DISSENTING OPINION OF JUDGE VALTICOS

[Translation]

1. While fully recognizing the qualities of the preceding Judgment, to which I shall return later, I am not able to associate myself with it.

2. For I do not consider that the Court is competent to consider the dispute between Qatar and Bahrain. Moreover, in its preceding Judgment of 1 July 1994, the Court itself did not state that it was so, but requested the Parties to furnish it with the additional elements which, in fact, were only furnished to it incompletely and by only one of the two Parties.

3. To be more specific, let us recall that, in the aforementioned Judgment of 1 July 1994, the Court considered that there had been international agreements creating rights and obligations for Bahrain and Qatar. More precisely, it found that these two States had undertaken to submit to the Court *the whole of the dispute* between them, in accordance with the "Bahraini" formula. It did not, however, conclude that these agreements between the two States were enough of a Special Agreement to enable the case to be referred directly to the Court as it stood.

4. In fact, this agreement between the two States had still to be supplemented by an agreement on the precise subject of the referral to the Court, as well as by a joint or separate (but, as I shall indicate below, doubly separate) act of the two Parties, as the Court itself indicated in its Judgment of 1 July 1994.

5. If these additional measures had not been considered necessary, the Court would not, by this Judgment, have asked *"the Parties"* (i.e., the two Parties) to submit to it *"the whole of the dispute"*. In this respect, the additional measures deemed necessary by the Court have only been taken in part, since only one of the Parties (Qatar) has addressed a list of points to the Court and, while it may on this occasion have mentioned Zubarah together with the other questions forming the subject of the dispute, this was in terms which did not meet with the agreement of the other Party. Indeed, Qatar indicated that it wished the matter to be defined simply by the word "Zubarah", with an indication that it "understands that Bahrain defines its claim concerning Zubarah as a claim of sovereignty". Bahrain rejected this form of words, explaining that it had asked for the term "sovereignty" to be included in the actual wording of the question.

6. One may wonder whether this difference does not still persist, since, towards the end of its most recent Judgment — *"in cauda suave"* as it were — the Court now holds that, in reality, the question of Zubarah and that of the Hawar islands having been submitted to it, claims of sover-

eignty may be put forward by either Party and that it is therefore seised of the dispute as a whole.

7. However, is it really possible to reason in this way — which, admittedly, would solve the problem — when one of the Parties (Qatar) does not accept this broad definition of the subject of the dispute and confines itself to noting the more general request of the other? Can this divergence between the Parties regarding the definition of the subject of the dispute, a divergence that the States concerned have considered substantial enough to prevent them reaching agreement on this point, really be set aside? For in reality, this divergence is quite substantial: the mere indication that it was understood by one of the Parties (Qatar) that the other Party (Bahrain) accorded wider scope to the formulation of a question does not mean that it agrees that this question should be submitted to the jurisdiction of the Court. On the contrary, that Party thus reserves the possibility, in due course, of disputing the Court's capacity to consider the question thus worded. This being so, and bearing in mind Qatar's position, it does not seem possible genuinely to consider that there was agreement between the two Parties that the question of sovereignty over Zubarah should be submitted to it.

8. Admittedly, during the long discussions between the two States, the question of Zubarah (and Zubarah only) had arisen, but the scope of this question — and more particularly whether it covered sovereignty — had never been the subject of an agreement.

9. It must therefore be acknowledged that, failing an agreement on this point, it is difficult to regard sovereignty over Zubarah as submitted to the Court, considering the explicit position adopted by Qatar.

10. It is clear, therefore, that there is no complete agreement of the two States as to the subject of the dispute between them and that the Court does not have before it what it asked the Parties to submit to it, namely, a definition of "the whole of the dispute" as formulated by them (Judgment of 1 July 1994, para. 41 (3)).

11. Moreover, in asking the Parties to submit to it the whole of the dispute, the Court (para. 41 (4)) specified that they were "jointly or separately, to take action to this end".

12. This brings us to the question of seisin which, in this case, has been the source of far too much confusion. Even in the earlier proceedings of the Court, there had been broad discussion of the meaning of the Arabic term *"al-tarafan"*, which had been used in the Doha Minutes and of whether this term referred to the two Parties taken together or separately. These discussions were inconclusive and it would thus be hazardous to base the validity of the seisin of the Court upon a disputed translation or upon rash deductions. Jurisdiction, which includes the seisin of the Court, cannot be founded on doubt.

13. However, since this matter is dealt with in the Judgment, the reasons which, in my view, to say the least raise doubts that the term *"al-tarafan"* used to refer to the conditions in which the Court was apparently seised of this case may be taken as meaning *either* Party, can-

not be glossed over. In fact, during the Doha discussions, a preliminary draft, drawn up by Oman, envisaged that, after a certain time had elapsed, "each of the two Parties" could submit the matter to the Court. At the request of Bahrain, this text was replaced by the wording according to which "the two Parties" (in Arabic *"al-tarafan"*) could seise the Court. This change would have been pointless if it meant the same thing as the initial draft. In the hectic atmosphere of the meeting, then overridingly concerned by the serious problems of Iraq and Kuwait, the previous text would not have been changed in favour of a text with the same meaning. The new text was certainly intended to mean something else and this could only have been that it was "both Parties at once" (or "together") who could refer the matter to the Court. The logic of this deduction seems to me at once elementary and decisive. Moreover, the Court has accepted that it is not a matter of an "explicit" text. How, in that case, can the jurisdiction be founded on doubt, or at all events, on an uncertain interpretation?

14. For my part, it does not seem to me possible to share the point of view according to which the amendment adopted at Doha was, ultimately, devoid of meaning. Indeed, and according to a well-known principle of interpretation, the changes made to a text cannot be meaningless. What should be decisive in this case is not suppositions about the manner in which the various interested parties are said to have understood this change, but essentially the actual text of the amendment, the intention which inspired it and an interpretation thus founded on its actual words and on the conditions of its adoption.

15. Returning now to the Court's Judgment of 1 July 1994, it must be stressed that, in deciding that "the Parties [were], jointly or separately, to take action" (operative paragraph 41 (4)) in order "to submit to the Court the whole of the dispute" (operative paragraph 41 (3)), the Court was manifestly referring, in either case, to an act by the two Parties, whether as one act effected together or as two separate acts. The request thus addressed by the Court to the two Parties was, moreover, no more than a logical consequence of the principle according to which the Court can only be seised by the two Parties to a dispute, unless there is an agreement to the contrary, which is hard to accept solely on the basis of the disputed Doha Minutes. Indeed, even if these Minutes are considered to be an international undertaking, this text did not specify what the matters at issue were and hence could not suffice in itself or be considered as authorizing each of the Parties to seise the Court of the matter. There would still have had to be agreement on the scope of the dispute for the Parties to be able to refer it to the Court.

16. Moreover, it is significant that, after the Doha Agreement, the two States concerned on a number of occasions endeavoured to negotiate a special agreement, and must therefore have considered that the Doha text was not sufficient in itself.

17. Lastly, the agreement of the Parties to proceed in accordance with the "Bahraini" formula does indeed presuppose a combined operation

with a — preferably simultaneous but in any case double and parallel — seisin by the two States.

18. Further, this whole discussion on seisin and on how and by whom it can be effected loses its significance in the present situation, since the Parties are not in agreement on the subject of the dispute and since the Court cannot be considered to have jurisdiction in the absence of such an agreement, which has never existed.

19. There would still appear to be one final question for consideration, namely, what weight should be given to Bahrain's current emphatic refusal to have the case referred to the Court, even though the Court has found that the Doha Minutes constitute an international agreement creating rights and obligations for the Parties? Can the undertaking between two States to seise the Court constitute the basis of proceedings before it even though there has been no complete agreement on the subject of the dispute? Are not further negotiations and further action by the States concerned still required before the Court can consider itself to have jurisdiction and to have been validly seised? This is the one and only explanation of the Judgment of 1 July 1994, in which the Court requested the Parties to take additional action and provide additional elements which it has since not obtained, or at least not obtained in full.

20. We are thus faced with a situation in which there is neither full agreement of the Parties on the subject of the dispute, nor any act by which the two Parties, acting "jointly or separately", as the Court had requested, are submitting to the Court the whole of the dispute between them.

21. In the Judgment in question of 1 July 1994, the Court, while holding that the two States concerned "have undertaken to submit to it the whole of the dispute between them", did not find on its own jurisdiction. It wished, as just stated, "to afford the Parties the opportunity to submit to the Court the whole of the dispute". The Parties did not take this opportunity. They have not managed to reach agreement on the matters (or more particularly on one of the matters) to be referred to the Court. Contrary to what was requested of them by the Court, there has been no submission, whether joint or separate — but in the latter case by each of the Parties — of the whole of the dispute to the Court. Only one of the States has made such a communication, whereas the other, disagreeing with the form of words proposed by its opponent, is formally opposed to the case being brought before the Court. The Doha Agreement, this mere semblance of legal harmony, thus remains incomplete.

22. I therefore consider that the Court should have concluded that it has no jurisdiction to entertain the Application of the State of Qatar and that this Application is inadmissible.

23. Further, in my view there is another more general reason why the above Judgment may be debatable. This is that, with undeniable skill, the Court has circumvented the obstacle constituted by the lack of real consent of the Parties. In so doing, it may well have provided an opportunity for the prevention of a conflict in danger of breaking out in an already

very sensitive region. On the actual question of its jurisdiction, the Court reached a conclusion which, overall, satisfies Qatar and, in fact, should also satisfy Bahrain (at least as regards the subject of the dispute), since it accepts that its jurisdiction covers the sovereignty over Zubarah.

24. Are these undeniable advantages enough to offset what I consider to be the weakness, legally speaking, of the absence of actual consent by one of the Parties and the inadequacy of the seisin? Can the very legitimate desire to prevent a conflict allow the Court to appear to be less exacting as regards the consensual principle which lies at the root of its jurisdiction and of the trust placed in it by the international community?

25. Personally, I do not feel able to associate myself with a conclusion which seems to me to exceed the Court's jurisdiction.

(Signed) Nicolas VALTICOS.