# LEADING ARTICLES

# A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States

*Christine Chinkin**

**Keywords:** dispute settlement; International Court of Justice; international agreements.

**Abstract:** The article discusses the two decisions (thus far) of the International Court of Justice in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, especially its consideration of when an internationally binding agreement has come into existence. The Court's willingness to infer a legally binding agreement, regardless of the intentions of at least one of the parties, appears to displace the primacy of consent it has emphasized in its earlier jurisprudence. The decision seems to hold states bound by informal commitments, an approach that might inhibit open negotiations between states and undermine genuine attempts to pre-empt disputes or to comply with the obligation of peaceful settlement of disputes.

## 1. INTRODUCTION

Readers of the judgments and opinions of the International Court of Justice have become accustomed to the extraordinary range of issues relating to international legal process that are drawn together, often in seemingly random fashion. They are also used to the innovative approaches to substance and procedure sometimes chosen by the Court to the claims of states that obscure or evade the issues raised in the application before it.[1] Even

* Professor of International Law, London School of Economics. The author thanks Sir Ian Sinclair and Anthony Aust for their assistance, including a preview of the text of the latter's forthcoming book on treaty law.

1. Perhaps the most famous example is the holding in the Nuclear Tests cases (Australia *v.* France; New Zealand *v.* France), Judgment, 1974 ICJ Rep. 253 and 457, respectively, that there was no longer a dispute between the parties and thus no object to continuation of the proceedings; *see* the discussion in M. Koskenniemi, From Apology to Utopia 307-311 (1988).

Leiden Journal of International Law 10: 223-247, 1997.

considered against these standards, however, the decision in the case concerning *Maritime Delimitation and Territorial Questions* between Qatar and Bahrain (*Qatar* v. *Bahrain*) may be regarded as 'novel and disquieting'.[2]

The jurisdiction and admissibility phase of the *Qatar* v. *Bahrain* case combined issues of the relationship between negotiations for the resolution of an international dispute and seising the Court with that dispute, determining how states indicate their consent (or unwillingness) to be bound by the outcome of negotiations, the use of *travaux préparatoires* in treaty interpretation, and the role of the Court in overseeing and affirming the legal consequences of the entire process. While all these elements were inextricably fused, this article will concentrate upon the Court's consideration of when an internationally binding agreement has come into existence.

In its first judgment, the Court stated that it did not "find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain, or for that matter, those of the Foreign Minister of Qatar" in determining whether signed minutes of a meeting created rights and obligations binding upon the two states.[3] In its countenance of the conclusion of a legally binding agreement regardless of the intentions of at least one of the parties, this statement appears to displace the primacy of consent. The decision has accordingly been hailed as 'monumental' in that it opens the way to holding states bound by commitments however informally given.[4] On the other hand such an approach might cause misgivings in that it could make states reluctant to agree to even the most imprecise and unofficial formulations, for example in diplomatic exchanges, for fear of their subsequently being held to have incurred legal rights and obligations. This could impede the regular flow of communications between states and inhibit negotiations, unless unequivocal wording disavowing intent was incorporated at all stages.[5] This in turn might undermine genuine attempts

---

2. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain), Jurisdiction and Admissibility, Judgment of 1 July 1994, 1994 ICJ Rep. 112; Judgment of 15 February 1995, 1995 ICJ Rep. 6. The adjectives are those of Vice President Schwebel, 1994 ICJ Rep. 112, at 130 (Judge Schwebel, Separate Opinion).
3. Qatar *v.* Bahrain, Judgment of 1 July 1994, *supra* note 2, at para. 27.
4. J. Klabbers, The Concept of Treaty in International Law (1996).
5. Aust refers to the "slightly tiresome, if harmless - even quaint - British obsession" of adhering strictly to unequivocal form and wording for binding agreements. This would surely increase if states are to be bound by the most informal of arrangements; A. Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787 (1986). McNeill explains how the US Office of General Counsel, Department of Defense, instructed its officials to avoid all language that might denote non-binding arrangements to avoid misun-

to pre-empt disputes or to comply with the obligation of peaceful settlement of disputes.[6] The advantages of simplicity, informality, speed, and flexibility motivate states to eschew formal treaty-making processes in finalising their understandings.[7] Nevertheless the objectives of stability and certainty in international dealings make it desirable for decision and policy makers to be able to determine with some confidence when states have indeed entered into legal relations. However the surrounding circumstances of parties' interactions vary greatly, as do the objects and purpose of negotiations and the form in which any outcome is expressed. The interpretation of each is open to objective and subjective evaluation with the inevitability of future disputes as to true intent. The question is whether the ruling in *Qatar* v. *Bahrain* has undermined certainty in differentiating between binding and non-binding agreements.

The article examines the *Qatar* v. *Bahrain* case in this light. It first considers the context in which the statement cited above was made and then assesses the Court's earlier jurisprudence on the importance of the intentions of the parties in determining whether agreement with legal effect has been reached. It concludes that such certainty was never more than a mirage in that the Court has oscillated between giving explicit primacy to the intentions of the parties or to the text and surrounding circumstances. Neither can be decisive and focus upon one or the other distorts the reality of the parties' dispute.

## 2. *QATAR* V. *BAHRAIN* (JURISDICTION AND ADMISSIBILITY)

The case arose out of a long-term territorial and boundary dispute between the two Arab states and mediation attempts by the King of Saudi Arabia to steer the parties towards an acceptable resolution of their differences. In May 1983 the parties agreed five Principles for the Framework for Reaching a Settlement that had first been proposed in 1978. For some years there was little progress in putting these into effect until in 1987 the King exchanged identical, but separate, letters with each party that included the

derstanding; J. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AJIL 821 (1994).

6. United Nations Charter, Arts. 2(3), 33.
7. Aust, *supra* note 5.

following provision:

> [a]ll 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.[8]

On 21 December 1987 Saudi Arabia announced the parties' agreement expressed in these letters that the matter would be 'submitted for arbitration'. The establishment of a Tripartite Committee comprising the parties and Saudi Arabia was also agreed

> for the purpose of approaching the International Court of Justice and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued.[9]

The Committee met on a number of separate occasions in 1988 but a joint submission to the Court was not agreed. At the December 1990 Gulf Co-operation Council Summit Meeting, where the primary concern was the Iraqi occupation of Kuwait, Qatar raised this continuing failure. After further negotiations at the Council Meeting, Minutes were prepared in Arabic and signed by the Foreign Ministers of Qatar, Bahrain and Saudi Arabia.

The Minutes (known as the Doha Minutes) reaffirmed previous commitments between the parties and recorded agreement to recommence mediation by the King of Saudi Arabia until the month of Shawwal, 1411 H (May 1991, in five months time). If at the expiry of this time there was still no agreement, the case could then be submitted to the Court in accordance with the so-called 'Bahraini formula'. The Bahraini formula stated:

> [t]he 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.[10]

The formula had first been proposed in October 1988 by Bahrain for the phrasing of a joint submission to the Court. Qatar had initially rejected it and its willingness to accept it at the Doha Summit facilitated acceptance of the Minutes.[11]

---

8. Qatar *v.* Bahrain, Judgment of 1 July 1994, *supra* note 2, at para. 17.
9. *Id.* The appropriate translation from the original Arabic was disputed by the parties.
10. *Id.*, at para. 18.
11. The Court commended the Bahraini formula as being carefully constructed to avoid any

After the required lapse of time, Qatar filed a unilateral application to the Court on 8 July 1991 asserting that the combined effect of the 1987 exchange of letters (the 1987 Agreement) and the Doha Minutes was to give the Court jurisdiction under Article 36(1) of its Statute. It defined the subject of the disputes as sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at and Jaradah and delimitation of the maritime boundary between Qatar and Bahrain. The application omitted Bahrain's claim to Zubarah on the mainland of Qatar which had been understood to be encompassed by the Bahraini formula.[12] In a letter dated 14 July 1991 Bahrain claimed that Article 38(5) of the Rules of the Court excluded Qatar's application from being entered upon the list and requested the Court to act accordingly. The case was however entered on the General List and in a subsequent letter Bahrain rejected the Court's jurisdiction based upon Qatar's unilateral application. The President of the Court brought together representatives of Qatar and Bahrain in two meetings at his chambers where it was agreed that jurisdiction and admissibility should be dealt with before the merits of the dispute.[13]

The key as to whether Qatar's unilateral submission of the dispute accorded the Court jurisdiction under Article 36(1) of the Statute of the International Court of Justice was the legal nature of the 1987 Agreement and the Doha Minutes and their correct interpretation. Neither party contested that the 1987 exchanges of letters between each one of them and the King of Saudi Arabia constituted an international agreement creating rights and obligations for the parties, including referral of all disputed matters to the Court.[14] There was however no agreement as to the terms of any such submission, as evidenced by the establishment of the Tripartite Committee

---

express reference to the sensitive areas in dispute while sufficiently clearly comprehending the entire dispute; Qatar *v.* Bahrain, Judgment of 15 February 1995, *supra* note 2, at para. 31.

12. E. Lauterpacht, *'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice*, *in* V. Lowe & M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice 468 (1996).

13. The President's Order of 11 October 1991 reflected this understanding.

14. As was pointed out by Judge Oda, the form of the 1987 Agreement was unusual. No letters were exchanged between the parties but between Saudi Arabia and Qatar and Saudi Arabia and Bahrain. For this reason Judge Oda denied their legal effect: Qatar *v.* Bahrain, Judgment of 15 February 1995, *supra* note 2, at 44-45 (Judge Oda, Dissenting Opinion). However, this arrangement is not so unusual where an outcome has been facilitated by a third party mediator substituting for direct negotiations between the parties. E.g., the Algerian Declarations of 19 January 1981 were not directly between the parties, although they clearly constituted legal rights and obligations.

to work towards achieving this.

In contrast, Bahrain did dispute Qatar's assertion of the legally binding nature of the Doha Minutes and their intended meaning. Bahrain contended that the Minutes recorded the continuing negotiation attempts and comprised only a political understanding that there would be eventual joint recourse to the Court. The Minutes did not constitute legal consent to a unilateral application by Qatar. Indeed, Bahrain argued, it would be contrary to Article 37 of its 1973 Constitution for an international agreement to be entered into in this informal way without reference to the Amir and Council of Ministers. It supported its arguments by reference to the subsequent behaviour of both parties that it claimed supported their common understanding that there was no legal consequence to be drawn from the Minutes. Qatar (like Bahrain) had not complied with its constitutional requirements for treaty making and had not applied to register the document under United Nations Charter Article 102 until six months after the meeting,[15] that is only just prior to its application to the Court.[16] Bahrain's immediate protest against Qatar's application to have the Minutes registered was also registered. In addition, Qatar had not filed the Minutes with the Secretariat of the League of Arab States as required by Article 17 of the Pact of the League.

In addition to the dispute as to the legal effect of the Doha Minutes, there was disagreement as to their interpretation. Qatar contended that the Minutes provided for unilateral seisin by either party while Bahrain insisted they required joint seisin by special agreement. The focus of this difference of opinion was the English meaning of the Arabic word *Al-tarafan* which was used to indicate 'the parties'. Qatar translated the crucial section of the Minutes as "[a]fter the end of this period, *the parties* may submit the matter to the International Court of Justice in accordance with the Bahraini formula [...]", while Bahrain claimed that the proper translation was "*the two parties* may at the end of this period submit the matter to the International Court of Justice in accordance with the Bahraini formula [...]" (emphasis added).

In its first judgment in July 1994 the Court found that, while the 1987

15. United Nations Charter, Art. 102(1) states: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

16. Qatar applied for registration in June 1991 and filed its application on 8 July 1991.

Agreement and the Doha Minutes constituted internationally binding agreements creating rights and obligations upon the parties, the dispute as submitted by Qatar was not the whole dispute between the parties as envisaged by those agreements. It did not determine the jurisdictional question but instead gave the parties until 30 November 1994 "jointly or separately to take action to this end", that is to do precisely what they had failed to achieve over many years, agree the terms of a joint submission to the Court.

Not surprisingly there was no success and on 30 November 1994 Qatar addressed to the Court "[a]n Act to comply with [...] the judgment of the Court dated 1-7-1994." Qatar claimed that this application submitted the whole of the dispute in accordance with the Bahraini formula and included Zubarah and areas for pearl fishing and fishing for swimming fish. Bahrain again contested jurisdiction, arguing that a second individual act by Qatar, even though it inserted Bahrain's claims with respect to Zubarah, could not cure the original defective jurisdiction. In its decision of 15 February 1995 the Court decided by a majority of 10 to 5 that it had jurisdiction upon the dispute submitted to it between Qatar and Bahrain.[17]

## 3. A LEGALLY BINDING AGREEMENT?

### 3.1. The indeterminacy of form

It is axiomatic that neither the form nor the nomenclature of an instrument is determinative of its legal status.[18] As has been pointed out by the ICJ,[19] the International Law Commission,[20] commentators,[21] and docu-

17. Qatar *v.* Bahrain, *supra* note 2. Vice-President Schwebel, Judges Oda, Shahabuddeen, Koroma, and Judge *ad hoc* Valticos dissented.
18. Judge Jessup described how terminology has always bedevilled the law of treaties, for example in 1925 a Sub-committee of the League of Nations Committee on the Codification of International Law referred to "the prevailing anarchy as regards terminology in the law of treaties." South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Preliminary Objections, Judgment, 1962 ICJ Rep. 319, at 402 (Judge Jessup, Separate Opinion).
19. *See, e.g.*, Temple of Preah Vihear (Cambodia *v.* Thailand) (Preliminary Objections), Judgment of 26 May 1961, 1961 ICJ Rep. 17, at 32; Nuclear Tests case (Australia *v.* France), *supra* note 1, at para. 45.
20. Report of the International Law Commission on the work of its eighteenth session, 1966-2 YILC 172.
21. *See, e.g.*, R. Jennings & A. Watts, Oppenheim's International Law, Vol. I, 1200 (1992);

mentation of state practice[22] there are many different terms employed to indicate a binding legal agreement and such agreements may be concluded in a variety of forms.[23] The Vienna Convention on the Law of Treaties is limited by its terms to:

> [a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; [...].[24]

However, since the Convention states that this is without prejudice to the legal force of agreements not falling within this definition,[25] the threshold question remains that of distinguishing between instruments with legal force and those of only political and moral effect.[26] Aust describes the distinction in the following terms:

> [t]he fundamental distinction between an informal instrument and a treaty is that, although the former puts on record the mutual understandings of the States concerned as to how each will act in relation to the other, or others, the parties have no intention that the instrument should itself create a legal relationship and be binding upon them.[27]

### 3.2. The intention of the parties: drafting history and language

The insignificance of the form chosen by parties to record their undertakings has meant that decision-makers have had to turn to other factors to determine their legal significance, most notably the intentions of the parties.[28] The Vienna Convention criterion of governance by interna-

---

I. Brownlie, Principles of Public International Law 606 (1990). Brownlie gives the example of minutes of a conference as a potentially binding agreement.

22. *E.g.*, the United States State Department International Agreement Regulations, 27 April 1981 (5) states that departures from the customary form "will not preclude the agreement from being a customary agreement." Cited by Aust, *supra* note 5, at 799.
23. R. Baxter, *International Law in "Her Infinite Variety"*, 29 ICLQ 549 (1980).
24. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (1980), Art. 2(1)(a).
25. *Id.*, Art. 3.
26. O. Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AJIL 296 (1977).
27. Aust, *supra* note 5, at 794.
28. The editors of Oppenheim, e.g., suggest that the 'decisive factor' is the intention of the parties: Jennings & Watts, *supra* note 21, at 1202. State officials repeatedly emphasise the crucial nature of the intention of the parties; *see e.g.*, Aust, *supra* note 5; M.J. Nash (Leich),

tional law subsumes the intention of the parties to enter into legally binding relations.[29]

There is no requirement as to how that intention must be evidenced and it can be expressed in different ways and in diverse arenas. In the words of former Judge Jessup:

> [i]nternational law, not being a formalistic system, holds states legally bound by their undertakings in a variety of circumstances and does not need either to insist or to deny that the beneficiaries are 'parties' to the undertakings.[30]

An intention to be bound has generally been deduced from the language employed in the agreement, the circumstances of its conclusion and occasionally the subsequent actions of the parties.[31] The ICJ and its predecessor, the PCIJ, have considered these factors on a number of occasions. In the *South West Africa* cases South Africa raised as a preliminary objection that the Mandate had never been a 'treaty in force' conferring rights and obligations upon South Africa within the terms of Article 37 of the Statute of the International Court of Justice, either in its entirety or with respect to Article 7.[32] It based this argument on the confirmation of the Mandate as a Declaration of the Council of the League of Nations. The Court rejected this objection holding that the formal status of the Mandate as a

---

*International Instruments Not Constituting Agreements*, 88 AJIL 515 (1994); McNeill, *supra* note 5.

29. E.g., the Fourth Special Rapporteur of the International Law Commission asserted that in so far as an intention to create legal relations is required under international law "the element of intention is embraced in the phrase 'governed by international law'." H. Waldock, Special Rapporteur, 1965 YILC II, at 12. Munch considered that this phrase excluded political declarations and municipal contracts. Attention focussed on the latter and the former became obscured because of their difficulty; F. Munch, *Comment on the 1968 Draft Convention on the Law of Treaties: Non-binding Agreements*, 29 ZaöRV 1 (1969).

30. South West Africa cases, *supra* note 18, at 411 (Judge Jessup, Separate Opinion).

31. The differing views as to whether there is a presumption that an agreement is binding is a less extreme form of the debate as to whether all informal commitments have legal effect: J. Klabbers, The Concept of Treaty in International Law (1996). Fawcett argued against such a presumption: J. Fawcett, *The Legal Character of International Agreements*, 30 BYIL 381 (1953). Mullerson prefers the presumption that every agreement duly signed by states has a legally binding intent unless the opposite intention is clearly manifested: R. Mullerson, *Sources of International Law: New Tendencies in Soviet Thinking*, 83 AJIL 511 (1989).

32. Article 7 of the Mandate provided for the submission of disputes as to the interpretation or application of the Mandate to the International Court of Justice. Article 37 states: "[w]henever a treaty or convention in force provides for reference to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Council Declaration was of no legal significance and the Mandate "in fact and in law, is an international agreement having the character of a treaty or convention."[33]

Judge Jessup expressed the fundamental question as "whether a State has given a promise or undertaking from which flow international rights and duties."[34] The question emphasises the subjective will of the parties, but in reality states rarely make their intentions explicit.[35] Accordingly they must be deduced from the surrounding circumstances in an *ex post facto* objective evaluation. In the *South West Africa* cases the majority derived the intentions of all the parties from the drafting history and imperative language of the Mandate agreement. The negotiating history and the Mandate Preamble verified that its conferral had been agreed by the Allied and Associated Powers and accepted by His Britannic Majesty for and on behalf of the Union of South Africa in May 1919. The initial agreement was presented to the Council in December 1920, amended and confirmed by it. This arrangement was intended and understood by all concerned to constitute a legally binding agreement. This conclusion was bolstered by the requirement that the Mandate instrument be deposited in the archives of the League of Nations and forwarded to all states parties to the Treaty of Peace with Germany. For the majority, the effect of these different factors was to uphold the conclusion that the parties had intended to create a legally binding instrument, and had succeeded in so doing.[36]

Judges Spender and Fitzmaurice however drew the opposite conclusion from these same surrounding facts. They noted that all Mandates except one, that over Iraq, were concluded by Declarations of the Council of the League. The Iraq Mandate alone was in treaty form between Great Britain and Iraq. This choice of different form was deliberate and could not be ignored. Preference was generally given to a quasi-legislative act of the Council of the League over mutually adopted rights and obligations by the parties. The condition that the Mandate could only be modified with the consent of the Council (as opposed to confirmation by the Council) was also inconsistent with an autonomous agreement between the parties.

---

33. South West Africa cases, *supra* note 18, at 330.
34. South West Africa cases, *supra* note 18 (Judge Jessup, Separate Opinion).
35. It has been commented that parties only make it explicit in the text or through preparatory statements when an agreement is not to be considered binding; *see, e.g.*, Munch, *supra* note 29; Jennings & Watts, *supra* note 21, at 1202.
36. South West Africa cases, *supra* note 18.

Indeed at its December 1920 meeting the Council had exercised this power and amended the earlier text, further proof to the dissenting judges that an agreement had not been concluded.[37]

The background to the negotiations and prior diplomatic exchanges were also crucial in determining the parties' intentions in the *Aegean Sea Continental Shelf* case.[38] The Court had to decide whether Greece and Turkey had agreed to accept the Court's jurisdiction over their dispute. Greece claimed that the Court's jurisdiction had been accepted by an unsigned, uninitialed joint communiqué between the Prime Ministers of the respective states issued at Brussels on 31 May 1975. The communiqué stated:

> [i]n the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problem which led to the existing situation as regards relations between their countries.
>
> They decided [*ont décidé*] that those problems should be resolved [*doivent être résolus*] peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at the Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.
>
> In that connection they decided to bring forward the date of the meeting of experts concerning the question of the continental shelf of the Aegean Sea and that of the experts on the question of air space.

The Court again held that form is not determinative and that international law does not preclude a joint communiqué from constituting a binding agreement to refer a case to arbitration, or to adjudication. In deciding whether the particular instrument does in fact have that character the Court must have regard to its nature and above all 'to its actual terms and to the particular circumstances in which it was drawn up'. Accordingly it examined the communiqué in its entirety with special attention given to the language used and the context of the May 1975 meeting. This required examination of the many diplomatic exchanges that had previously occurred. The Court found that Turkey had been consistent in demanding that referral to the Court be through a joint submission after the conclusion of a special agreement that clarified the issues to be resolved by the Court. Turkey had agreed to 'contemplate a joint submission to the Court'

37. South West Africa cases, *supra* note 18 (Judges Spender and Fitzmaurice, Separate Opinion).

38. Aegean Sea Continental Shelf case (Greece *v.* Turkey) (Jurisdiction), Judgment, 1978 ICJ Rep. 3, at para. 97.

but the joint communiqué was insufficient to found jurisdictional consent. Vierdag concludes that the careful analysis of the true intentions of the parties "represents another example of the Court's endeavour to avoid imposing upon States obligations that are not firmly rooted in customary law or that do not unequivocally correspond to a state's intention to be bound."[39]

Except for being unsigned, the joint communiqué resembles the 1987 Agreement in the *Qatar* v. *Bahrain* case. The Court did not dismiss the former as being without any legal effect but only as insufficient to support a unilateral application of the dispute to the Court. Similarly, the 1987 Agreement could not have been the basis of a unilateral application. In both cases a commitment was made to continue negotiations towards conferring jurisdiction on the Court. In *Qatar* v. *Bahrain* too the question was whether that had been achieved. The 1987 Agreement was supplemented by the establishment of the Tripartite Committee, but there was disagreement as to the function of this Committee. Bahrain alleged its sole purpose was to produce an agreed joint submission and that consequently a unilateral application was never anticipated. The Court noted that much of the work of the Committee had indeed been directed towards this end, but that did not mean this was the only approach sanctioned by the 1987 Agreement. The Court explained the Committee's task as being to assist the parties in fulfilling the commitment to have recourse to the Court.

Unlike the joint communiqué, the 1987 agreement was supplemented by further agreed exchanges as recorded in the Doha Minutes. These essentially acknowledged that since the Tripartite Committee had failed in its purpose, the good offices of the King of Saudi Arabia were again to be attempted for a final five months during which there could be no recourse to the Court. After that time the parties could apply to the Court and the Minutes addressed the circumstances in which the Court would be validly seised.

It was in its July 1994 judgment that the Court asserted that it need not consider the intentions of the parties in signing the Doha Minutes. Their legal effect was to be found in the text as signed and the surrounding circumstances rather than in evidence as to the intentions of the parties. The Court restated its *dicta* in the *Aegean Sea* case that it "[...] must have regard

39. *Cf.* E. Vierdag, *The International Court of Justice and the Law of Treaties*, *in* Lowe & Fitzmaurice (Eds.), *supra* note 12, at 153.

above all to its actual terms and to the particular circumstances in which it was drawn up."[40] In an extremely brief passage the Court held that the Foreign Minister of Bahrain could not subsequently argue that he intended only to subscribe to a statement of political undertaking contrary to the wording of the text. The signed Minutes did not merely record the discussions at Doha but summarised areas of agreement and disagreement and reaffirmed commitments already undertaken by the parties. Even if such a limited intention as that expressed by the Foreign Minister of Bahrain existed, it could not prevail over the actual terms of the instrument in question.

In the February 1995 judgment this conclusion was reiterated. In determining precisely what had been agreed by the parties, the Court looked to the object and purpose of the 1990 negotiations. These were said by the Court to be the advancement of the dispute settlement process by setting a specified time limit upon attempts at mediated resolution of the substantive differences and then by giving practical effect to the commitment to have recourse to the Court that had been made in 1987. This was done by settling the controversial question of the definition of disputed matters through Qatar's acceptance of the Bahraini formula and reaffirming earlier commitments.[41] These encompassed point one of the 1987 Agreement, to have recourse to the Court, but not point three, re-establishment of the Tripartitite Committee that had not reconvened since December 1988. In these circumstances a further agreement that was confined to opening up the possibility of a joint submission would not have furthered the dispute resolution process as this was precisely what the parties had conspicuously failed to accomplish over many years of assisted negotiations. As the majority put it: "It could not have been the purpose of the Minutes to delay the resolution of the dispute or to make it more difficult."[42]

Bahrain did not only refute the legal nature of the Doha Minutes, but also challenged their meaning with respect to seising the Court of the dispute. In determining whether they provided for unilateral seisin the Court emphasised the need to examine the wording of the Minutes and the surrounding circumstances - precisely the same criteria as those specified for

40. Aegean Sea Continental Shelf case, *supra* note 38, at para. 96, cited in Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 ICJ Rep. 6, at paras. 22-23.
41. Qatar *v.* Bahrain, Judgment of 15 February 1995, *supra* note 2, at para. 35.
42. *Id.*, at para. 36.

deciding their legal nature. Article 32 of the Vienna Convention allows recourse to the *travaux* as a supplementary (and subjective) means of interpreting a text where the meaning is ambiguous or obscure.[43] This was patently the case in *Qatar* v. *Bahrain* and indeed in any case where there is a good faith disagreement as to interpretation. Nevertheless, the Court largely discounted the usefulness of the *travaux préparatoires* because of their 'fragmentary nature'. They could not provide conclusive supplementary evidence of either the circumstances, nor the meaning to be attached to the text.[44] The Court rejected the relevance of the parties' motives in signing the Minutes:

> [w]hatever 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.[45]

The Court adopted a 'reasonable man' approach in its assessment of the purpose of the Doha discussions in the interlocking questions of their legally binding outcome and meaning.[46] A reasonable person might well have assumed with the Court that the Minutes were to move the dispute resolution process along, but the behaviour of parties in dispute does not always conform to rational expectations. Indeed, subjectively it may be perfectly reasonable to negotiate with the intention of stalling the process. The Court acknowledged that the central focus of the Doha summit was not the territorial dispute between Qatar and Bahrain but the invasion of Kuwait. It even accepted that this background might explain why there was not a more explicit text, but refused to draw any further conclusions. It is at least possible that less care was given by the parties to the Minutes in order to revert to the main agenda item. Unlike its careful consideration of

---

43. Vienna Convention on the Law of Treaties, Arts. 31 and 32 presuppose the existence of a treaty. There is no provision in the Convention with respect to interpretation for the purposes of deciding whether a treaty has been concluded. The structure of the Court's judgment in Qatar *v.* Bahrain emphasises the wording and surrounding circumstances for both.

44. Dismissal of the *travaux préparatoires* as a supplementary means of interpretation discounted the parties' intentions although the meaning of the words were not clear. Qatar *v.* Bahrain, Judgment of 15 February 1995, *supra* note 2, at 27 (Vice-President Schwebel, Dissenting Opinion).

45. *Id.*, at para. 41.

46. *Cf.* Koskenniemi, *supra* note 1, at 306: "[t]herefore it is necessary to look, not at what other States subjectively experienced but how a "reasonable man" acting in good faith, would have understood the declaration."

how Turkey evinced its intentions with respect to agreeing the joint communiqué and contents, it paid scant regard to the Bahrain pleadings in which the negotiations were analysed and Bahraini intentions explained. *Travaux préparatoires* provide subjective and contemporaneous evidence of both words and circumstances but were only sparingly referred to. The dilemma is that emphasis upon parties' intentions allows any party to reinterpret those intentions, but emphasis upon the surrounding circumstances enables those intentions to be discounted even while the decision maker purports to determine them through interpretation of the words used.

### 3.3. Subsequent behaviour

In the *Aegean Sea* case the Court expressly rejected the form of the joint communiqué as determinative of its legal status. However in a passage that was not referred to in *Qatar* v. *Bahrain* it asserted that it was for the two governments to consider the implications of the joint communiqué and the impact, if any, on their attempts to resolve the dispute.[47] This raises the relevance of the parties' subsequent behaviour. Judge Lachs rejected the dicta of the majority in words that are echoed in *Qatar* v. *Bahrain*:

> [o]n the contrary, insofar as the Communiqué is an international instrument, the question of its precise legal implications cannot be regarded as lying within the direction of either of the governments concerned.[48]

The statement by the majority in the *Aegean Sea* case assumed the parties to be willing to consider jointly the implications of the communiqué,[49] but such cooperation might not be possible. In *Qatar* v. *Bahrain* the two states drew differing conclusions as to the implications and effects of the Doha Minutes. The Court rejected any subsequent statements as to those intentions as relevant to the legal characterisation of the Minutes. It must be correct that the parties cannot effectively deny the consequences of what can be objectively determined to constitute a legal instrument, although subjective intentions are germane to the determination of the existence of a

47. Aegean Sea Continental Shelf case, *supra* note 38, at para. 108.
48. *Id.*, at 50 (Judge Lachs, Dissenting Opinion).
49. In the Heathrow Airport User Charges case the arbitral award found that a Memorandum of Understanding between the US and UK was not a source of independent legal rights and duties but that it had value as consensual subsequent practice by the parties. The award is described in 88 AJIL 738 (1994).

binding legal agreement. Subsequent contrary actions might be alternatively construed as objective evidence of those original intentions, or as attempts to change and conceal those intentions. Indeed inconsistent behaviour might amount to breach of the agreement, even if committed immediately after its conclusion.[50] Domestic courts are also wary of parties who attempt to renege on their obligations by denying that they entered into a binding agreement. Similarly, failure to comply with domestic constitutional requirements for valid treaty making can only exceptionally detract from the legal nature of the instrument under international law.[51] However, Bahrain did not refer to Article 46 of the Vienna Convention in an attempt to invalidate its consent to be bound, but as an objective indication of what it claimed to be its true intentions with respect to the Minutes.

The ICJ has taken account of subsequent behaviour as evidence of the parties' intentions at the time of entering into the agreement rather than as construing that behaviour as completing or denying the existence of a legal instrument. In the *South West Africa* cases, for example, the majority were mindful of the actions, statements and practice of parties and other members of the international community in reliance upon the existence of the Mandate. However there is no doubt that the Mandate instruments were of a very special nature. Together they created an institutional regime that could only be effective if all involved recognised its legal basis. As Judge Bustamante stressed, the history and sociology of the Mandate concept cannot be ignored. He considered that the actual agreement could not be separated from the overall Mandate system since 'the former takes its inspiration from the latter'.[52] It must also be remembered that in the *South West Africa* cases the Court was examining the origins of the Mandate after some 40 years of operation and its replication in the Trusteeship System. In the context of decolonisation and international condemnation of the apartheid regime in South West Africa, it was inconceivable that the Court would find in 1962 that the entire edifice had no legal foundations. The Mandate had imposed responsibilities on all Members of the League, including South Africa, and all had acted upon the assumption of its legality. As the Court has spelled out, without the Mandate South Africa had no entitlement to South West Africa at all.[53] Similarly in 1970 when the

50. Vienna Convention on the Law of Treaties, *supra* note 24, Art. 60.
51. *Id.*, Art. 46.
52. South West Africa cases, *supra* note 18, at 351 (Judge Bustamante, Separate Opinion).
53. In 1950, the Court had opined that "[t]he authority which the Union Government exer-

Court was considering the termination of the Mandate, it accepted without question the conclusion reached in 1962 that the Mandate agreement had treaty status.[54] This enabled the Court to apply the Vienna Convention on the Law of Treaties provisions with respect to termination, leaving the way legally open for assertion of UN authority there. These factors differentiate an institutional agreement entered into in pursuance of the 'sacred trust of civilisation' from a bilateral agreement for the resolution of territorial disputes.[55] It cannot therefore be assumed that the Court would apply similar reasoning in the second situation.

One particular type of subsequent behaviour that was in issue in both *South West Africa* and *Qatar* v. *Bahrain* is failure to complete procedural formalities, for example registration under Article 102 of the United Nations Charter or its forerunner, Article 18 of the League Covenant. Article 18 stipulated that no treaty was binding until so registered. Despite the clear wording of Article 18 the majority of the Court in the *South West Africa* cases held failure to register the Mandate agreement to be irrelevant to its binding character. The Court surmised the purpose of registration to be to inhibit secret agreements. The requirements within the Mandate for its deposit within the League archives and distribution to other Member States provided alternative mechanisms for ensuring publicity and failure to register was therefore irrelevant. Indeed, these formalities provided support for the conclusion that a legally binding instrument had been concluded.[56] Unlike UN Charter Article 103, the League Covenant contained no priority clause, but nevertheless this pragmatic conclusion ignored the strict requirements of the Covenant.

In contrast to Article 18 of the Covenant, the United Nations Charter Article 102 makes no judgment as to the binding nature of unregistered

---

cises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed." Advisory Opinion Concerning the International Status of South West Africa, 1950 ICJ Rep. 133. In 1962, Judge Mbanefo explicitly asserted that estoppel precluded South Africa from raising the non-legal effect of the Mandate in face of its own conduct over the past forty years; South West Africa cases, *supra* note 18, at 440 (Judge Mbanefo, Separate Opinion).

54. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June, 1971 ICJ Rep. 16, at para. 94.

55. Covenant of the League of Nations, 1919, Art. 22.

56. Thus while form is not determinative, increased formality may be further evidence of the parties' intention to be bound.

treaties but instead stipulates that:

> (2) No party to any such treaty or international agreement which has not been registered in accordance with paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

While the binding nature of the treaty is not therefore challenged by non-registration *per se*, failure to do so might constitute evidence as to whether the parties perceived an agreement as a treaty.[57] Neither Bahrain nor Qatar registered the 1987 Agreement although both parties conceded its binding nature. Even when it registered the 1990 Minutes Qatar made no reference to the earlier documents. Despite not being registered the 1987 Agreement was invoked before the Court, as indeed were the oral undertakings in the *Nuclear Tests* cases. Bahrain adduced the failure by Qatar to register the 1990 Minutes until shortly before its application to the Court as evidence of Qatar's real belief that this was not a binding agreement, until it sought reliance upon it. The Court dismissed this argument saying it could draw no conclusions from actions with respect to registration, including its timing. To have decided otherwise would have been to impute bad faith to Qatar, or at least a change of opinion, but the consequence is that compliance or otherwise with Article 102 is irrelevant in determining the legal nature of an instrument.[58]

For its part, Bahrain did not simply not register either the 1987 Agreement or the Doha Minutes but immediately protested Qatar's registration of the Minutes. Failure to protest may be regarded as objective evidence of acquiescence, or lead to a state being estopped from later denying that it intended to be bound.[59] Koskenniemi has described the relationship between acquiescence and estoppel as equivocal, although he considers that

---

57. This point is highlighted by the difference between these two statements: "Non registration [...] does not have any consequence for the actual validity of the agreement, which remains binding upon the parties." Qatar *v.* Bahrain, Judgment of 1 July 1994, *supra* note 2, at para. 29. "Non-registration is good evidence that [...] neither the Council nor any Member of the League [...] thought that it was." South West Africa cases, *supra* note 18, at 494 (Judge Spender and Judge Fitzmaurice, Joint Dissenting Opinions).

58. This is consistent with the approach of the Secretariat which makes no judgment as to whether documents submitted for registration have the legal character of an international agreement. *See further* H. Han, *The U.N. Secretary-General's Treaty Depositary Function: Legal Implications*, 14 Brooklyn Journal of International Law 549, at 567 (1988).

59. Anglo-Norwegian Fisheries (United Kingdom *v.* Norway), Judgment, 1951 ICJ Rep. 116; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada *v.* United States of America), Judgment, 1984 ICJ Rep. 246.

estoppel seems more related to justice in that it prevents a state from blowing 'hot and cold'.[60] In *Military and Paramilitary Activities in and Against Nicaragua* the Court allowed subsequent behaviour to substitute for the formal requirements of acceptance of the jurisdiction of the PCIJ (and after 1946 the ICJ).[61] Nicaragua's long failure to ratify its acceptance of the Statute of the PCIJ was discounted in favour of acquiescence for over forty years by all concerned (including the United States, respondents to the disputed application) and continued official records noting the anomaly. Presumably, if the United States had at some point protested the listing of Nicaragua as having a valid Declaration, it would not have been bound by Nicaragua's assertion of jurisdiction. Despite its failure to do so, it remains difficult to see how "passivity and inaction on the part of officials and States can transform a Nicaraguan will into a Nicaraguan deed".[62]

Conversely, Bahrain's protests against formal registration of the 1990 Minutes by Qatar were not deemed pertinent as evidence of its intentions with respect to their status. Positive acts by a party were accorded less weight in *Qatar* v. *Bahrain* than omission to act by everyone else in the *Nicaragua* case. The difference is that the US was viewed as acquiescent in Nicaragua's failure to complete procedural formalities while, once the Minutes are accepted as a binding agreement, Bahrain's protests were directed at Qatar's compliance with the legal obligation of registration. It can be argued that Bahrain was not 'blowing hot and cold' but consistently challenging Qatari actions that characterised the Minutes as a legally binding agreement. What is missing from the Court's decision are clear criteria for distinguishing subsequent actions that are relevant as evidence of the parties' original intentions from those that constitute effective protest, situations where silence is deemed tacit consent, or actions that are incapable of altering an already determined legal status. It might be noted that in *South West Africa*, *Nicaragua*, and *Qatar* v. *Bahrain* the outcome of all these uncertainties and inconsistencies was to uphold the jurisdiction of the Court.

---

60. Koskenniemi, *supra* note 1, at 312-320.
61. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America) (Jurisdiction and Admissibility), Judgment, 1984 ICJ Rep. 392.
62. R. Higgins, *Fundamentals of International Law*, *in* N. Jasentuliyana (Ed.), Perspectives on International Law: Dedicated to Manfred Lachs 3 (1995).

### 3.4. Unilateral agreements

In oral argument in the *Aegean Sea* case it was argued on behalf of Greece that failure to accept the intentions of the parties as set out in the joint communiqué would cause the Court's jurisprudence with respect to unilateral statements to crumble.[63] In these cases the Court has formally at least paid great heed to the declarant's intentions.[64] For example, in the *Temple* case the Court stated that the "sole relevant question is whether the language employed in any given declaration does reveal a clear intention".[65] However, as with bilateral or multilateral agreements, such intentions can only be surmised through objective analysis of the surrounding circumstances and the words used. In the *Nuclear Tests* cases, for example, the Court held that the requisite intention is to be ascertained by the 'interpretation of the act', a concept that is broader than interpretation of the statement.[66] In determining the legal effect of the statements of the French President the Court accordingly had regard to their substance and to the circumstances in which they were made. The public nature of the undertakings by the French President to the international community as a whole (*erga omnes*) meant that all other states, including the applicant states, Australia and New Zealand, were entitled to act in reliance upon them. Yet since they wanted a determination of the substantive issues, neither of these states had relied, nor wished to rely, upon the French statements. At the same time it is arguable whether the French President intended to incur binding obligations.[67] The result was a fiction that was constructed from

63. Aegean Sea Continental Shelf case, Pleadings, Oral Arguments and Documents, at 345.
64. Legal Status of Eastern Greenland (Norway *v.* Denmark), 1933 PCIJ (Ser. A/B) No. 53; Nuclear Tests cases, *supra* note 1, at 457; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment, 1986 ICJ Rep. 14; Frontier Dispute case (Burkino Faso *v.* Mali), Judgment, 1986 ICJ Rep. 554.
65. Temple of Preah Vihear, *supra* note 19, at 32. The statement was made in the context of a declaration made under the Statute of the International Court of Justice, Article 36(2). Such declarations have been described as unilateral acts giving rise to bilateral engagements; Military and Paramilitary Activities in and Against Nicaragua, *supra* note 61, at para. 60. Since a number of the cases discussed concern the question of consent to the jurisdiction of the Court these *dicta* are especially pertinent.
66. Nuclear Test cases, *supra* note 1.
67. "Many commentators have stressed the extreme unlikeliness that France would really have inteded (sic) to assume an obligation - not least because it had itself in another connexion denied that unilateral statements of this kind would be binding.": Koskenniemi, *supra* note 1, at 307.

subjective intent, assumed reliance and good faith.[68] In the *Frontier Dispute* case the Chamber again combined subjective intention with objective assessment of the circumstances. "Thus it all depends upon the intention of the State in question, and [...] it is for the Court 'to form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation'."[69] In doing this the decision maker must take account of "all the factual circumstances in which the act occurred."[70] This formulation is not in fact so far different from the Court's stance in *Qatar* v. *Bahrain* in the context of a bilateral agreement. There the Court asserted its dependence upon the language and circumstances of the agreement of the Minutes that encompassed what it construed as the intention of the parties at that time. In both situations, however, it is the constructed will of the parties, rather than their real will, that is decisive. In the *Frontier Dispute* case the Chamber based its conclusion that the President of Mali had no intention to be bound by statements made in an interview on the fact that the parties had not manifested their intentions through negotiation of "a formal agreement on the basis of reciprocity."[71] This accentuates what the circumstances might have been (a decision of the Mediation Commission of the Organisation of African Unity) rather than those actually surrounding the interview. This again illustrates the fluidity of the Court in determining when an intention to be bound exists.

It can be problematic whether an action is correctly characterised as unilateral or bilateral. In *South West Africa*, Judge Jessup itemised instances where the Permanent Court had held an agreement to exist that included a unilateral manifesto issued by a domestic organ of Sardinia, a Lithuanain statute and the participation of two states in the adoption of a resolution of the League Council. All these combined unilateral actions with some bilateral elements.[72] The Chamber stated in the *Frontier Dispute* case that for a unilateral statement to be held binding there is no requirement that it be

68. *Id.*, at 308.
69. Frontier Dispute case, *supra* note 64, para. 39.
70. *Id.*, at para. 40.
71. In Military and Paramilitary Activities in and Against Nicaragua, *supra* note 64, at para. 261, the Court denied that there was anything in a communication from the Junta of National Reconstruction to the Organisation of American States from which it could infer a legal status.
72. South West Africa cases, *supra* note 18, at 403 (Judge Jessup, Separate Opinion).

made during the course of international negotiations, nor is it necessary for it to be directed towards another party. It considered it had a duty to "show even greater caution when it is a question of a unilateral declaration not directed to any particular recipient."[73] By definition, the lack of any negotiation process does not arise in the context of bilateral (or multilateral) agreements. However, negotiation strategy envisages the presentation by all parties of without prejudice offers, the weighing of compromises and consideration of offers and counter-offers. Those involved will have different intentions at various stages of the process, for example a desire to maintain its momentum, to make a political gesture, to stall for time, or to reject the latest offer. It cannot be assumed that any statement issued, or even agreed, accurately reflects the true intentions of the parties, nor that the purpose of the negotiations has been achieved. The Court should exercise similar caution in determining the intentions of parties involved in negotiations as was expressed with respect to unilateral statements outside of such processes.

## 4. CONCLUSIONS

In the context of unilateral statements, Koskenniemi has identified three understandings upon which the Court may choose to rest its decision: declarant will, reliance, and non-subjective justice. He explains that none of these choices can be consistently applied and "the problem-solver must have recourse to a strategy of evasion."[74] In determining whether an agreement exists, the Court has emphasised the subjective intention of the parties but has simultaneously accepted that a legally binding agreement can objectively exist, as determined from the surrounding circumstances and the text of the instrument. "The difficulty here is that statements or contexts do not demonstrate their objective nature automatically" and construction inevitably denies the subjectivity of at least one of the parties, in the form of the "Court knowing better".[75] Reliance upon subsequent statements by the parties as to their earlier intentions reverts to subjectivity, but allows for subsequent reappraisal and changed expressions of what

73. Frontier Dispute case, *supra* note 64, at para. 39.
74. Koskenniemi, *supra* note 1, at 300.
75. *Id.*, at 304.

may or may not have been earlier intentions. This outcome the Court rejected in *Qatar* v. *Bahrain*.

Thus the Court's options are in reality limited. Objective evaluation of the surrounding circumstances does not conceal the Court's subjectivities in their interpretation. Similarly in other cases, apparent emphasis upon subjective intent has not concealed construction of that intent through reliance upon external evidence. The Court may seek its solution in what Koskenniemi has termed 'non-subjective justice' based upon policy considerations of good faith, legitimate expectations and reasonableness.[76] These are not easily applied in the context of submission to the jurisdiction of the Court where consensuality is paramount.[77] The facts in *Qatar* v. *Bahrain* lead to two divergent, but reasonable, conclusions. In the words of Judge ad hoc Valticos "ultimately there was indeed an agreement to come to the Court"[78] while Lauterpacht sees the decision as "a further step along the path of the gradual erosion of specific consent as the basis of the Court's jurisdiction."[79] Nor is it easy to be confident about which approach is 'just' and upholds more effectively international community objectives. If the Court too readily concludes from the surrounding circumstances that there has been consent, it is likely to inhibit states from considering even in general terms the desirability of the Court as a dispute resolution forum. Parties to a dispute might be prepared to consider a joint submission, which has advantages for both. They can set out the parameters of dispute, reduce the potential for lengthy proceedings on jurisdiction and admissibility, minimise the likelihood of third party intervention, and move the focus directly to the substance of the disputed matters. Neither party gains the advantages of defining the dispute that is gained through unilateral application. Fear of without prejudice statements or exploratory proposals being construed as constituting consent could impede attempts at negotiating a joint submission to the Court. Further, compliance with the Court's judgment is less likely where genuine consent to its jurisdiction is lacking and its legitimacy to hear the dispute accordingly undermined.

---

76. The Court especially emphasized good faith and trust in international relations in the Nuclear Tests cases, *supra* note 1, at para. 46. *Cf.* Jennings & Watts, *supra* note 21, at 1202.
77. It is noticeable that in many of these cases, South West Africa, Aegean Sea, Nicaragua and Qatar v. Bahrain itself, the issue of the legal status of an instrument has arisen in the context of determining whether the parties have consented to the Court's exercise of jurisdiction within the terms of Article 36.
78. Qatar *v.* Bahrain, Judgment of 1 July 1994, *supra* note 2.
79. Lauterpacht, *supra* note 12, at 467.

Non-compliance inevitably weakens the Court's authority however much the state in question considers it justified. On the other hand, if the Court declines jurisdiction unless the state's subjective will to participate is manifest, it may become marginalised and be perceived as having abdicated any role in encouraging states to have recourse to it.[80] Seen in this light, the decision of the Court to allow the parties one final attempt at defining their dispute is a commendable instance of directive case management, although it conformed to the expectations of neither party. Once it had failed however, the continued assertion of Bahraini consent is a striking denial of subjective will.

*Qatar* v. *Bahrain* is not only relevant to the construal of consent to the Court's jurisdiction, but to other informal binding agreements. In that the Court was perhaps more transparent in relying upon objective criteria to the exclusion of subjective assertions than it has been previously, Vierdag considers that the decision will have a decisive impact upon what he terms the prevalent practice of drawing up all kinds of informal arrangements between states, governments, ministries, and state agencies. He argues that at present the possible legal significance of these arrangements is commonly ignored or left ambiguous.[81] Nevertheless, the considerable advantages of informality means that states will continue to conduct their international relations in this way. In some cases misunderstandings can arise through different expectations as to legal effect. In others ambiguity may be deliberate in order to facilitate some appearance of agreement. It is only subsequently when divergent interpretations threaten the stability of the arrangement that clarity is sought.[82] Construction of the 'real' intention of the parties is then fictitious and ignores the reality of the dispute. States may be able to resolve those differences, for example through renegotiation and clarification.[83] If third party assistance is sought, inevitably the current intentions of at least one of the parties are discounted. Drawing the

---

80. This point was made by P. Kooijmans in his Commentary, Increasing the Use and Appeal of the Court, at The Hague in April 1996.

81. Vierdag, *supra* note 39, at 166.

82. In the Heathrow Airport User Charges case (*supra* note 49), UK contentions that the Memorandum of Understanding was no more than a 'gentleman's agreement' with no legal effect caused US consternation with respect to other Memoranda of Understanding on defense issues. This led to substantial delays in the negotiation of defense programs between the two states, and between the US and other states that were thought likely to adopt the UK approach: *see* McNeill, *supra* note 5.

83. As was done through the so-called Chapeau Agreement between the US and UK to resolve the difference of opinion with respect to Memoranda of Understanding. *See id.*

line between binding and non-binding agreements has always been problematic and has not been simplified by the International Court of Justice in *Qatar* v. *Bahrain*. Apparent reliance upon intention and consent to be bound merely obscures the many nuances of states' actions over time, while external facts and circumstances explicitly preferred in this case can be manipulated to produce different results. The finding that the Minutes constituted a binding legal agreement may well be appropriate in light of the specific reaffirmation of earlier agreements, but the *dicta* serve only to blur still further the grey twilight zone between binding and non-binding international agreements.