DISSENTING OPINION OF JUDGE ODA

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I. INTRODUCTION

1. To my profound regret but anxious to remain true to my legal conscience, I find myself unable to vote for the present Judgment as my views essentially differ from those of the Court. Although I have voted against each of the operative paragraphs, my objection is in fact directed to the Judgment as a whole, or to the way in which the Court determined that it had been seised of the present case. It appears to me that the Court, instead of determining whether it has jurisdiction to deal with the dispute referred to in the Application filed by Qatar on 8 July 1991, has been led to substitute, for that unilateral Application, a supposition that it was seised with the dispute referred to it by agreement and to have assumed that Qatar had proceeded to the Court on the basis of such an agreement, albeit misinterpreted by that Party. This has led the Court to order the redrafting of submissions in the present Judgment.

II. A UNILATERAL APPLICATION BUT NOT A UNILATERAL NOTIFICATION OF A SPECIAL AGREEMENT

2. In my view the Court should not have transformed a unilateral Application into a unilateral filing of an agreement which it found to have been improperly drafted, but should rather have answered "yes" or "no" to the Application unilaterally filed by Qatar. If the Court was unable to find that the documents referred to in operative clause (1) constituted a treaty or a convention such as to authorize the unilateral filing of an application by one of the Parties under Article 36 (1) of the Statute, it should have declared that it lacked jurisdiction to entertain the present Application. If, as is suggested in operative clauses (3) and (4), the "whole of the dispute" could have been presented by Qatar to the Court at the outset, Bahrain would not have opposed the Application. Rather, Qatar and Bahrain together could have jointly submitted the dispute by concluding a special agreement, and it would not have been the subject of a unilateral application. It is a fact that *not* the "whole of the dispute" but only certain aspects of it (as selected by Qatar) were referred to the Court unilaterally.

3. It appears that the Court is now attempting to render an interlocutory judgment — which is not unusual in domestic legal systems — for the first time in the history of this Court and its predecessor. In my view, the application of this concept of domestic law to the jurisprudence of the International Court of Justice is most inappropriate. In a municipal legal system there is generally no problem of the court's jurisdiction and it is competent to hand down an interlocutory judgment since its jurisdiction

has been established without question. Sometimes, however, the interlocutory judgment itself is handed down in order to dispose of the issue of jurisdiction before entering into the merits phase. On the other hand, the present Court is now confronted by a question as to whether or not it has the jurisdiction to entertain the Application of Qatar. Without having disposed of this jurisdictional issue, the Court cannot hand down an interlocutory judgment. What the Court should do at the present stage is to state clearly whether or not it has jurisdiction to entertain certain limited aspects of the "whole" dispute, as submitted by Qatar.

4. Operative clause (4) of the Judgment seems to impose upon both Parties an obligation to "take action to this end". However, Qatar could only reconsider its own claim within the framework of a fresh case, brought either by a unilateral application or by the notification of a special agreement, and this would only be conceivable if the Court were to find that it lacked jurisdiction to entertain the claim as submitted at present. On the other hand, Bahrain is not in a position to receive an order from the Court, unless the Court's jurisdiction is first established. For the kind of order given in operative clause (4) of the Judgment to have any effect the Court must have been validly seised of the present dispute. I fail to understand how the Court envisages the follow-up to its decision, if the Parties are not willing to "take action" pursuant to operative clause (4). If the Parties do not "take [that] action", will it be accepted that either Qatar, or both Qatar and Bahrain, have not complied with the present Judgment? Or will the Court simply decide to discontinue the present case which has already been entered in the General List and of which it will assume that it has been seised? It seems to me that actually the Court is simply making a gesture of issuing an invitation, in the guise of a Judgment, to the Parties to proceed to the submission of a new case independently of the present Application.

5. The present Judgment cannot, in my view, be seen as the type of decision that the Court should hand down at a preliminary stage of the case concerned with the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application. If the Court does not find it possible to entertain the present Application as it stands, then it should reject it. The Court's desire to have the two Parties refer to it the "whole of the dispute", whether unilaterally or jointly, must be seen as a different matter. My dissent does not mean that I am opposed to the Court's desire to have the Parties come before it once again to submit the "whole of the dispute", and the Court's wishes could have been conveyed to the Parties if the present Application had been rejected. The Court should have taken a clear position on the matter of whether or not it was able to exercise its jurisdiction to deal with the Application unilaterally filed by Qatar under Article 38 (1) of the Rules of Court. By avoiding the essential point, the Court seems to be playing a role of conciliator rather than acting as a judicial institution.

III. Neither the "1987 Agreement" nor the "1990 Agreement" Confer Jurisdiction upon the Court to Entertain the Qatari Application

6. The Application instituting proceedings brought by Qatar against Bahrain was submitted to the Court "in accordance with Article 40 (1) of the Statute of the Court read with Article 38 of the Rules of Court" (Application, para. 1). This is without any doubt "a written application addressed to the Registrar" (Statute, Art. 40 (1)) or "proceedings [brought] before the Court . . . instituted by means of an application" (Rules, Art. 38 (1)). The present case *cannot* be seen as a case brought before the Court "by the notification of the special agreement" (Statute, Art. 40 (1)), or as "proceedings . . . brought before the Court by the notification of a special agreement" (Rules, Art. 39 (1)). This is, in my view, so self-evident that there is no need for argument. I must emphasize this point, however, since in my view the present Judgment has been drafted so as to hold that the present submission was not the one agreed upon by the Parties in dispute. The Court may be validly seised of the present case only if proceedings were instituted by means of an application filed by Qatar, concerning disputes which fell within the category of "matters specially provided for . . . in treaties and conventions in force" (Statute, Art. 36 (1)).

7. As has been clearly indicated in the submissions of both Parties, the Court is requested to determine whether it has jurisdiction to entertain the dispute to which reference is made in the Application unilaterally filed by Qatar. The question raised is whether the Court is competent to exercise its jurisdiction on the grounds that the matters in dispute are "matters specially provided for . . . in treaties and conventions in force", within the meaning of Article 36 (1) of the Statute. This provision of the Statute is meant to refer to the so-called "compromissory clause" which provides that, in the event of one party's referring a dispute to the Court, the other party is bound to accept the Court's jurisdiction to deal with it.

8. In its Application, Qatar appears to take both "the agreements of December 1987 and December 1990" as the grounds upon which the jurisdiction of the Court to adjudicate upon the dispute is said to be based (Application, para. 40). In fact, however, the relevant provision of the Qatari Application is ambiguous to an extent that permits of an interpretation that this submission is based on an agreement of the Parties. It is obvious, however, that Qatar might not have wished to contend that it had attempted to refer to the Court disputes, the content of which had been agreed upon, as otherwise this could not have been a unilateral application under Article 38 (1) of the Rules of Court, as it so clearly was. Bahrain, on the other hand, requested at the very outset that Qatar's Application should not be entered in the General List of the Court, apparently on the ground that there was no treaty or convention to provide a basis for the jurisdiction of the Court to deal with that unilateral

Application. In Bahrain's view, Qatar's Application could not be anything other than a request under Article 38 (5) of the Rules or, in other words, a request for the application of *forum prorogatum*. Subsequently, Bahrain, however, did not press this contention since it agreed that there should be a proceeding addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application (Order of 11 October 1991).

9. In the present case the question is whether the "1987 Agreement" or the "1990 Agreement", or both, which Qatar invokes as a basis for the jurisdiction of the Court, are of the nature of "treaties and conventions in force" within the meaning of Article 36 (1) of the Statute, i.e., whether they contain a compromissory clause.

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Agreement of December 1987

10. Of what does the "Agreement of December 1987" consist? There exists a letter dated 19 December 1987 from the King of Saudi Arabia addressed to the Amir of Qatar in which the former presented proposals as a basis for settling the relevant disputes. A letter in reply was transmitted by the Amir of Qatar to the King of Saudi Arabia on 21 December 1987, expressing his full agreement with the proposals set out in the King's letter. A letter identical to Saudi Arabia's letter to Qatar was despatched by the King of Saudi Arabia to Bahrain also on 19 December 1987, but Bahrain's response to Saudi Arabia was not sent until 26 December 1987. It should be emphatically noted that there was no exchange of letters directly between Qatar and Bahrain at that time. How could the two separate exchanges of letters, as described above, constitute a legally binding "international agreement concluded . . . in written form" (Vienna Convention on the Law of Treaties, Art. 2 (1) *(a)*) between Qatar and Bahrain?

11. Reference is also made to a "draft of the announcement made public on 21 December 1987" (quoted in part in paragraph 17 of the Judgment), which I quote below in paragraph 21. This text is incorporated into Qatar's Application but it is not known from the documents presented by Qatar whether this announcement, which is reported simply as "a draft", was actually made or not. If it was in fact made on 21 December 1987, this was, strange to relate, five days in advance of the despatch of a letter from Bahrain addressed to Saudi Arabia on 26 December 1987, in which Bahrain agreed to accept the Saudi Arabian offer. The "draft of the announcement" certainly was not signed by either Qatar or Bahrain and cannot constitute a legally binding document.

12. One may ask how a "treaty" which may be defined as "an international agreement concluded between States in written form and governed by international law" (Vienna Convention on the Law of Treaties, Art. 2 (1) *(a)*) was concluded between Qatar and Bahrain solely on the

basis of this chain of events? I fail to understand how the "Agreement of December 1987" can be regarded as one of the "treaties [or] conventions in force" contemplated by Article 36 (1) of the Statute. I have a rather firm view that there was, in December 1987, no treaty or convention within the meaning of Article 36 (1) of the Statute.

13. It may further be noted that Qatar, which regards the December 1987 Agreement as a basis of the Court's jurisdiction, did not register that "agreement" with the United Nations Secretariat, whereas the "1990 Agreement" was registered in June 1991. While it may not be necessary to discuss the effect of the registration of "every treaty and every international agreement" with the United Nations Secretariat (Charter, Art. 102), this fact may lead one to doubt whether Qatar has always regarded the December 1987 Agreement as a treaty in the true sense of the word.

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Agreement of December 1990

14. Qatar's Application takes the "Agreement of December 1990" as a basis for the exercise of jurisdiction by the Court (Application, para. 40). Qatar did register the "1990 Agreement" with the United Nations Secretariat on 28 June 1991, just a few weeks before it filed its Application in the Registry of the Court. Bahrain, which did not regard this document as an international agreement, protested against that registration on 9 August 1991 and that protest was also duly registered.

15. Qatar uses the term "1990 Agreement" to denote the Minutes of a meeting on 25 December 1990 between the respective Ministers for Foreign Affairs of Saudi Arabia, Qatar and Bahrain which took place during the 1990 session of the Gulf Co-operation Council (GCC) summit in Doha (Application, Ann. 6). It is stated in these Minutes that, at the time of the GCC summit, consultations took place between the Foreign Ministers of Bahrain and Qatar and were attended by Saudi Arabia's Foreign Minister, and that certain items were agreed by the three Ministers, who signed the Minutes.

16. In fact, the three Foreign Ministers, in attestation of that agreement, did sign the Minutes of the meeting (i.e., the agreed record of the discussion that had taken place during that tripartite meeting) and, in my view, they certainly did so without the slightest idea that they were signing a tripartite treaty or convention. It is clear from what is described in paragraph 26 of the Judgment that at least the Minister for Foreign Affairs of Bahrain never thought that he was signing an international agreement. Given what we know of "the preparatory work of the treaty and the circumstances of its conclusion" which, according to the Vienna Convention on the Law of Treaties (Art. 32) is to be used as a supplementary means of interpretation of a treaty, as those "circumstances" are

reflected in the statement made by the Minister for Foreign Affairs of Bahrain, these Minutes cannot be interpreted as falling within the category of "treaties and conventions in force" which specially provide for certain matters to be referred to the Court for a decision by means of a unilateral application. Whether a document signed by the Foreign Minister in disregard of constitutional rules relating to the conclusion of treaties can or cannot be considered a legally binding treaty is not at issue. Quite simply, the Foreign Minister of Bahrain signed the Minutes without so much as thinking that they were a legally binding international agreement.

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17. Thus, it may properly be concluded that neither the 1987 Agreement nor the 1990 Agreement constituted a treaty or convention within the meaning of Article 36 (1) of the Statute.

IV. Efforts to Draw Up a Special Agreement and the Failure of Those Efforts

18. If neither the December 1987 document nor the December 1990 document are to be seen as constituting a treaty or convention containing a compromissory clause, what were Qatar and Bahrain then in fact trying to achieve in the negotiations by endorsing those documents? It may be pertinent in this regard to make a recital of the negotiations which had been going on for more than two decades and of which, in my view, the present Judgment has not necessarily provided a sufficient reflection.

19. The "Principles of the Framework for Reaching a Settlement" of the disputes between Qatar and Bahrain, originally drafted in 1978 by Saudi Arabia, were amended in 1983 after Saudi Arabia had received certain comments from Qatar. The amended principles (which are quoted in paragraph 16 of the Judgment) read in part:

> "*Firstly:* 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.
>
> . . . . . .
>
> *Fourthly:* Formation of a Committee from both sides, to be attended by a representative of the Kingdom of Saudi Arabia, with the aim of reaching solutions acceptable to the two parties on the basis of justice, good neighbourhood, balance of interests and security requirements of both parties.
>
> *Fifthly:* In case that the negotiations provided for in the fourth

> principle fail to reach agreement on the solution of one or more of the aforesaid disputed matters, the Governments of the two countries shall undertake, in consultation with the Government of Saudi Arabia, to determine the best means of resolving that matter or matters, on the basis of the provisions of international law. The ruling of the authority agreed upon for this purpose shall be final and binding." (Memorial of Qatar, Ann. II.10; Counter-Memorial of Bahrain, Ann. I.1.)

Those principles did not include any reference to the International Court of Justice.

20. On 15 July 1987 Saudi Arabia suggested to Qatar that:

> "[an effort to end the issues in dispute] should be based on the joint realisation that the difference of views between the brothers should be resolved by accord and brotherly understanding aimed at achieving the common interest in accordance with a common conviction that such a solution cannot be reached without a joint brotherly and sincere co-operation that accounts for an equal reduction of some claims, thus ensuring a compromise and bringing views closer" (Memorial of Qatar, Ann. II.13).

On 24 August 1987 Qatar replied to that suggestion by pointing out that:

> "as our dispute with our brothers in Bahrain is related to the right of sovereignty over the disputed areas, it can only be settled if either party comes to the conviction that this right belongs to the other party, in such a manner as to admit the same willingly and intelligibly. Failing this, the duty of keenness shared by the two brotherly countries to maintain the fraternal relations that join them, and observance of their interests and the higher common interests of all of us, requires them to search, through international arbitration, for the just solution to their dispute which shall be binding on both of them." (*Ibid.*, Ann. II.14.)

In this exchange of letters between Saudi Arabia and Qatar, no mention is made of a reference of the dispute to the International Court of Justice. Neither Qatar's documents nor Bahrain's documents tell us whether a similar correspondence was exchanged between Saudi Arabia and Bahrain.

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GCC Summit in December 1987

21. Against this background, the GCC summit for the year 1987 was held in Riyadh in December of that year. On 19 December 1987, as I mentioned in paragraph 10 above, Saudi Arabia sent the letters to Qatar and Bahrain which are quoted in part in paragraphs 17 and 31 of the Judgment. These read in part as follows:

> "*Firstly:* All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms.
>
> . . . . . .
>
> *Thirdly:* Formation of a committee comprising representatives of the States of Qatar and Bahrain and of the Kingdom of Saudi Arabia for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued." (Application, Ann. 4 (A).)

The idea of a possible reference to the International Court of Justice of the matters in dispute between Qatar and Bahrain appeared for the first time in those letters, the main aim of which was to set up a Tripartite Committee

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions".

Both Qatar and Bahrain responded on 21 and 26 December, respectively, by accepting the aforementioned proposals of Saudi Arabia, as reflected in a "draft of the announcement made public on 21 December 1987" which was prepared by Saudi Arabia and to which I referred in paragraph 11 above:

> "The contacts carried out by the Kingdom of Saudi Arabia with the two sisterly States have resulted in a proposal, submitted by the Kingdom of Saudi Arabia and sanctioned by the two countries, that the matter be submitted for arbitration, in pursuance of the principles of the framework for settlement which had been agreed by the two sisterly States, particularly the fifth principle which reads:
>
> 'The Governments of the two parties undertake to consult with the Government of the Kingdom of Saudi Arabia to determine the best means of resolving that matter or matters on the basis of the provisions of International Law. The decision of the authority agreed upon for this purpose shall be final and binding upon both parties.'
>
> Accordingly, it has been agreed by the two parties, under the five principles, to set up a committee comprising representatives of the State of Bahrain, the State of Qatar and the Kingdom of Saudi Arabia for the purpose of approaching the International Court of Justice and meeting the requirements to have the dispute submitted

to the Court according to its rules and instructions, so that a final ruling binding upon both parties be issued." (Application, Ann. 4 (B). N.B.: The fifth principle quoted herein, which is not identical to the text of the "amended principles" of 1983, as quoted in paragraph 19 above, must be the same in the original Arabic.)

22. During the summit meeting in December 1987 (but apparently after the Saudi Arabian letter of 19 December 1987), Bahrain prepared a "draft procedural agreement concerning the formation of the joint committee" (the precise date of which has not been reported), of which the relevant passage reads as follows:

"1. A Committee shall be formed of representatives of the State of Qatar and the State of Bahrain and representatives of Saudi Arabia 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." (Counter-Memorial of Bahrain, Ann. I.5. N.B.: This is the text of a translation *by Qatar* which appears in the Counter-Memorial of Bahrain, although another, different, translation is incorporated in Qatari document Ann. II.17, Memorial of Qatar; emphasis added.)

It is believed that this document remained as a draft and was later reintroduced at the first session of the Tripartite Committee, as I explain in paragraph 24 below. Reference is also made only in Qatar's documents submitted to the Court to "Qatar's draft letter to the Registrar of the Court dated 27 December 1987", according to which the Court was to be informed of differences between Qatar and Bahrain (which incidentally did not refer to the question of Zubarah) and to the agreement between the Ministers for Foreign Affairs of both Qatar and Bahrain, to the effect that they were

"1. To submit their aforesaid differences, to the International Court of Justice (or a chamber composed of five judges thereof), for settlement in accordance with International Law.

2. To open negotiations between them with a view to preparing the *necessary Special Agreement* in this respect, and transmitting to you a certified copy thereof when it is concluded." (Memorial of Qatar, Ann. II.18; emphasis added.)

The letter was not, in fact, sent to the Registrar of the Court. In any event, one is led to conclude that Qatar as well as Bahrain recognized that they would have to prepare jointly a *special agreement* for submission of the dispute to the Court.

23. In my view, if any mutual understanding was reached between Qatar and Bahrain in December 1987 (albeit not in the form of a treaty

or convention), this was simply an agreement, if I may quote the relevant passage once more, to form a Tripartite Committee

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions",

as stated in paragraph 21 above. Moreover, to repeat what has already been said, the purpose of the Tripartite Committee was to facilitate the drafting of a *special agreement* whereby the disputes could be submitted to the Court.

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Tripartite Committee Meetings in 1988

24. The Tripartite Committee came into being at the time of the GCC summit in December 1987. The Committee met six times during 1988. "Bahrain's revised draft agreement (procedural agreement concerning the formation of the joint committee)" submitted at the first meeting of the Tripartite Committee on 17 January 1988 seems to have been *identical* to the draft presented by Bahrain to the summit meeting in December 1987, which I refer to in paragraph 22 above (Memorial of Qatar, Ann. II.19). The aim of the Committee was clearly to reach a special agreement to submit the disputed matters to the Court for a final judgment. Whether this so-called "revised" text of the agreement was actually signed by the representatives of the three countries is not known.

25. It is reported that as of 15 March 1988 Qatar prepared a *draft special agreement* according to which both Parties would have agreed upon the following provisions:

> "*Article I*
>
> The parties submit the questions stated in Article II of the present Agreement to the International Court of Justice for decision in accordance with international law.
>
> *Article II*
>
> The questions for the decision of the Court in accordance with Article I are:
>
> 1. To which of the two States does sovereignty over Hawar Islands belong?
>
> 2. What is the legal status of the Dibal and Jaradeh shoals? In particular, does either State have sovereignty, if any, over the Dibal or Jaradeh shoal or any part of either shoal?
>
> 3. . . . Does [the] median line [drawn by the British Political Agent

on 23 December 1947] represent the right boundary between the [respective] continental shelves?

4. . . . 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?" (Memorial of Qatar, Ann. II.21; Counter-Memorial of Bahrain, Ann. I.8.)

In parallel, Bahrain prepared as of 19 March 1988 a *draft special agreement* according to which:

"*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

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

(b) to determine the rights of the State of Bahrain in and around Zubara.

2. The Court is requested to describe the course of the maritime boundary . . ." (Memorial of Qatar, Ann. II.22; Counter-Memorial of Bahrain, Ann. I.9.)

26. Qatar and Bahrain both apparently endeavoured to draft a *special agreement* by which they could jointly refer the matters in dispute to the International Court of Justice. A letter of Qatar dated 25 March 1988 addressed to Saudi Arabia (Memorial of Qatar, Ann. II.23), as well as a Memorandum of Qatar of 27 March 1988 addressed to Saudi Arabia concerning comments on the draft special agreement by Bahrain (*ibid.*, Ann. II.24; Rejoinder of Bahrain, Ann. 1.2), together pointed to the efforts made by both Parties to agree on the text of a *special agreement* to be filed in the Registry of the Court. The intent of both countries was clear and their aim was to achieve an agreement on the matters to be referred to the International Court of Justice, in other words, on Article II of the respective draft special agreements as mentioned above. In both the *draft special agreements* prepared by Qatar and Bahrain, respectively, the matters which each Government wanted the Court to decide seem to have been quite different, in particular with regard to whether the question of Zubarah would be included or not.

27. At the fourth meeting of the Tripartite Committee held in Jeddah on 28 June 1988, texts of a revised Article II were presented by both Qatar and Bahrain. The Qatari text read as follows:

"*Article II*

1. . . .

2. The parties request the Court to decide . . . on the following questions:

(a) To which of the two States does sovereignty over the Hawar Islands belong?

(b) What is the legal status of Dibal and Jaradeh shoals? In particular, does either State have sovereignty, if any, over the Dibal and Jaradeh shoals or any part of either shoal?

(c) Does the line described in the letter of 23 December 1947 represent the correct boundary between the continental shelves of the State of Bahrain and the State of Qatar?

(d) Having regard to the answers of the Court to questions *(a)*, *(b)* and *(c)*, what should be the course of the boundary or boundaries between the maritime areas appertaining respectively to the State of Bahrain and the State of Qatar?" (*The Meetings of the Tripartite Committee* deposited by Qatar with the Registry, Doc. 7.)

The text of Bahrain's Article II read as follows:

"The Court is requested:

(1) to determine the extent to which the two States have exercised sovereignty over the Hawar Islands and have thus established such sovereignty;

(2) to determine the legal status of and sovereign and other rights of both States in any features, other than Fasht ad Dibal and the Bahraini island of Qitat Jaradah in the Bahrain archipelago, or in any natural resources both living and non-living which may affect the delimitation referred to in paragraph (4) below;

(3) to determine any other matter of territorial right or other title or interest claimed by either State in the land or maritime territory of the other;

(4) . . . to draw a single maritime boundary . . ." (Memorial of Qatar, Ann. II.27.)

The Amir of Qatar gave King Fahd of Saudi Arabia some explanations regarding this situation in a letter dated 9 July 1988:

"Since the previous three meetings had failed in making any progress with regard to agreeing on a text of the *Special Agreement*, the Qatari delegation presented to the fourth meeting of the Tripartite Committee a brief memo on the reasons which led to this situa-

tion, with the hope of joining our efforts to make the Committee succeed in its task." (Memorial of Qatar, Ann. II.28; emphasis added.)

That letter continues:

"Since Article Two in the *Draft Special Agreements* presented by the Governments of the State of Qatar and Bahrain is the *basic* article in both drafts, which states that upon referring the subjects of dispute to the Court it has been agreed that each side would come forth with proposals for the amendment of this article in the light of the discussions on it which were recorded in the minutes of the Tripartite Committee, and in such a manner as to close the gap between the viewpoints through the exclusion from this article in either draft of any provisions that are unacceptable due to their being contrary to the principles on which this article must be based, namely history, right, logic and law, and the consideration of remarks expressed on them on the basis of those principles." (*Ibid.*; first emphasis added.)

28. Some months elapsed after the fourth meeting and on 26 October 1988 Bahrain submitted a "Bahraini formula" (which is quoted in paragraph 18 of the Judgment), which was related to Article II of either Qatar's draft or Bahrain's draft, that is to say, the matters in dispute to be referred to the Court, and which read:

"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." (Application, Ann. 5.)

At the fifth meeting held at Riyadh on 15 November 1988 Qatar welcomed the opportunity to discuss the Bahraini formula as a possible basis for negotiations but expressed strong reservations on the matter of whether Bahrain's claim to Zubarah should be considered as falling within the framework of the dispute. In other words, it was still difficult for Qatar and Bahrain to agree on the subject of the disputes to be referred to the International Court of Justice — even at the fifth meeting of the Tripartite Committee in November 1988.

29. At the sixth meeting on 6 December 1988 Qatar proposed an amendment of the Bahraini formula so that it would read as follows:

"[Qatar and 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." (Memorial of Qatar, Ann. II.31.)

The Minutes of this session read:

"(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.

(3) The Qatari delegation also enquired what was meant by the content of the dispute regarding Zubarah. It stated that if the content of the dispute regarding Zubarah related to sovereignty over the area, then it would not agree in its inclusion in the subjects to be referred to the Court. But if the content relates to private rights in Zubarah, then Qatar's delegation would not object.

The Bahraini delegation responded that their claims regarding Zubarah which would be submitted to the Court would represent the most unrestricted maximum possible claims, and that it should be left to the Court to decide on this matter according to legal evidence and arguments submitted by Bahrain." (Memorial of Qatar, Ann. II.31.)

After all, the Parties seem to have agreed on the inclusion of the question of Zubarah but to have differed as to how that question would be comprised within the subjects of the disputes to be submitted to the Court.

30. It is important to note that the task of the Tripartite Committee in 1988 related to the form of words of a *special agreement* which certainly should have defined the matters in dispute to be referred to the Court. The Tripartite Committee was unable to produce an agreed draft of a *special agreement* to be notified to the Court.

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Doha Meeting in December 1990

31. After the sixth meeting of the Tripartite Committee in December 1988, which did not produce any useful result, very little progress was made until the end of the year 1990 — the time of the signature of the "Doha Minutes" of the tripartite meeting in December, to which I referred in paragraph 15 above.

32. To what did the signatories then in fact agree in Doha in December 1990? The indications provided by the Doha Minutes read:

> "The following was agreed:
>
> (1) to reaffirm what was agreed previously between the two parties;
>
> (2) to continue the good offices of [Saudi Arabia] between the two countries till the month of . . . May of the next year 1991. After the end of this period, *the parties* may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom. Saudi Arabia's good offices will continue during the submission of the matter to arbitration;
>
> (3) should a brotherly solution acceptable to the two parties be reached, the case will be withdrawn from arbitration." (Application, Ann. 6; Counter-Memorial of Bahrain, Ann. I.20; emphasis added.)

The United Nations translation of paragraph 2 is given here below for clarity:

> "2. The good offices of [Saudi Arabia], in addressing the dispute between the two countries shall continue until [May 1991]. Once that period has elapsed, the *two parties* may submit the case to the International Court of Justice, in accordance with the Bahraini formula accepted by the State of Qatar and the arrangements relating thereto. The good offices of the Kingdom of Saudi Arabia may continue during the period in which the case is referred to arbitration." (Counter-Memorial of Bahrain, Ann. I.20; emphasis added.)

33. It was agreed by the three Foreign Ministers in these tripartite talks that after May 1991 "the parties [the two parties — United Nations translation] may submit the case to the International Court of Justice". This must be interpreted as indicating that the good offices of Saudi Arabia aimed at finding some concrete solution to the dispute between Qatar and Bahrain were to be continued until May 1991 after which time, and in the event of the failure of those good offices, Qatar and Bahrain would be able to come to the Court. This conclusion may be confirmed if one looks at the letter dated 30 December 1990 and sent by Qatar to Saudi Arabia, in which Qatar stressed its confidence that its dispute with Bahrain could be settled "whether through your good offices or through the International Court of Justice" (Memorial of Qatar, Ann. II.33). In other

words, reference to the International Court of Justice was to be an alternative to Saudi Arabia's good offices to be continued until May 1991 for the solution of the disputes between Qatar and Bahrain. This did not imply any authorization such as to permit one party to make an approach to the Court by unilateral application, ignoring "what was agreed previously between the two parties" (Doha Minutes), that is to say, the submission of the matter to the Court in accordance with the Bahraini formula which could itself have constituted Article II of a *special agreement*.

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After the Doha Meeting

34. In May 1991, namely, after the lapse of this five-month period allowed for the resumed good offices of Saudi Arabia, Qatar and Bahrain could then have continued negotiations to work out a draft of a *special agreement*. In fact, in September 1991, Saudi Arabia suggested a *draft special agreement* to both countries (Counter-Memorial of Bahrain, Ann. I.24) and a *draft special agreement* was also drawn up by Bahrain on 20 June 1992 (Rejoinder of Bahrain, Ann. 1.7).

35. Qatar arrived at a different interpretation of the 1990 Doha Minutes and took steps to seise the Court by unilaterally addressing a written Application to the Registrar of the Court on 8 July 1991 and requested the Court to adjudge and declare what it had already stated in Article II of its March 1988 *draft special agreement* (as quoted in paragraph 25 above). Qatar took this action without due regard to the discussions held with Bahrain on the text of Article II contained in both Qatar's and Bahrain's draft special agreements at the ensuing sessions of the Tripartite Committee.

V. Conclusion

36. I am confident that neither the "1987 Agreement" nor the "1990 Agreement" can be deemed to constitute a basis for the jurisdiction of the Court in the event of a unilateral application under Article 38 (1) of the Rules of Court and that the Court is not empowered to exercise jurisdiction in respect of the relevant disputes unless they are jointly referred to the Court by a special agreement under Article 39 (1) of the Rules which, in my view, has not occurred in this case. The Court has nonetheless opted for the role of conciliator instead of finding, as I believe it ought to have done, that it lacks jurisdiction to entertain the Application filed by Qatar on 8 July 1991.

(Signed) Shigeru Oda.