule" that requires that all the antecedents be separated by commas in order for the nearest antecedent to be referred to by *-hā*, here we are in a world of Prof. El-Kosheri's own invention: there is no rule of Arabic punctuation which has this effect, so the absence of commas in the sentence has nil significance. Even Prof. El-Kosheri admits in his footnote 5, p. 96 that the source he is quoting to support his claim is concerned with English, not Arabic legal drafting. The further claim in the footnote, designed to bolster his argument, that "punctuation plays a vital role" in the Koran is sheer fantasy - there is NO punctuation in the text of the Koran! I am mystified at how someone who claims to be versed in the "Arabo-Islamic" tradition, and appeals to it for support, could make such a baseless claim. For the record, the Koran is divided into *sūras* ('chapters') which are divided into *'āyāt* ('verses'). Although some verses are long - running to ten or more lines of Arabic text - there are no commas, full-stops, semi-colons, question-marks or any other punctuation marks of any kind whatever which break up the text of a verse. The only written marks other than the words themselves are signs which mark the places for obligatory and optional pauses in oral recitation, but these are unique to the Koran, appearing in no other written document, and by no stretch of the imagination can these be called "punctuation" if these are what Prof. El-Kosheri is referring to. Perhaps he has been misled by the punctuation conventions adopted in translations of the Koran into other languages, in which the longer verses are broken up when translated into

five, six or more sentences, each with commas, question marks, and other punctuation. But these punctuation marks do *not* appear in the Arabic of the sacred text itself.

25. - His third reason *ibid.*, p. 97, also involves invoking the Koran or, to be precise, a medieval work in which, he states "ample reference is made to passages of the Koran itself where suffixes expressed in the feminine gender are used in reference to words of the masculine gender and vice versa." Nevertheless, Professor El-Kosheri does not cite any instance in support of his view. Even assuming that we were to give him the benefit of the doubt, and accept that such instances "could perfectly refer" (note the less than unequivocal assertion) to a masculine noun in the disputed sentence of the Minutes of 25 December 1990, this would be rather like appealing to some arcane usage in the English grammar of Shakespeare, or the King James's translation of the Bible, in order to explain the meaning of a perfectly normal sentence in an agreement between two English-speaking governments concluded in the present day. The Minutes of 25 December 1990 were written by Arabs writing in the late twentieth century, to be read by other Arabs living in the same era. There is no reason to believe that whoever drafted them did so according to anything other than the rules of Arabic as it is written in the 20th century, any more than there is to believe that the drafter intended his readers to disregard those rules in favour of rare instances of non-concordant grammatical structures which occur in sacred scripture written down 14 centuries ago.

26. - Prof. El-Kosheri's fourth reason for rejection is a fall-back position: if, after all, *-hā* is not referring to a masculine noun, then perhaps it could be referring to either of two other feminine nouns in the vicinity. Apart from the ungrammaticality of having *-hā* refer to anything other than its nearest acceptable feminine antecedent *ṣīgha* 'formula', the logic of having 'procedures' or 'steps' 'arise' from other feminine nouns such as a 'court' (*maḥkama*) or from the very 'procedures' themselves (*'ijrā'āt*) (which would then make the phrase also mean 'the procedures arising from themselves'), escapes me. I also note that he has systematically disregarded Dr. Badawi's analysis of this phrase, which refuted his assertion on this point in his First Opinion (see Bahraini Counter-Memorial, Vol. II, pp. 266-7).

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