

SEPARATE OPINION OF VICE-PRESIDENT SCHWEBEL

I have voted for the operative paragraphs of the Judgment because their content is unobjectionable. At the same time, as a judgment on jurisdiction and admissibility, the Judgment is novel — and disquieting.

The Judgment lacks an essential quality of a judgment of this Court or of any court: it does not adjudge the principal issue submitted to it. Unlike the characteristic judgments of this Court, it does not respond to the submissions of the Parties. It is — or until this Judgment, it was — a commanding feature of the jurisprudence of this Court that the submissions of the Parties define the parameters of a judgment, that it is the function of the *dispositif* of the judgment to rule upon and dispose of those submissions (unless exceptional considerations rendered them moot). That this Judgment fails to do.

The applicant State of Qatar requested the Court

“to adjudge and declare, rejecting all contrary claims and submissions, 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.”

The Judgment adopted by the Court does neither. The respondent State of Bahrain requested the Court

“to adjudge and declare, rejecting all contrary claims and submissions, that the Court is without jurisdiction over the dispute brought before it by the Application filed by Qatar on 8 July 1991”.

The Court equally fails to accept or reject this submission.

The Court does make two findings, in the first and second operative paragraphs, which have judgmental elements. But these are preliminary decisions, which put the Court in a position to pass upon the submissions of the Parties; which the Court then fails to do (at any rate, as yet). Thus, the second operative paragraph, which makes a finding that is correct as far as it goes — that the Parties agreed that the whole of their dispute should be submitted to the Court — fails to draw what in my view is the proper conclusion from that holding, namely, that since not “the Parties” but one Party submitted to the Court not “the whole of the dispute

between them, as circumscribed by the text" agreed between them, but only part of that dispute, the Court lacks jurisdiction.

The Court rather proceeds, in the third operative paragraph, "to afford the Parties the opportunity to submit to the Court the whole of the dispute". But if the issue now before the Court is whether the Court lacks jurisdiction, either because, by the purport of the agreements between Qatar and Bahrain, the Court could be seised only by the two Parties acting together, or because its material jurisdiction comprises only the whole and not part of the dispute between them, or both, the Court should rule upon that issue. That would be a proper decision in exercise of its judicial function.

As it is, the Court has rather reserved, for a future time, its entire decision as to whether it has jurisdiction, whether the Parties move by what it calls "a joint act" or "separate acts". If the Parties together, or separately, make no fresh motions at all, the Court's ultimate position is unstated and unclear.

The Rules of Court provide, in respect of Preliminary Objections (and hence equally in respect of other ways of passing upon objections to jurisdiction or admissibility) that,

"After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character."

These are the three options afforded by Article 79, paragraph 7, of the Rules, but with this Judgment, the Court has invented another.

I question whether the judicial function is served by such an innovation, however well meant its purposes and however desirable it is that Qatar and Bahrain realize their commitment to submit their dispute to the Court.

(Signed) Stephen M. SCHWEBEL.