DISSENTING OPINION OF JUDGE ODA

1. To my regret I am unable to concur with the Court's Judgment. My position has already been clearly stated in the dissenting opinion which I attached to the Judgment of 1 July 1994. I shall now give my reasons for having to disagree with the present Judgment and shall be unable to avoid a certain amount of repetition of what was said in my previous opinion.

I. The Procedures Leading to the Present Judgment

2. The Court has before it the unilateral Application filed by Qatar on 8 July 1991 in which Qatar presented both an agreement of December 1987 (a series of documents dating from December 1987) and an agreement of December 1990 (the Doha Minutes of the Tripartite Committee), which it claimed to constitute the basis of the Court's jurisdiction (Judgment, 1 July 1994, para. 3). Bahrain, in its letters of 14 July and 18 August 1991, contended that the Court's jurisdiction could not be based on such documents (*ibid.*, para. 4).

On 11 October 1991 the Court ordered that the written pleadings at the first stage should be addressed to the questions of the jurisdiction of the Court to entertain the dispute and to the admissibility of the Application (*ibid.*, para. 5). Upon the closure of the written proceedings, oral arguments were heard in February-March 1994 (*ibid.*, para. 11).

On 1 July 1994 the Court delivered a Judgment — *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* — which, however, did not seem to be addressed either to the unilateral Application of Qatar or to the objection raised by Bahrain, and which in my view was not so much a "Judgment" of the Court as a record of the Court's attempted *conciliation* (cf. paras. 5 and 36 of my dissenting opinion appended to the Judgment of 1 July 1994).

The Court is now delivering a second Judgment entitled *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*. What is one then to think of the "Judgment" of 1 July 1994, with exactly the same title?

3. The "Judgment" of July 1994 indicated that "[by 30 November 1994] the Parties [were], jointly or separately, to take action to [effect the submission] to the Court [of] the whole of the dispute between them, as circumscribed by [the 'Bahraini formula']" (Judgment, 1 July 1994, operative paragraph 41 (4), read in conjunction with 41 (2) and (3)).

I submit that the Court did not, in fact, have any competence to oblige

the Parties to take any action until the Court had established its jurisdiction to entertain the case.

By 30 November 1994 the Parties had failed to take any action, either *jointly* or *separately*, in response to the July 1994 "Judgment". It is certainly obvious that, when it stated that the Parties were *jointly* or *separately* to take action to effect the submission to the Court of the whole of the dispute, the Court cannot have meant that any one Party was to take *independent* action. If it were permissible for any Party to simply take an independent action, then the Court would not have suggested that "the Parties are, *jointly* or *separately*, to take action . . ." (emphasis added).

On 30 November 1994, the Registry received from Qatar a document entitled "Act to comply with paragraphs (3) and (4) of operative paragraph 41 of the Judgment of the Court dated 1 July 1994" and from Bahrain a "Report of the State of Bahrain to the International Court of Justice on the attempt by the Parties to implement the Court's Judgment of 1st July, 1994".

4. I must now examine the legal effect of these two documents. Bahrain's document is simply a report of what had previously been attempted by the Parties and, as such, was not intended to have any legal effect.

On the other hand, one may be led to wonder whether the "Act" of Qatar was intended to modify the original submissions presented in the Qatari Application which read:

> "the State of Qatar requests the Court:
>
> I. To adjudge and declare in accordance with international law
>
> (A) that the State of Qatar has sovereignty over the Hawar islands; and,
>
> (B) that the State of Qatar has sovereign rights over Dibal and Qit'at Jaradah shoals;
>
> and
>
> II. With due regard to the line dividing the sea-bed of the two States as described in the British decision of 23 December 1947, to draw in accordance with international law a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain" (Application, para. 41),

or the submissions presented in the course of the written proceedings which were identical to those presented in the later stage of the oral proceedings, reading:

> "the State of Qatar respectfully requests the Court to adjudge and declare . . . that —
>
> The Court has jurisdiction to entertain the dispute referred to in

the Application filed by Qatar on 8 July 1991 and that Qatar's Application is admissible." (See Judgment, 1 July 1994, para. 13.)

5. The Act of 30 November 1994 of Qatar states that:

"The following subjects fall within the jurisdiction of the Court by virtue of the rights and obligations created by the international agreements of December 1987 and 25 December 1990 and are, by virtue of Qatar's Application dated 5 July 1991 and the present Act, submitted to the Court:

1. The Hawar islands, including the island of Janan;
2. Fasht al Dibal and Qit'at Jaradah;
3. The archipelagic baselines;
4. Zubarah;
5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries."

Further to its Application, Qatar requests the Court

"to adjudge and declare that Bahrain has no sovereignty or other territorial right over the island of Janan or over Zubarah, and that any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case".

Qatar has suggested the following interpretation of these submissions:

"As a result the Court has before it 'any matter of territorial right or other title or interest which may be a matter of difference between' the Parties, and a request that it 'draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters'."

6. The Court was confronted by the unilateral Application of Qatar in July 1991 and if there was any difference between the situation after 30 November 1994 and that prior to the July 1994 "Judgment", it related solely to the *modification of* and *addition to* the original submissions of Qatar. The basis of jurisdiction of the Court on which Qatar attempted to rely remained the same.

In the event of any modification of or addition to its submissions by Qatar, the Court should have formally notified Bahrain of that modification or addition and should have given Bahrain an opportunity to express its views within a certain time. The Court does not seem to have taken any such action.

What did happen was that the Court received Bahrain's "Comments" on the "Act" of Qatar which were sent to the Registry on Bahrain's own initiative on 5 December 1994, only a few days after it had received a

copy of the "Act" of Qatar from the Registry. As no further oral proceedings were ordered by the Court, Bahrain was not given the opportunity to express its formal position on those modifications of or additions to the Qatari submissions. The procedure was, I believe, unfortunate, as the Court proceeded instead to draft the present Judgment.

II. The Basis of Jurisdiction

1. The Court's Interpretation of the Basis of Jurisdiction

7. In spite of the "Judgment" of July 1994, the Court is still confronted with the unilateral Application of Qatar of July 1991. While the Qatari Application now contains some *amended or additional* submissions, the Court is still being asked to determine whether or not it has jurisdiction to deal with the "disputes" unilaterally referred to it by Qatar. The question of admissibility — or at least the confirmation of admissibility — does not arise until the Court's jurisdiction is established.

8. The Court seems to me to be saying that the "1987 Documents" and the "1990 Doha Minutes", together constitute an international agreement containing a compromissory clause as contemplated by Article 36, paragraph 1, of the Statute, and, in particular, that at the close of the 1990 Doha meeting the representatives of Qatar and Bahrain, together with the representative of Saudi Arabia, signed the minutes of that tripartite meeting and thereby concluded between the two countries an international agreement as contemplated under that provision of the Statute which confers jurisdiction upon the Court in the event of a unilateral submission by one party.

The Court seems to have found that the subject of the dispute to be submitted to it, which was originally covered by the expression used in the "1987 Documents", i.e., "all the disputed matters", in fact meant "the whole of the dispute". It now appears to consider that Qatar failed in its 1991 Application to satisfy the requirements of the "1990 Agreement" simply on account of its not having submitted "the whole of the dispute", but that "the whole of the dispute", as understood by Qatar, has now been incorporated into the amended submissions as of 30 November 1994, so that the Application of Qatar now falls within the ambit of the "1990 Agreement".

9. This is the only interpretation of the Court's position from which the operative paragraph of the present Judgment could be derived. In my view, however, that position is totally unfounded, and I should now like to present my own interpretation with respect to the jurisdiction of the Court. As my detailed analysis has already been given in the dissenting opinion which I attached to the "Judgment" of July 1994, I will here confine myself to giving the gist of that analysis in the expectation that reference will be made to my previous opinion.

2. The So-Called "Agreement of December 1987"

10. Qatar's Application takes the "Agreement of December 1987" as a basis for the exercise of jurisdiction by the Court (Application, para. 40). On 19 December 1987 the King of Saudi Arabia addressed to the Amir of Qatar and to the Amir of Bahrain, respectively, identical letters in which he made certain proposals to serve as a basis for a settlement of the disputes between Qatar and Bahrain. A reply was given by Qatar on 21 December 1987, in which it expressed its full agreement with the proposals set out in the King's letter, but Bahrain's response was not sent until 26 December 1987.

It is important to note that there was no exchange of letters directly between Bahrain and Qatar 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?

I would also refer to a "draft of the announcement made public on 21 December 1987". It is not known 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 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.

11. One may ask how "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)*) came to be concluded between Qatar and Bahrain solely on the basis of this chain of events? I fail to understand how the "Agreement of December 1987", relied upon by Qatar as conferring jurisdiction upon the Court, can be regarded as one of the "treaties [or] conventions in force" contemplated by Article 36, paragraph 1, of the Statute. I am rather confirmed in my view that there was, in December 1987, no treaty or convention within the meaning of Article 36, paragraph 1, of the Statute.

It may further be noted that Qatar, which regards the "Agreement of December 1987" as a basis of the Court's jurisdiction, did not register that "agreement" with the United Nations Secretariat. While there is no need at this juncture 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.

12. Reference may also be made to "Qatar's draft letter to the Registrar of the Court dated 27 December 1987", which is included in the documents submitted by Qatar to the Court, and according to which the Court was to be informed of certain differences between Qatar and Bahrain (which incidentally did not include the question of Zubarah)

and of 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." (Emphasis added.)

The letter was not, in fact, received by the Registrar of the Court. One is, however, led to conclude that both Qatar and Bahrain recognized that they would have to prepare jointly a *special agreement* for the submission of the dispute to the Court.

13. 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 to form a Tripartite Committee of representatives of Saudi Arabia, Qatar and Bahrain

> "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" (Saudi Arabian letter of 19 December 1987).

In fact, at the first meeting of the Tripartite Committee which had thus been constituted, which was held on 17 January 1988, Bahrain drew up a draft "procedural agreement concerning the formation of the joint committee" of which the relevant passage reads as follows:

> "1. A Committee shall be formed of [Qatar, Bahrain and 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." (Emphasis added.)

3. The So-Called "Agreement of December 1990"

14. Qatar's Application also takes the "Agreement of December 1990" as a basis for the exercise of jurisdiction by the Court (Application, para. 40). Qatar uses the term "1990 Agreement" to denote the Minutes of a meeting held 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).

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. Whether the adoption by the participants of the minutes of a multilateral meeting can constitute an international agreement on the part of one participating State in its relations with any other participating State may well be arguable.

In fact, while the three Foreign Ministers, in attestation of the agreement reached, did sign the Minutes of the meeting (i.e., the agreed record of the discussion that had taken place during that tripartite meeting), in my view, they certainly did so without the slightest idea that they were signing a tripartite treaty or convention. It is clear from the statement made by the Foreign Minister of Bahrain on 21 May 1992 and subsequently presented to the Court, that at least the Minister for Foreign Affairs of Bahrain never thought that he was signing an international agreement (Counter-Memorial of Bahrain, Ann. I.25).

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) are to be used as supplementary means of interpretation of a treaty, and given the way in which 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 under Article 36, paragraph 1, of the Statute.

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

> "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 ["al-tarafan"]* 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." (Translation supplied by Qatar: Memorial of Qatar, Ann. II.32.; emphasis added.)

It was understood from the minutes of that session that the parties seemed to have agreed on the inclusion of Zubarah but to have remained

undecided as to how that matter would be included within the subject of the disputes to be submitted to the Court.

* *

17. *The Bahraini formula.* It may be pertinent at this stage to look back at the events which had led to the signing of the 1990 Doha Minutes, particularly in relation to the "Bahraini formula".

In the course of the successive meetings of the Tripartite Committee in 1988, both Qatar and Bahrain prepared draft *special agreements* on 15 March 1988 and 19 March 1988, respectively, in relation to the matters which each Government wanted the Court to decide. Those matters seem to have been quite different in each case. In particular, different views were expressed as to whether or not the question of Zubarah should be included.

At the fourth meeting of the Tripartite Committee on 28 June 1988, two different texts of a revised Article II for the draft *special agreements* were presented by Qatar and Bahrain respectively. The Amir of Qatar gave the King of Saudi Arabia some explanations regarding this situation in a letter dated 9 July 1988 which points out that:

> "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." (Memorial of Qatar, Ann. II.28; first emphasis added.)

18. Some months elapsed after the fourth meeting and then, on 26 October 1988, Bahrain proposed what became known as the "Bahraini formula" which was related to Article II of either Qatar's draft or Bahrain's draft of a *special agreement* — an essential point overlooked in the present Judgment — or, in other words, to the matters in dispute to be referred to the Court by a *special agreement*, 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 in Riyadh on 15 November 1988, Qatar welcomed the opportunity to discuss the Bahraini formula as a possible basis

for negotiations but expressed strong reservations as to 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 by a *special agreement* to the International Court of Justice — even at the fifth meeting of the Tripartite Committee in November 1988.

At the sixth meeting on 6 December 1988 Qatar proposed an amendment of the Bahraini formula 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." (Memorial of Qatar, Ann. II.31.)

19. 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 ought to have defined the matters in dispute to be referred to the Court. The Tripartite Committee was unable to produce an agreed draft of such a *special agreement* to be notified to the Court. After the sixth meeting of the Tripartite Committee in December 1988, 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.

* *

20. This leads us to the Doha Minutes of December 1990, as referred to above. It was agreed at the Doha meeting of the Tripartite Committee, in what became known as the "Agreement of December 1990" (as quoted in paragraph 16 above), that the good offices of Saudi Arabia were to be continued until May 1991 but that thereafter the parties *("al-tarafan")* could submit the case to the International Court of Justice in accordance with the "Bahraini formula". This should be interpreted as meaning that, in the event of a failure of the good offices of Saudi Arabia for the settlement of the dispute, the Parties could come before the International Court of Justice, and this is confirmed in the letter of Qatar addressed to Saudi Arabia on 30 December 1990, 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".

In other words, the submission to the International Court of Justice could have been an alternative to the good offices of Saudi Arabia prior to May 1991. However, this could not be taken to authorize a unilateral

application by either Party, failing to take account of the fact that the "Bahraini formula" could have constituted Article II of a *special agreement* as explained in paragraph 18 above.

21. In May 1991, i.e., after the lapse of this five-month period allowed for the continued good offices of Saudi Arabia, Qatar and Bahrain could have resumed 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 and a draft *special agreement* was also drawn up by Bahrain on 20 June 1992.

Qatar arrived at a different interpretation of the 1990 Doha Minutes and took steps to seise the Court by unilaterally filing a written application in the Registry of the Court on 8 July 1991, and requesting the Court to adjudge and declare what it had already asserted in Article II of its March 1988 draft *special agreement*. It seems to me that Qatar took this action without due regard to the discussion held with Bahrain on the text of Article II of both Qatar's and Bahrain's draft *special agreements*, at the ensuing session of the Tripartite Committee.

III. Conclusions

22. The Judgment seems to imply that no evidence could be found that in the meetings of the Tripartite Committee the Parties had expressly ruled out the possibility of unilateral seisin by either of them. I would rather question whether the Court really found and indicated in the present Judgment any evidence to show that in the meetings of the Tripartite Committee the two Parties conferred jurisdiction upon the Court to deal with their dispute as unilaterally submitted by either one of them.

23. I am convinced that neither the "Agreement of December 1987" nor the "Agreement of December 1990", which were relied upon by Qatar as constituting a basis of the Court's jurisdiction, in fact confer jurisdiction upon the Court in the event of a unilateral application under Article 38, paragraph 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, paragraph 1, of the Rules — which has not been done in this case.

24. I must also add that, even if the "1990 Agreement" can constitute a basis on which the Court may be seised of the dispute, there seems to be nothing in the present Judgment to show that the amended or additional submissions of Qatar filed on 30 November 1994 in fact comprise "the whole of the dispute" — an expression used in the 1994 "Judgment" (see para. 8 above) — as compared to the opposite position which seems to have been taken by Bahrain (note: Bahrain has not had an opportunity to give any official expression to its views on this point other than in its

"Comments" of 5 December 1994, which it voluntarily and hastily sent to the Registry, as already stated in paragraph 6 above).

25. While I must reject the unilateral Application of Qatar, I am, however, second to none in urging that the relevant disputes between Qatar and Bahrain should be settled by the International Court of Justice through their joint submission (as agreed in the 1990 Doha Minutes), after they have reached a common understanding of what constitutes "the whole of the dispute".

(Signed) Shigeru ODA.