International Court of Justice — Disputes — Nature of dispute — Definition — Different views of dispute — When dispute sufficiently defined for adjudication — Agreement to submit whole dispute to International Court of Justice — Whether unilateral application by one Party placed whole dispute before the Court

International Court of Justice — Jurisdiction — Requirement of consent — Agreement between Parties to submit whole dispute to Court — Relationship between jurisdiction and seisin — Method of seisin — Whether agreement envisaged seisin by unilateral application — 1987 and 1990 agreements between Bahrain and Qatar — Whether sufficient to provide basis for the jurisdiction of the Court — Whether consent to jurisdiction conditional upon conclusion of a special agreement — Invitation by Court to Parties to submit whole dispute to the Court by joint or separate acts — Submission by one Party acting alone — Whether sufficient — Admissibility

International Court of Justice — Procedure — Method of seisin — Unilateral application — Procedural consequences — Invitation by Court to Parties to submit whole dispute to it by joint or separate acts — Whether Court envisaging co-ordinated acts by both Parties — Unilateral act by one Party — Time-limits for filing of Memorials

Treaties — Definition — Essential nature of a treaty — Form of agreement irrelevant—Treaty contained in several separate instruments — Minutes of a meeting — Whether capable of amounting to a treaty — Intention of the parties — Foreign Minister not authorized to sign binding agreement and not intending to do so — Whether preventing minutes from constituting a treaty — Vienna Convention on the Law of Treaties, 1969, Article 2(1)(a)

Treaties — Interpretation — Principles of interpretation — Common intention of the parties as revealed in the text — Recourse to supplementary means of interpretation — *Travaux préparatoires* — Recourse to negotiating history to confirm interpretation of text — Effect of conflict between interpretation reached by study of text and negotiating history

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

International Court of Justice

Jurisdiction and Admissibility (First Decision). 1 *July* 1994

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer and Koroma, *Judges*; Valticos[1] and Ruda,[2] *Judges ad hoc*)

Jurisdiction and Admissibility (Second Decision). 15 *February* 1995

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer and Koroma, *Judges*; Valticos and Torres Bernárdez,[3] *Judges ad hoc*)

Order. 28 *April* 1995

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma and Vereshchetin, *Judges*; Torres Bernárdez, *Judge ad hoc*)

SUMMARY: *The facts*:—On 8 July 1991 Qatar filed an Application instituting proceedings against Bahrain in respect of certain disputes between the two States. Bahrain contested the jurisdiction of the Court and initially objected to the inclusion of the case in the Court's General List. Subsequently, it was agreed that questions of jurisdiction and admissibility should be separately determined before any proceedings on the merits.

Attempts to find a solution to certain disputes between Bahrain and Qatar had been made since 1976 in the context of a mediation by the King of Saudi Arabia. In 1983 a set of "Principles for the Framework for Reaching a Settlement" were approved at a tripartite meeting.[4] The first principle specified 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.

[1] Judge *ad hoc* designated by Bahrain.
[2] Judge *ad hoc* designated by Qatar.
[3] Judge *ad hoc* designated by Qatar following the death of Judge Ruda.
[4] See p. 13.

In December 1987 the King of Saudi Arabia proposed that "all the disputed matters" should be referred to the International Court of Justice and that a Tripartite Committee should be established "for the purpose of approaching the International Court of Justice and satisfying the necessary requirements to have the dispute submitted to the Court".[5] These proposals were accepted by the Amirs of Bahrain and Qatar ("the 1987 exchanges of letters").

Several meetings of the Tripartite Committee discussed how the dispute might be submitted to the Court but without reaching agreement. At the fourth meeting of the Committee in October 1988 Bahrain proposed the following formula ("the Bahraini formula"):

> 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.

Qatar, on the other hand, 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.

Discussions continued in the Tripartite Committee, in the course of which it was agreed in principle that the matters to be referred to the Court were:

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

With regard to Zubarah, Bahrain insisted that the dispute was over sovereignty. Qatar, however, stated that it could only agree to the inclusion of Zubarah in the list if the dispute related to private rights. Thereafter meetings of the Tripartite Committee ceased.

At a meeting of the Gulf Co-operation Council in Doha in December 1990, Qatar let it be known that it was ready to accept the Bahraini formula. The Foreign Ministers of Bahrain, Qatar and Saudi Arabia signed minutes ("the 1990 Minutes"), which reaffirmed what had previously been agreed between the two Parties and provided that the good offices of the King of Saudi Arabia would continue until May 1991, after which the dispute might be submitted to the International Court. Qatar had originally proposed that the Minutes should provide that either of the Parties could seise the Court of the dispute. Bahrain, however, insisted on a different formula, which was eventually adopted. According to Bahrain, the English translation of the relevant part of the 1990 Minutes was that "the two parties" might submit the dispute to the Court, whereas Qatar maintained that the correct translation from the Arabic was "the parties may submit the matter to the International Court of Justice".[6] The good offices of the King of Saudi Arabia did not lead

[5] See p. 14.
[6] See p. 16, below.

to an agreement and on 8 July 1991 Qatar unilaterally instituted proceedings relating to sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

Qatar maintained that the 1987 exchanges of letters and the 1990 Minutes were legally binding agreements by which the two States had given their consent to the Court exercising jurisdiction in respect of the disputes referred to therein and that, in the absence of an agreement between the Parties to seise the Court, either State could make a unilteral application. Bahrain accepted that the 1987 exchanges of letters were binding. It denied, however, that the 1990 Minutes were a binding agreement and argued that they were merely a record of negotiations, similar to the minutes of the meetings of the Tripartite Committee. The Foreign Minister of Bahrain, it was claimed, would not have signed the Minutes if they had been intended as a binding instrument since he lacked the authority to conclude a binding agreement. In any event, Bahrain contended that the combined provisions of the 1987 exchanges of letters and the 1990 Minutes were not such as to enable Qatar unilaterally to seise the Court.

Judgment of 1 July 1994

Held (by fifteen votes to one, Judge Oda dissenting):—(1) The 1987 exchanges of letters and the 1990 Minutes were international agreements creating rights and obligations for the Parties. International agreements could take a number of forms and be given a diversity of names. There was no reason why a joint communiqué could not constitute an agreement to submit a dispute to the Court. The terms of the 1990 Minutes and the circumstances in which they were drawn up showed that the Minutes were not merely a record of negotiations but an international agreement, enumerating the commitments to which the Parties had consented. Having signed such a text the Foreign Minister of Bahrain was not in a position subsequently to say that he had intended to subscribe only to a political understanding. Nor did the subsequent practice of the Parties show that they did not regard the Minutes as a binding agreement. The fact that Qatar did not register the Minutes with the United Nations Secretariat for six months and had not registered them with the Arab League did not mean that it did not regard the Minutes as a legally binding agreement (pp. 17-19).

(2) By the terms of those agreements the Parties had undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the Bahraini formula. While this formula circumscribed the dispute, it left open the possibility for each Party to present its own claims to the Court within the framework thus fixed. Since, however, Qatar's Application did not embrace the whole of the dispute encompassed by the Bahraini formula, it was appropriate to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute. This could be achieved either by a joint act of both the Parties or by separate acts. The Court accordingly fixed 30 November 1994 as the time-limit within which the Parties were, jointly or separately, to take action to that end (pp. 19-22).

(3) Although Qatar had not accepted a 1988 proposal by Bahrain that a special agreement between the two States include a provision that neither party should introduce in evidence or disclose proposals made with a view to the settlement of the dispute, a rule to that effect already formed part of customary international law (pp. 22-3).

Declaration of Judge Shahabuddeen: It would have been preferable for the issue of jurisdiction to have been fully decided at the present stage (p. 26).

Separate Opinion of Vice-President Schwebel: The Judgment lacked the essential quality of adjudging the principal issue submitted to the Court, for the Court had failed either to accept or reject Bahrain's submission that it was without jurisdiction over the dispute brought before it by the Application of Qatar. This was a novel and disquieting feature (pp. 27-8).

Separate Opinion of Judge ad hoc *Valticos*: The Court should only proceed to deal with the merits if both the States concerned were to seise it of their disputes, whether jointly or separately, and in accordance with the Bahraini formula (p. 29).

Dissenting Opinion of Judge Oda: Neither the 1987 exchanges of letters nor the 1990 Minutes could be deemed to constitute a basis for the jurisdiction of the Court in the event of a unilateral application, since neither constituted a treaty or convention within the meaning of Article 36(1) of the Statute of the Court and they envisaged only the conclusion of a special agreement between the Parties. The Court was therefore without jurisdiction to entertain Qatar's Application. The Court should not have treated that unilateral Application as though it were the unilateral notification of a special agreement between the Parties (pp. 30-46).

Further facts:—Following the Judgment of 1 July 1994 there were a number of meetings and exchanges of letters between the Parties. On 30 November 1994 the Agent of Qatar filed with the Registry a document entitled "Act to comply with paragraphs (3) and (4) of the operative paragraph 41 of the Judgment of the Court dated 1 July 1994", which stated that in the absence of an agreement between Qatar and Bahrain to act jointly, Qatar was submitting to the Court "the whole of the dispute between Qatar and Bahrain, as circumscribed by the text . . . referred to in the 1990 Doha Minutes and the 'Bahraini formula'". This act listed the subject matter of the dispute as it had been agreed in principle in 1988 and stated that "it is understood by Qatar that Bahrain defines its claim concerning Zubarah as a claim of sovereignty". Bahrain submitted a "Report of the State of Bahrain to the International Court of Justice on the Attempts by the Parties to Implement the Court's Judgment of 1st July 1994", in which it said that it understood the Judgment of 1 July 1994 as confirming that the submission to the Court of the whole of the dispute must be consensual in character but that Qatar had insisted on pursuing the dispute within the framework of the unilateral Qatari Application. On 5 December 1994 Bahrain sent a further letter in which it asserted that the Act submitted by Qatar could not bestow

upon the Court a jurisdiction to consider the unilateral Application which the Court had failed to assert in its 1994 Judgment.

Judgment of 15 February 1995

Held (by ten votes to five, Vice-President Schwebel, Judges Oda, Shahabuddeen and Koroma and Judge *ad hoc* Valticos dissenting):—(1) The Court had jurisdiction to adjudicate upon the dispute submitted to it.

(a) The text of the 1987 exchange of letters and the 1990 Minutes did not require the conclusion of a special agreement between the Parties as a condition precedent to submitting the dispute between them to the Court. The conclusion of the 1990 Minutes which included the Bahraini formula meant that the Parties had agreed to the extent of the jurisdiction of the Court but they continued to differ on the question of the method of seisin (pp. 57-9).

(b) The Court was therefore required to determine whether the 1990 Minutes permitted the seisin of the Court by unilateral application. In accordance with customary law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty had to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The phrase in the 1990 Minutes which, in the translation offered by Bahrain, read "the two parties may submit the matter to the International Court of Justice" suggested, in its natural meaning, a right or option for them to seise the Court. That right was to come into being as soon as the period established for mediation by Saudi Arabia had ended. The provision only made sense, therefore, on the basis that each party had a right of unilateral seisin. Moreover, the right of unilateral seisin was the necessary complement to the suspension of mediation. The fact that the 1990 Minutes referred to the Bahraini formula, which had originally been put forward for inclusion in a special agreement, did not alter that conclusion (pp. 59-62).

(c) Since the text of the 1990 Minutes was clear, there was no need to have recourse to supplementary means of interpretation but the Court could examine the *travaux préparatoires* of the Minutes to seek possible confirmation of its interpretation of the text, even though the fragmentary nature of the *travaux préparatoires* in the present case meant that caution was necessary. Although the *travaux préparatoires* showed that an initial proposal that the text should stipulate that either party could seise the Court had not been accepted, the abandonment of that form of words did not mean that the text finally adopted had to be interpreted as permitting only joint seisin. Whatever may have been the motives of the Parties, the Court could only confine itself to the actual terms of the Minutes as the expression of their common intention (pp. 62-4).

(d) The jurisdiction of the Court could only be established on the basis of the will of the Parties. Moreover, the Court was unable to entertain a case so long as the relevant basis of jurisdiction had not been supplemented by the necessary act of seisin, so that, from this point of view, seisin appeared to be a question of jurisdiction. Since, however, the Court had concluded that the 1990 Minutes permitted a unilateral seisin in the present case, the Court had been validly seised (pp. 63-4).

(2) The Application of Qatar, as formulated in the Act of 30 November 1994, was admissible. It now encompassed the whole of the dispute envisaged by the Bahraini formula and described the dispute in the terms used by Bahrain in the meeting of the Tripartite Committee. Within the framework thus established, it was open to Bahrain to present a claim to sovereignty over Zubarah (pp. 64-5).

Dissenting Opinion of Vice-President Schwebel: Jurisdiction could be conferred upon the Court only by an expression of the common intention of the Parties. In the present case, it had not been the common intention of the Parties that either of them might, by unilateral application, seise the Court. The text of the 1990 Minutes was far from clear. However, the *travaux préparatoires* and, in particular, the decision not to adopt the text originally proposed which would have provided that either party might seise the Court, showed that it had not been the common intention of the Parties that the Court could be seised by unilateral application. The Court's decision to discount the *travaux préparatoires*, because they did not confirm the interpretation at which it had already arrived, was hard to reconcile with the duty to interpret a treaty in good faith (pp. 68-80).

Dissenting Opinion of Judge Oda: (a) The Court should have given Bahrain the opportunity to express its formal position on the modifications or additions to the Qatari submissions made when Qatar filed its Act of 30 November 1994 (pp. 81-4).

(b) The 1990 Minutes did not constitute a legally binding international agreement that either State might submit the dispute between them to the Court by unilateral application (pp. 84-90).

(c) The amended or additional submissions of Qatar did not, in any event, comprise the whole of the dispute, as required by the Bahraini formula (pp. 90-1).

Dissenting Opinion of Judge Shahabuddeen: (a) The Act filed by Qatar in November 1994 did not satisfy the requirements of the July 1994 Judgment. Although that Judgment referred to the possibility of the Parties submitting a joint act or separate acts, the term "separate acts" visualized acts done by each Party acting separately, not an act done by one Party alone where the other did nothing; each Party would have had to act so as to complement the act of the other and in that way to submit the whole of the dispute to the Court (pp. 92-5).

(b) It followed that all the Court had before it was the unilateral Application by Qatar of 8 July 1991. That Application did not include the whole of the dispute contemplated by the Bahraini fomula and the Court was thus without jurisdiction (pp. 95-6).

(c) Qatar had no right of unilateral application under the 1990 Minutes. The Minutes did not represent an agreement to such a unilateral application. While a treaty had to be interpreted in accordance with its object and purpose, it was not for the Court to make it more effective for achieving its apparent purpose than the Parties themselves saw fit to do. Nor was it the case that, once consent to the jurisdiction of the Court had been given, the

Court might be unilaterally seised unless the right to do so was shown to have been excluded by the Parties (pp. 96-103).

(d) Establishing that the Court possessed jurisdiction was a matter of great importance and the standard of proof was accordingly high. It was necessary for Qatar to show that the force of the arguments militating in favour of jurisdiction was preponderant. Where the Court was in doubt, it would not affirm its jurisdiction (pp. 103-6).

Dissenting Opinion of Judge Koroma: The 1987 exchanges of letters were subject to the conditions that the Tripartite Committee should conclude a special agreement for approaching the Court and that the consent to confer jurisdiction was conditional on reaching such an agreement. The conclusion of such an agreement was also a condition of the 1990 Minutes. The negotiating history of those Minutes was incompatible with the interpretation now placed upon them by the Judgment. Qatar's reformulation of the dispute in its Act of 30 November 1994 without the consent of Bahrain did not suffice to bring the whole dispute before the Court. The Court was not, therefore, entitled to assume jurisdiction and the claim was inadmissible (pp. 108-14).

Dissenting Opinion of Judge ad hoc *Valticos*: In its Judgment of 1 July 1994 the Court had invited the two Parties to submit to it the whole of the dispute. Qatar's unilateral action was not sufficient to do this. Bahrain regarded the dispute over the Hawar islands and Zubarah as a dispute over sovereignty, whereas Qatar did not accept that and had merely noted in its Application, as supplemented by the Act of 30 November 1994, that Bahrain regarded the dispute in this way. The dispute over Zubarah had not, therefore, properly been submitted to the Court. The negotiating history of the 1990 Minutes should have been taken as showing that there was no consent to the seisin of the Court by unilateral application. The practice of the Parties, subsequent to the conclusion of the 1990 Minutes, also pointed to such an interpretation. The Court had thus assumed jurisdiction without the consent of one of the Parties (pp. 115-19).

Further facts:—The Court invited both Parties to give their views regarding time-limits for the written proceedings on the merits. Bahrain declined to attend a meeting of the agents called for this purpose.

Held:—Having ascertained the views of Qatar and given Bahrain an opportunity of stating its views, the Court fixed 29 February 1996 as the time-limit for the filing by each of the Parties of a Memorial on the merits and reserved the subsequent procedure for further discussion (pp. 119-21).

The text of the Judgments and Order of the Court is set out as follows:

The following is the text of the judgment of 1 July 1994:

112] JUDGMENT

Present: *President* BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, Sir Robert JENNINGS, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA; *Judges* ad hoc VALTICOS, RUDA; *Registrar* VALENCIA-OSPINA.

In the case concerning maritime delimitation and territorial questions between Qatar and Bahrain,

between

the State of Qatar,

represented by [11

H.E. Mr. Najeeb Al-Nauimi, Minister Legal Adviser,
as Agent and Counsel;
Mr. Adel Sherbini, Legal Expert,
Mr. Sami Abushaikha, Legal Expert,
as Legal Advisers;
Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I,
Mr. Jean Salmon, Professor at the Université libre de Bruxelles,
Mr. R. K. P. Shankardass, Senior Advocate, Supreme Court of India, Former President of the International Bar Association,
Sir Ian Sinclair, K.C.M.G., Q.C., Barrister at Law, Member of the Institute of International Law,
Sir Francis Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law at the University of London,
as Counsel and Advocates;
Mr. Richard Meese, Advocate, partner in Frere Cholmeley, Paris,
Miss Nanette E. Pilkington, Advocate, Frere Cholmeley, Paris,
Mr. David S. Sellers, Solicitor, Frere Cholmeley, Paris,

and

the State of Bahrain,
represented by

H.E. Mr. Husain Mohammed Al Baharna, Minister of State for Legal Affairs, Barrister at Law, Member of the International Law Commission of the United Nations,
as Agent and Counsel:
Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus at the University of Cambridge,
Mr. Keith Highet, Member of the Bars of the District of Columbia and New York,
† Mr. Eduardo Jiménez de Aréchaga, Professor of International Law at the Law School, Catholic University, Montevideo, Uruguay,
Mr. Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law and Director of the Research Centre for International Law, University of Cambridge; Member of the Institute of International Law,
Mr. Prosper Weil, Professor emeritus at the Université de droit, d'économie et de sciences sociales de Paris,
as Counsel and Advocates;
Mr. Donald W. Jones, Solicitor, Trowers & Hamlins, London,
Mr. John H. A. McHugo, Solicitor, Trowers & Hamlins, London,
Mr. David Biggerstaff, Solicitor, Trowers & Hamlins, London,
as Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment: