DISSENTING OPINION OF JUDGE KOROMA

I regret that I am unable to agree or to support the present Judgment of the Court. All the more so when much of the reasoning deployed to reach the findings on jurisdiction and admissibility should have led to the opposite conclusions.

Although the Court in its Judgment of 1 July 1994 did not expressly state it lacked jurisdiction in this case, it was equally unable to declare it had jurisdiction to entertain the dispute on the basis of the Application filed by Qatar on 8 July 1991.

The Court, in that Judgment, held that the exchange of letters of 19 December 1987, as well as the Doha Minutes of 25 December 1990, constituted international agreements, creating rights and obligations for the Parties — Qatar and Bahrain.

Both Parties had acknowledged the nature of the 1987 document as an international agreement, but they also agreed that it did not by itself provide an immediate basis for enabling the Court to exercise jurisdiction.

By the terms of that Agreement:

> "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." (Application, p. 46.)

Paragraph 3 provides for the setting up of 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 . . ." *(Ibid.)*

In construing these provisions, Qatar maintains that the Parties clearly and unconditionally conferred upon the Court jurisdiction to deal with the disputed matters between them; that the work of the Tripartite Committee was directed solely to considering the procedures to be followed to implement the commitment thus made to seise the Court; and that there was nothing to show that any particular method or procedure ought to have been followed to that end, provided that the seisin of the Court took place in accordance with its regulations and instructions.

Bahrain, for its part, maintains that the texts in question expressed only the Parties' consent in principle to a seisin of the Court, but that such consent was clearly subject to the conclusion of a special agreement marking the end of the work of the Tripartite Committee, setting forth the questions to be put to the Court by mutual agreement and settling a

number of related procedural questions. Bahrain further maintains that its interpretation of the texts is corroborated by the subsequent conduct of the Parties, in so far as the work of the Tripartite Committee, in which the two Parties participated, was concerned exclusively with the drawing up of a Special Agreement to submit the disputed matters to the Court.

The Court, in rejecting Bahrain's interpretation of paragraph 3 of the Agreement, stated as follows:

> "while it is undeniable that the Tripartite Committee focused exclusively upon the attempt to finalize the text of a special agreement *determining the subject-matter of the dispute*, this does not at all mean that the Parties took that approach to be the only one sanctioned by the Agreement of 1987" (Judgment, para. 28; emphasis added).

It is obvious that the drawing up of the Special Agreement, determining the subject-matter of the dispute, was not the only one function contemplated by the 1987 Agreement, as certain other consequences would have had to follow if that Agreement had been drawn up and which could have been given expression either in the Agreement itself or in a related document. But, as recognized by the Judgment, the Tripartite Committee primarily focused on the conclusion of the Special Agreement "because that course appeared to it, at the time, to be the most natural and best suited to give effect to the consent of the Parties" (Judgment, para. 28).

In my view, this clearly demonstrates that the 1987 Agreement was subject to the following conditions:

(i) the conclusion of a Special Agreement by the Tripartite Committee for approaching the Court;
(ii) that the consent to confer jurisdiction was conditional on reaching such an agreement by the Tripartite Committee.

Thus, the Agreement, objectively interpreted, demonstrates that the consent of the Parties to confer jurisdiction on the Court was conditional upon a Special Agreement being concluded. Accordingly, the consent which the Court had deduced from the Agreement was conditional on a joint agreement being reached by both Parties with the assistance of the Committee. That such an agreement was necessary was the reason the Committee held six meetings and concentrated on that issue. It is only this reading of the 1987 Agreement which offers adequate and sufficient explanation for the activities of the Committee and its *raison d'être.*

This interpretation of the Committee's mandate is further reinforced by the fact that the Kingdom of Saudi Arabia was requested "to continue its good offices to guarantee the implementation of these terms".

A similar request was made in paragraph 2 of the 1990 Doha Minutes which read as follows:

> "(2) The good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, shall continue between the two coun-

> tries until the month of Shawwal 1411 A.H., corresponding to May 1991. Once that period has elapsed, the two parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and with the procedures consequent on it. The good offices of the Kingdom of Saudi Arabia will continue during the period when the matter is under arbitration."

Both these provisions suggest that the role of Saudi Arabia in using its good offices to reach an agreement on the subject-matter of the dispute was independent of the act of seising the Court. In fact, Saudi Arabia's efforts were to continue even if the dispute were submitted to the Court. Thus an agreement on the subject-matter of the dispute was a condition precedent for jurisdiction to be conferred. This condition was not fulfilled prior to the submission of Qatar's unilateral Application on 8 July 1991.

On the matter of seisin of the Court, the Court's analysis and conclusion of the provision "Once that period has elapsed, the two Parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula . . .", as denoting an option or even a right of unilateral seisin, in my view, does not bear close scrutiny, both in terms of interpreting the provision and given the chronology of the dispute. In the first place, the appropriate emphasis in this provision should not be given to the word "may", which, according to the Judgment of the Court, may allow either Party or both Parties to seise the Court, but rather on the correct interpretation to be given to the expression *"al-tarafan"* in the context of the Agreement.

The Court, in interpreting that expression, reached the conclusion that given the failure to negotiate the Special Agreement, the Parties were to be understood as now having agreed on a right of unilateral application.

This conclusion is reached after the Court itself had acknowledged that the expression *"al-tarafan"* — "the parties", "the two parties" — was substituted for the words "either of the two parties" in the Doha Agreement itself. I find it hard to understand and also untenable that the Court could have reached this conclusion in the face of those changes which were made to the draft of the Agreement, accepted by both Qatar and Bahrain, and supported by the *travaux préparatoires,* which is undisputed by both Parties.

If, as the Court has found, unilateral seisin was contemplated and expected, it is incomprehensible why the proposed changes were made and agreed to by both Parties. Moreover, if unilateral seisin was contemplated, the original text would have remained as it was proposed and would have read as follows: "Once that period has elapsed, [either] party may submit the matter to the International Court of Justice . . ." But "either party" was changed and replaced with "the parties" or "the two parties", and this was accepted by both Qatar and Bahrain. This, reason-

ably, suggests that what was intended was a joint approach to the Court. This conclusion is even stronger and persuasive when read together with the "Bahraini formula", according to which: "The Parties request the Court to decide any matter of territorial right or other title . . ." That "formula" also stipulates that it is "the Parties" not "either of the parties" that may request the Court to decide any matter of territorial right or other title.

By way of analogy, Article III of the Optional Protocol concerning the Settlement of Disputes of the Law of the Sea, provides as follows:

> "The Parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either Party to this Protocol may bring the dispute before the Court by an application." (United Nations, *Treaty Series*, Vol. 450, 1963, p. 172.)

Similarly, under this Protocol, "the Parties", not "either Party", first have to agree to resort to an arbitral tribunal in case of a dispute. Where it is intended that either party may bring the dispute before the Court after an expired period by an application, it is so explicitly stated and leaves no room for doubt that one party may bring the dispute before the Court. On the other hand, the 1990 Agreement states: "After the end of this period, the Parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, . . ."

The similarities between this Protocol and the Doha Minutes are not only striking and unambiguous, but the Protocol lends further clarity to the text of Doha. Nor is this conclusion vitiated by the rules of interpretation embodied in Article 31 of the 1969 Vienna Convention on the Law of Treaties, that a treaty must 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 ordinary meaning of the "parties" is that the two or both Parties jointly must submit their dispute to the Court and neither the Doha Minutes nor the Bahraini formula has as its object and purpose the unilateral seisin of the Court.

From a jurisdictional point of view, therefore, and for this stage of the dispute, the crucially important issue was that of consent: whether consent was granted conferring jurisdiction on the Court, on what conditions, and whether those conditions were met by Qatar's unilateral Application. Both legal principles and the fundamental jurisprudence of the Court have always founded jurisdiction upon the clear and unambiguous consent of the parties to a dispute. While the Court has tended to refine this principle to allow for the intention of the parties to be determined in

particular circumstances, it has remained constant that clear and indubitable consent remains the basis for the assumption of jurisdiction. Not only must such consent be clear and unambiguous, it only acquires its validity if and when the procedure or the conditions under which it was granted have been met. In my view, the unilateral Application of Qatar did not meet the requirements laid down in both the 1987 Agreement and the 1990 Doha Minutes for the Court to be in a position to assume jurisdiction in this matter.

Qatar had initiated these proceedings in accordance with Article 40, paragraph 1, of the Statute of the Court read with Article 38 of the Rules of Court. Article 40, paragraph 1, of the Statute provides as follows:

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

According to Article 38, paragraph 1, of the Rules of Court:

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

Qatar, having brought this matter by means of a written Application, the Application should indicate the party making it, the State against which the claim is brought, and the subject of the dispute. It was, therefore, a prerequisite to indicate the subject of the dispute to enable the Court to assume jurisdiction.

When the Court by its Judgment of 1 July 1994 afforded the Parties to submit "the whole of the dispute", based on the terms of the 1987 Agreement and the 1990 Doha Minutes, it implied that this had not been done by Qatar's Application of 8 July 1991. It also implied that there had to be an agreement between the Parties for "the whole dispute" whether separately or jointly to be submitted to the Court. If this were not so, the Court could just specifically have instructed Qatar to amend its Application, to enable it to decide on its jurisdiction. Since no agreement was reached within the time allotted, the Court had accordingly not been seised of "the whole of the dispute" by "the Parties" as comprehended by the "Bahraini formula". It would be stretching credulity too far to hold that the Applicant by its "Act" of 30 November 1994 had completed the circle, as it were, by mentioning "Zubarah" in its amended Application, even though no agreement had been reached both as contemplated by the "Bahraini formula", and by the 1 July 1994 Judgment.

Bahrain did not agree to the formulation of the Zubarah issue over which it claims sovereignty, as presented by Qatar, and, as the record shows, Zubarah has been one of the main bones of contention that the

Parties had not been able to reach agreement to seise the Court of the dispute. To accept that the reformulation of this issue by Qatar alone, without the agreement of the other Party, and for the Court to accept that such reformulation has now invested it with "the whole dispute", does not, in my view, lend conviction to the Court's Judgment. It is evident that the conditions stipulated in the Agreements that "the Parties" submit "the whole dispute", underlying the consent to confer jurisdiction had not been met and the Court is not therefore in a position to assume jurisdiction in this matter.

The Judgment also considered the links which exist between jurisdiction and seisin and their correlation to the issue before the Court. That the Court will lack jurisdiction to deal with a case so long as the relevant basis of jurisdiction has not been supplemented by the necessary act of seisin is unimpeachable. But this statement is subject to any special provision upon which the parties may have agreed as to the method of instituting proceedings under a given title of jurisdiction. It is in this sense that I would tend to agree with the submission that "seisin" is an integral part of consensual jurisdiction.

When this principle is applied to the Doha document, and in attempting to determine the meaning of the Arabic term *"al-tarafan"*, which Qatar had maintained could be interpreted to mean "the two parties" acting separately, and Bahrain that it was intended to mean "the two parties" acting together or jointly, it leaves enormous room for doubt. The disagreement relates to the issue of the method of approaching the Court, whether separate seisin was contemplated by the Doha Agreement as contended by Qatar, or joint seisin was intended, as Bahrain maintains. The Judgment acknowledges that the expression *"al-tarafan"* is ambiguous by itself to give the true intention of the Parties.

Notwithstanding the serious ambiguities and lack of clarity surrounding the crucial aspects of the Agreements, and which do not make for a decisive resolution of the issues in contention, the Court has held that it could validly be seised by means of a unilateral application. This conclusion is not unimpeachable. To find as a basis for jurisdiction, the evidence must be clear and preponderant. Here the evidence is not of such quality. Hence, I do not find this conclusion, like the rest of the Judgment, impeccable.

Similarly, the Judgment of 1 July 1994 contemplated an agreement when it enjoined the Parties to submit to the Court "the whole of the dispute" as circumscribed by the "Bahraini formula". Since neither the "Act" of Qatar of 30 November nor the "Report" of Bahrain, evinced an agreement between the two Parties to submit "the whole of the dispute" to the Court, the Court does not accordingly have before it "the whole of the dispute", a prerequisite for conferring jurisdiction on it in terms of the Doha Minutes, and without which it cannot be in a position to assume jurisdiction.

In view of the foregoing, and taking into account the 1 July 1994 deter-

mination by the Court that it did not have "the whole of the dispute" before it to enable it to assume jurisdiction on the matter, which defect was not cured by the inability of the two Parties to reach an agreement to submit the whole of the dispute, I am not persuaded that the Court is entitled to assume jurisdiction in this matter. This conclusion is in accordance with the material before the Court, and with its Judgment of 1 July 1994. The Court should accordingly have decided that it lacked jurisdiction, and that the claim is inadmissible.

(Signed) Abdul G. KOROMA.