DISSENTING OPINION OF VICE-PRESIDENT SCHWEBEL

I regret that I have been unable to join in supporting the Judgment of the Court.

In the law of treaties, "the primary object of interpretation, namely, the revealing of the intention of the parties", is, in the words of that late, great Judge and authority on the law of treaties, Sir Hersch Lauterpacht, paramount:

> "The intention of the parties — express or implied — is the law. Any considerations — of effectiveness or otherwise — which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation." (H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", *British Year Book of International Law*, 1949, Vol. XXVI, p. 73.)

As Lord McNair, no less an authority on the law of treaties and an eminent former President of this Court, put it:

> "Many references are to be found . . . to the primary necessity of giving effect to the 'plain terms' of a treaty, or construing words according to their 'general and ordinary meaning' . . . But this so-called rule of interpretation like others is merely a starting-point, a prima facie guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them." (Lord McNair, *The Law of Treaties*, 1961, p. 366.)

"The intention of the parties", in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of "the" intention of "the parties" as meaning the diverse intentions of each party would be oxymoronic.

In the jurisprudence of this Court, jurisdiction can be conferred upon it only by the common intention of both parties to the case. As held by a Chamber of this Court in the case concerning the *Land, Island and Maritime Frontier Dispute* "it is only from the meeting of minds . . . that jurisdiction is created" (*I.C.J. Reports 1992*, p. 585, para. 378). That intention may be jointly expressed, as by the conclusion of a special agreement. It may be unilaterally expressed, as by the invocation of overlapping or identical acceptances of the Court's compulsory jurisdiction under the optional clause or through treaty proviso. But if that common intention

is lacking, if the intention to submit to the Court's jurisdiction is that of one but not both parties, the Court is without jurisdiction to decide the merits of the dispute.

In my view, these axiomatic considerations combine to defeat the Court's jurisdiction in this case.

Before explaining why I so conclude on the facts of this case, an exposition of elements of the law respecting the interpretation of treaties may be in order.

Preparatory Work in the Perspective of the Vienna Convention

The Vienna Convention on the Law of Treaties is accepted by this Court as an authoritative codification of international law. Its provisions on interpretation of treaties however were particularly contested, to some extent in the International Law Commission which composed them, and much more acutely in the United Nations Conference on the Law of Treaties itself. Nevertheless they were adopted by large majorities. The Convention, as of this writing, has 78 parties, not including Bahrain and Qatar (and not including the United States of America, the principal critic of those provisions).

In his Third Report on the Law of Treaties, the distinguished Special Rapporteur of the Commission, Sir Humphrey Waldock, set out an approach which was sustained in the further work of the Commission on treaty interpretation and ultimately by the Vienna Conference itself:

> "Writers also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to —
>
> *(a)* the text of the treaty as the authentic expression of the intentions of the parties;
>
> *(b)* the intentions of the parties as a subjective element distinct from the text; and
>
> *(c)* the declared or apparent objects and purposes of the treaty.
>
> Some, like Sir H. Lauterpacht, place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some give great weight to the objects and purposes of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority of modern writers, however, insists upon the primacy of the text as the basis for the interpretation

> of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means for correcting or, in limited measure, supplementing the text." (*Yearbook of the International Law Commission*, 1964, Vol. II, pp. 53-54, para. 4.)

At the same time, Sir Humphrey continued,

> "recourse to many of these principles is discretionary rather than obligatory, and the interpretation of documents is to some extent an art, not an exact science" (*ibid.*, p. 54, para. 6).

By no means were the intentions of the parties to be depreciated; on the contrary,

> "the text must be presumed to be the authentic expression of the intentions of the parties; . . . in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it makes the actual text the dominant factor in the interpretation of a treaty." (*Ibid.*, p. 56, para. 13.)

He further explained his proposals which, in substance, today are reflected in the text of the Vienna Convention, as follows:

> "where either the natural and ordinary meaning of the terms in their context does not give a viable result or for one reason or another the meaning is not clear . . . it is permissible to fix the meaning of the terms by reference to evidence or indications of the intentions of the parties outside the ordinary sense of their words . . ." (*ibid.*, p. 57, para. 16).

Accordingly, the text proposed:

> "recognizes the propriety of recourse to extraneous evidence or indications of the intentions of the parties for the purpose of: *(a) confirming* the natural and ordinary meaning of a term; *(b) determining* the meaning of an ambiguous or obscure term or of a term whose natural and ordinary meaning gives an absurd or unreasonable result; and *(c) establishing* the use of a term by the parties with a special meaning" (*ibid.*, p. 58, para. 20).

Sir Humphrey pointed out that,

> "Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such light as they may throw upon the treaty . . .

> Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text . . . is frequent both in State practice and in cases before international tribunals." (*Yearbook of the International Law Commission*, 1964, Vol. II, p. 58, paras. 20 and 21.)

He continued:

> "Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned, an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty." (*Ibid.*, p. 58, para. 21.)

The subsequent evolution of what came to be Articles 31 and 32 of the Vienna Convention, in the Commission and in the light of the commentaries and proposals of Governments, and climactically at the Conference itself, is well known and fundamentally consonant with what has been described. But it may be instructive for present purposes to quote a few more elements of the *travaux préparatoires* of the Vienna Convention, as they are first of all to be found in the exchanges in the body which prepared the draft of it:

> "It was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so. At all events, it could be supposed that all practitioners of international law were free in their use of *travaux préparatoires*." (*Yearbook of the*

International Law Commission, 1964, Vol. I, Mr. Rosenne, p. 283, para. 17.)

"the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer [to] the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance" (*ibid.*, Mr. Yasseen, p. 313, para. 56).

"In his view, it was unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention . . . the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice." (*Ibid.*, Sir Humphrey Waldock, p. 314, para. 65.)

The text of the Convention adopted in Vienna respecting "Supplementary means of interpretation" (Art. 32) provides that,

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure . . ."

But what was not settled was, what happens when the *travaux préparatoires* turn out not to confirm but contradict the meaning arrived at by application of the general rule of interpretation? There are a few passages in statements of the Special Rapporteur that appear to cut one way or another; quoted above is an indication by him that the process of confirmation or verification could indeed tend to "undermine" the text of a treaty.

Surprisingly little attention was directed to this critical question. The most pertinent answer may have been that proffered by the representative of Portugal at the Vienna Conference:

"What would happen if, though the text of a treaty was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration, although they did

> not lead to the confirmation of the meaning . . ." (United Nations Conference on the Law of Treaties, First Session, 1968, *Official Records*, p. 183.)

It is significant for the case now before the Court that it does not seem to have occurred to counsel on either side that their concentration on the content of the *travaux préparatoires* could be questionable or beside the point. Neither Party suggested that the text of the treaty was so clear that the Court would be justified in declining to weigh the preparatory work in the scales of justice. Mired as they were in the ample ambiguities of the text, that suggestive omission is understandable. Nor did either Party suggest that the preparatory work was fragmentary, inconclusive, or otherwise open to discounting or disregard.

The Facts and Law of This Case

The Court founds its jurisdiction upon the commitments entered into by Qatar and Bahrain in 1987 and in 1990. It has concluded that the 1987 exchanges of letters and the 1990 Doha Minutes are international agreements creating rights and obligations for the Parties. It does not conclude — nor, for that matter, did Qatar maintain — that the commitments undertaken in 1987 of themselves suffice to sustain the Court's jurisdiction. Thus it is undisputed that the consent of Qatar and Bahrain to the provision that

> "All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties . . ."

of itself is not determinative. As the Parties agree, and the Court records, what those disputed matters were was not settled in 1987. Moreover, the 1987 exchanges of letters provided for the creation 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 . . .".

In Bahrain's view, the latter provision imported that the Tripartite Committee would prepare a special agreement, an interpretation, it contends, that is borne out by the subsequent activities of the Tripartite Committee which were in fact exclusively directed towards conclusion of a special agreement. Why create the machinery of a Tripartite Committee if not to prepare, and only to prepare, a special agreement? If the intention had been to authorize unilateral application, no committee at all would have been needed or established.

Qatar in these proceedings has however maintained that, by reason of

the cumulative commitments undertaken in 1987 and 1990, the Parties unconditionally conferred jurisdiction on the Court to deal with the matters in dispute between them. Qatar contends that, in the intention of the Parties, a special agreement was but one possible mode of approaching the Court and satisfying its requirements for submission of the dispute, a position with which the Court agrees in today's Judgment.

Yet, in 1987, in the draft letter to the Court's Registrar which it presented to Bahrain for its agreement with a view to submitting the case to the Court, Qatar provided for "preparing the *necessary* Special Agreement in this respect . . ." (Memorial of Qatar, Ann. II.18, p. 2; emphasis added). Qatar's letter hardly supports the Court's conclusion in this Judgment that

> "everything tends to suggest that, if the Committee explored that possibility [of a special agreement], it did so simply because that course appeared to it, at the time, to be the most natural and the best suited to give effect to the consent of the Parties" (para. 28).

On the contrary, the contemporaneous evidence of Qatar itself indicates that the Parties — Qatar no less than Bahrain — saw conclusion of a special agreement as "necessary". So the Court's conclusion in this regard may be one of several that is not so "clear".

Be that as it may, it remains uncontested that of themselves the 1987 exchanges of letters are accepted by the Parties as insufficient to found the jurisdiction of the Court. If it had been the meaning of the 1987 exchanges to authorize immediate and unilateral application to the Court, one or the other Party presumably would have exercised that authority. Yet it took Qatar another four years to submit its Application. Moreover, in the oral hearings, Qatar's counsel acknowledged that:

> "Qatar has not asserted that the terms of the 1987 Agreement by themselves provided an immediate basis for enabling the Court to exercise its jurisdiction." (CR 94/1, p. 49.)

Thus any finding of jurisdiction can be based only on the combined effect of the 1987 and 1990 commitments. It is accordingly necessary to examine the meaning of the 1990 Doha Minutes. In pertinent part, they provide:

> "The good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, shall continue between the two countries until . . . 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."

The main difference between the Parties in this phase of the case, the focus of dispute in their exchange of written pleadings and of expert opinions and in oral argument, was over the meaning of the phrase, "the two parties", as it was rendered in the original Arabic by the expression "al-tarafan". As the Court recalls in its Judgment, this provision derived from a draft presented at Doha by the Government of Oman, which, as proposed by Oman, read: "Once that period has elapsed, either of the two parties may submit the matter to the International Court of Justice." Bahrain required the amendment of this provision to specify in place of "either of the two parties" the expression "al-tarafan", i.e., "the two parties". Bahrain thus insisted on deletion of authorization for "either of" the two Parties to seise the Court. Qatar accepted that amendment.

There are three views about the significance of the change in the Omani text which was brought about in this way.

Bahrain maintains that its insistence, as the price of its signature of the Doha Minutes, on changing "either of the two parties" to "the two parties" demonstrates that its intention was to exclude unilateral recourse to the Court. In my view, that interpretation is not only plausible but persuasive.

Qatar claims that the purpose of the change was to make "clear that both Qatar *and* Bahrain had the right to make a unilateral application to the Court". The Agent of Qatar maintained in the second round of the hearings — in the ultimate word of Qatar on this crucial question — the following:

> "Now, what about the Omani draft? Again, there is no evidence of a rejection of unilateral application. On the Omani draft, Bahrain simply changed 'either of the parties' to 'the parties', thus making clear that both Qatar *and* Bahrain had the right to make a unilateral application to the Court. Bahrain also added a reference to the Court's procedures. I believe that these objective changes to the text are not at all rejections of the agreement reached during discussions at Doha that reference to the Court could now be by unilateral application, but rather subjective statements of the alleged intentions of Bahrain's negotiators." (CR 94/7, p. 16.)

One has only to read this argument to reject it.

If the object of the Parties — if their common intention — was to make clear that "both Qatar *and* Bahrain had the right to make a unilateral application to the Court", the provision that "either of the two parties may submit the matter" would have been left unchanged. That wording achieved that object clearly, simply, and precisely. As it was, that unchanged phraseology authorized either of the two Parties to make unilateral application to the Court. To suggest that the change of that

phraseology to "the two parties" rather imports that each of the Parties — because of that change — is entitled to make a unilateral application to the Court is unintelligible. And for the Qatari Agent to state that these "objective changes to the text" of the Omani draft — to the *text* — are "subjective statements of the alleged intentions of Bahrain's negotiators" is equally incomprehensible. How could recorded changes in a text accepted by both sides have been no more than "subjective statements of the alleged intentions of Bahrain's negotiators"?

Moreover, even if, as Qatar appears to argue, the change in the text is taken to have manifested the intentions only of Bahrain's negotiators, and not Qatar's, does not this argument of Qatar concede that a common intention of both Parties to authorize unilateral application was lacking?

For its part, the Court states:

> "the Court does not consider it necessary to resort to supplementary means of interpretation in order to determine the meaning of the Doha Minutes . . . however, as in other cases . . . it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text" (Judgment, para. 40).

It then summarizes the arguments of the Parties on the *travaux préparatoires*, and concludes:

> "The Court notes that the initial Omani draft expressly authorized a seisin by one or the other of the Parties, and that that formulation was not accepted. But the text finally adopted did not provide that the seisin of the Court could only be brought about by the two Parties acting in concert, whether jointly or separately. The Court is unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the Doha Minutes should imply that they must be interpreted in accordance with Bahrain's thesis. As a result, it does not consider that the *travaux préparatoires*, in the form in which they have been submitted to it — i.e., limited to the various drafts mentioned above — can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given." (Para. 41.)

In my view, such explanation as the Court thus offers in support of its position that the *travaux préparatoires* do not provide it with conclusive supplementary elements for interpretation of the text is unconvincing. Because "the text finally adopted did not provide that the seisin of the Court could only be brought about by the two Parties acting in con-

cert . . .", the Court "is unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the Doha Minutes should imply that they must be interpreted in accordance with Bahrain's thesis". But since deletion of the specification, "either of the two parties may submit the matter to the International Court of Justice" in favour of the adopted provision, "the two parties may submit the matter . . ." surely manifested Bahrain's intention that "either of the two parties" may *not* submit the matter, the Court's inability to see so plain a point suggests to me its unwillingness to do so.

In preceding passages of the Judgment, the Court holds that an interpretation other than that it chooses "would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result" (para. 35). But in interpreting the meaning of the deletion of the phrase, "either of", the Court deprives that deletion — and hence the text adopted by the Parties — of its effect and produces what in my view is "an unreasonable result". If it was not the intention of Bahrain to require joint seisin of the Court by insisting on, and achieving, the excision of the provision permitting "either of" the two Parties to submit the matter to the Court, what was its intention?

The Court concludes that,

> "whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given" (para. 41).

The Court's choice of the word "motives" is revealing of its devaluation of the intention of the Parties. But the fundamental flaw in its reasoning, as I see it, is the contention that it adheres to the actual terms of the Minutes "as the expression of their common intention" when I believe that it is demonstrable — and has been demonstrated — that their common intention could not have been to authorize unilateral application to the Court.

Thus in my view the Court's construction of the Doha Minutes is at odds with the rules of interpretation prescribed by the Vienna Convention. It does not comport with a good faith interpretation of the treaty's terms "in the light of its object and purpose" because the object and purpose of both Parties to the treaty was not to authorize unilateral recourse to the Court. It does not implement the Convention's provision for recourse to the preparatory work, because, far from confirming the meaning arrived at by the Court's interpretation, the preparatory work vitiates it. Moreover, the Court's failure to determine the meaning of the treaty in the light of its preparatory work results, if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work which is "manifestly . . . unreasonable".

Since, by using evidence submitted by both sides whose accuracy and comprehensiveness is contested by neither, Bahrain has demonstrated that its intention in signing the Doha Minutes was to exclude unilateral

application to the Court, since Qatar's rebuttal of that demonstration is unconvincing, and since the Court's analysis on that critical point is no more convincing, it follows that the 1987 exchanges of letters and 1990 Minutes do not suffice to support a finding of the Court's jurisdiction. The requisite common, ascertainable intention of the Parties to authorize unilateral reference to the Court is absent. Its absence is — or should have been — determinative.

The Court may believe itself justified in discounting the *travaux préparatoires* because the meaning of the actual terms of the Doha Minutes as it construes them is "clear". But if that is the purport of the Court's Judgment, that position is hardly tenable. The expression in the Doha Minutes of "al-tarafan", however translated, is quintessentially unclear; as the Court itself acknowledges, it is capable of being construed as meaning jointly or separately. The term is inherently ambiguous. Is the Court's analysis of other provisions of the Doha Minutes such as to render clear what is opaque?

Not in my view. The Court's analysis consists of several, cumulative arguments. The first turns on the provision of the Doha Minutes that, "Once that period has elapsed, the two parties may submit the matter to the International Court of Justice." The Court maintains that the word "may", in its ordinary meaning, envisages a possibility, or even a right. Accordingly, in the first place, and in its most natural sense, the provision suggests the option or right for them to seise the Court:

> "Taken as such, in its most ordinary meaning, that expression does not require a seisin by both Parties acting in concert but, on the contrary, allows a unilateral seisin." (Para. 35.)

True enough. But equally, that expression does not require a unilateral seisin, or disallow a joint seisin. What clear light then does the word "may" shed?

The Court then maintains that the proviso, "Once that period has elapsed", imports that unilateral application is in order. Any other interpretation would, the Court maintains, deprive the provision of its effect. But that is not so, if the provision is interpreted to mean no more than that, during the renewed five-month period of the good offices of the Saudi Arabian Government, there may be no recourse to the Court; once that period has elapsed, there may be.

The Court continues that the purpose of the Doha Minutes was "to advance the settlement of the dispute by giving effect to the formal commitment of the Parties to refer it to the Court" and that this purpose implies that unilateral application is permitted since joint application had been shown to have been unachievable. But does not the Court thereby assume what is in dispute, namely, that the purpose of both Parties in signing the Doha Minutes was to advance settlement of the dispute by

authorizing unilateral application? An equally plausible construction of the events that transpired at Doha was that Bahrain inexorably maintained its position that the dispute could be settled only by joint referral to the Court by way of special agreement of the dispute in all its elements. If that position constituted no "advance", it may nevertheless have constituted Bahrain's position.

All this is not to say that the Court's construction of the provision that, once the period for the renewed good offices of Saudi Arabia has elapsed, the two Parties may submit the case to the Court, is implausible. It is to say that it is not the sole, or necessarily the most, plausible construction that can be made. It may alternatively be maintained that these provisions of the Doha Minutes rather mean that *(a)* the good offices of Saudi Arabia in addressing the substance of the dispute between Bahrain and Qatar shall continue until May 1991; *(b)* during that period, the case cannot be submitted to the Court; *(c)* once that period has elapsed, the two Parties may submit the case to the Court; *(d)* during the time of the consideration of the case by the Court, Saudi Arabia may continue its good offices directed to a substantive settlement; and *(e)* if such a settlement is attained, the case shall be withdrawn from the Court.

What do these provisions, so interpreted, do that would not have obtained without them?

They do indicate that, not only would Saudi Arabia extend its efforts to bring about a substantive settlement, but that, during the five months of that period, the case could not be brought; thereafter it could be. The text has its striking ambiguities about whether the case then could be brought jointly or separately. But these provisions of themselves do not demonstrate that the meaning of the Doha document is that, after the end of the five-month period, each of the two Parties unilaterally could submit the case and effectively seise the Court of it. For five months, the Parties agreed to deny themselves recourse to the Court in deference to a renewed Saudi Arabian effort to settle their differences; after that period, "the two parties may" — not shall but may — submit it to the Court. The word "may" imports uncertainty and permissiveness rather than certainty and obligation. Why? It may be argued, because, given the record of their negotiations, it was clear that the Parties might or might not reach agreement on the terms of a special agreement. Thus, contrary to the Court's interpretation, the word "may" can be interpreted to cut not in favour but against the Qatari contentions.

What the text and context of the Doha Minutes leave so unclear is, however, crystal clear when those Minutes are analysed with the assistance of the *travaux préparatoires*. None of the usual arguments mar-

shalled in opposition to the use of *travaux* apply. The preparatory work in this instance is not fragmentary, it is complete. Neither of the Parties suggested that there is a scrap more; the whole of the record has been placed before the Court. The preparatory work is not composed of partial, self-serving statements made by one side or another in the course of a complex multilateral negotiation. Rather, a negotiation leading to signature of what has been held by the Court to be an international agreement — essentially bilateral, in form trilateral, but certainly not the complex type of multinational agreement that emerges from a global conference — produced a terse but comprehensive preparatory document which comprises all that the two Parties directly concerned had to say on the matter at that juncture of their relationship. None of the preparatory work at issue was or is secret, or known to one but not another Party. Finally, the preparatory work of itself is not ambiguous; on the contrary, a reasonable evaluation of it sustains only the position of Bahrain.

The Court provides no more explanation of why the *travaux préparatoires* do not provide it with conclusive supplementary elements for the interpretation of the text adopted than described above. But it also implies — in referring "to resort to supplementary means of interpretation — in order to seek a possible confirmation of its interpretation of the text" — that it discounts the *travaux préparatoires* on the ground that they do not confirm the meaning to which its analysis has led. In my view, such a position, if it be the position, would be hard to reconcile with the interpretation of a treaty "in good faith" which is the cardinal injunction of the Vienna Convention's rule of interpretation. The *travaux préparatoires* are no less evidence of the intention of the parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions.

These considerations have special force when the treaty at issue is one that is construed to confer jurisdiction on the Court. Where the *travaux préparatoires* of a treaty demonstrate the lack of a common intention of the parties to confer jurisdiction on the Court, the Court is not entitled to base its jurisdiction on that treaty.

(Signed) Stephen M. SCHWEBEL.