

‘Memoranda of Understanding’: mere political commitments or a well-established category of international treaty law?

What distinguishes a legally binding agreement from a non-legally binding instrument?

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Preliminary Comments

1. Non-legally binding agreements are recognised in international practice.
2. "...it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement. Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form-a communiqué-in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up" (Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, para. 96).
3. Issues arise when the status of political agreement is contested by parties, or its legality is questioned within a State's legal order. In some instances, the conclusion of a legally binding agreement is required. See, e.g.: UNCLOS Article 15 Delimitation of the territorial sea between States with opposite or adjacent coasts
"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. ..."
4. International courts and tribunals have developed a coherent approach.

International Jurisprudence

- **Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening)**, ICJ, 2002 *Maroua Declaration of 1 June 1975*

“During the meeting held at Maroua from May 30th to June 1st 1975, the two Heads of State of Cameroon and Nigeria agreed to extend the delineation of the maritime boundary between the two countries from point 12 to point G on the Admiralty Chart No. 3433...”

- **Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)**, ITLOS, 2012 *1974 Agreed Minutes between the Bangladesh Delegation and the Burmese Delegation regarding the Delimitation of the Maritime Boundary between the Two Countries*

“2. With respect to the delimitation of the first sector of the maritime boundary between Bangladesh and Burma, i.e., the territorial waters boundary, the two delegations agreed as follows:

I. The boundary will be formed by a line extending seaward from Boundary Point No. 1 in the Naaf River to the point of intersection of arcs of 12 [nm] from the southernmost tip of St. Martin’s Island and the nearest point on the coast of the Burmese mainland, connecting the intermediate points, which are the mid-points between the nearest points on the coast of St. Martin’s Island and the coast of the Burmese mainland...”

Aegean Sea Continental Shelf (Greece v. Turkey), ICJ, 1978

Brussels communiqué of 31 May 1975

“In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems 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 Government would take place. ...”

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), ICJ, 1994 *Minutes of 25 December 1990*

“The following was agreed :

1. To reaffirm what was previously agreed between the two parties.
2. The good offices of the Custodian of the Two Holy Mosques, King Fahd b. Abdul Aziz will continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. 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, which the State of Qatar has accepted, 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.
3. If a brotherly solution acceptable to the two parties is reached, the case will be withdrawn from arbitration”.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), ICJ, 1994 (*“Bahraini formula”*)

Question

“The 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.”

South China Sea arbitration (The Republic of Philippines v. The People's Republic of China), PCA, 2015

China–ASEAN Declaration on the Conduct of Parties in the South China Sea, signed on 4 November 2002

“1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall each serve as the basic norms governing state-to-state relations; . . .

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner. . . .

10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.”

Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), ICJ, 2017

Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other no-objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf

“[1] The Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic, in the spirit of cooperation and mutual understanding have agreed to conclude this Memorandum of Understanding: ...

[6] The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

[7] This Memorandum of Understanding shall enter into force upon its signature.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective Governments, have signed this Memorandum of Understanding...”

Observations

- Intention of the parties is the key element in identifying whether an instrument is a (non) legally binding agreement.
- Emphasis on the content and terms of the instrument.
- Context and circumstances are taken into account. Position of officials involved and subject matter may also be relevant.
- Conduct of the parties may serve as a guide as to the nature of the instrument.
- Form, modalities of conclusion, title of the instrument seem to play a residual role.
- Municipal law requirements applicable to treaties relate rather to the validity of the instrument.