« '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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I. Introduction

My task today is to focus on the distinction between non-legally binding instruments and treaties.

As a way of introduction, I would like to make four preliminary comments:

- First, we may recall that, in the legal doctrine, the view has been expressed that the category of political commitments is a fiction and that any obligations or commitments are necessarily of a legal nature.[1] In this connection, suffice to say that the existence of non-legally binding agreements is well recognized in international practice,[2] and that there are numerous examples of instruments which are treated by their authors as political commitments.[3]

- Second, as stated by the ICJ, "international agreements may take a number of forms and be given a diversity of names", [4] and the form of the instrument or the name given to it does not control its legal nature. Thus, there is no rule

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[1] See e.g., J. Klabbers, "Quatar v. Bahrein: the concept of 'treaty' in international law, Archiv des Völkerrechts, 1995, p. 368: "There are not two ways about it: commitments, once consented to, are by definition legal commitments".

[2] See e.g., the Guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements, adopted in 2020 by the OAS Inter-American Juridical Committee (Resolution CJI/RES. 259 (XCVII-O/20)).

[3] See e.g., the Final Act of the Conference on Security and Co-operation in Europe (1975), the Charter of Paris for a New Europe (1990), the NATO-Russia Founding Act (1997), or the ministerial declarations of the International Conference on the Protection of the North Sea, regularly adopted from 1984 until 2006.

[4] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility), Judgment, I.C.J. Reports 1994, p. 120, para. 23. See also: Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, para. 96: "…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".

preventing States from concluding international agreements (treaties) in the form of, inter alia, communiqué, procès-verbal, agreed minutes, or memorandum of understanding (MoU), although such terms may sometimes be used to indicate the intention to conclude something less than a treaty.[5] In this presentation, I will then refer to non-legally binding instruments or political agreements, rather than to MoU, to designate instruments which are not intended to create international legal obligations.

- Third, the status of political agreements does not raise particular issues when the States which concluded them share the same view regarding their legal nature (see e.g., the Iron Rhine Railway arbitration, where both Belgium and Netherlands agreed that the Memorandum of Understanding of 28 March 2000 was not a binding instrument).[6] The need to clarify the status of an agreement arises when the contracting parties express conflicting opinions (e.g., in cases before an international court or tribunal) or when issues are raised within the legal order of one of the contracting parties, for example as to the legality of the conclusion of such an instrument (see, e. g., the discussions regarding the EU-Turkey statement of 18 March 2016 concerning irregular migration from Turkey to the EU). In addition, it may be necessary to determine the legal nature of an agreement in light of certain treaty provisions which require the conclusion of a legally binding - and not a mere political - agreement (see e.g., articles 15[7] or 281 of UNCLOS).

- Fourth, in considering the distinction between legally binding agreements and political agreements we may benefit from a number of international decisions where international courts and tribunals were faced with opposite views as to the legal or political nature of instruments invoked before them. On that occasion, they were able to develop a coherent set of criteria, which may be of some assistance.

II. International jurisprudence

With a view to presenting the approach adopted by international courts and tribunals in addressing the status of international instruments whose legal nature is disputed, I have selected six decisions. Four concern issues of jurisdiction and two relate to the merits of the dispute. These decisions have been adopted by the ICJ (4 cases), the

[5] According to the United Kingdom Foreign, Commonwealth & Development Office (FCDO), "[a]n MOU records international "commitments" but in a form and with wording which expresses an intention that it is not to be legally binding as a matter of international law…". See United Kingdom Foreign, Commonwealth & Development Office Treaties and MOUs: Guidance on Practice and Procedures (March 19, 2013).

[6] Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands (2005) 27 RIAA, p. 156.

[7] Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, para. 89: "The Tribunal notes that, in light of the object and purpose of article 15 of the Convention, the term "agreement" refers to a legally binding agreement. In the view of the Tribunal, what is important is not the form or designation of an instrument but its legal nature and content."

International Tribunal for the Law of the Sea (ITLOS) (1 case) and an arbitration tribunal (1 case). They refer to informal agreements called “declaration” (2 cases), “minutes” (2 cases), “MoU”, or “communiqué”.

I will start with the two decisions concerning instruments invoked by one party in support of its arguments relating to the merits of a case submitted to an international court or tribunal.

A. Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening) (I.C.J. Reports 2002)

In the case concerning the Land and Maritime Boundary between Cameroon and Nigeria, the ICJ had to determine the legal nature of the “Maroua Declaration”, signed in 1975 by the Heads of State of Cameroon and Nigeria. The declaration stated that the two Heads of State had “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 annexed to this Declaration". [8]

The terms of the agreement were clear and the Court had no difficulty to conclude that “the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the [VCLT].” [9]

It then examined - and rejected - the Nigeria’s claim of invalidity of the agreement for non-compliance with constitutional requirements, based on article 46, paragraph 2, of the 1969 Vienna Convention on the law of treaties.[10]

B. Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) (ITLOS Reports 2012)

It is interesting to compare the decision just referred to with the judgment rendered by ITLOS in the case concerning the maritime boundary in the Bay of Bengal. In this case, the issue also concerned the status of an agreement on the limits of the territorial sea between the two States,[11] recorded in an informal agreement, i.e., the “Agreed

[8] Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, para. 264.
[9] Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, para. 263.
[10] Ibid., para. 265.
[11] Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, para. 57: “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…”.

minutes" of negotiations, signed, in 1974 by the respective heads of the two delegations.

However, there are important differences between the "Maroua Declaration" and the "Agreed minutes". The minutes expressly referred to negotiations relating to a comprehensive agreement on the maritime boundary between the two parties - including the continental shelf and the exclusive economic zone - and the limits of the territorial sea only constituted a first step. The Tribunal therefore concluded that:

"… the terms of the 1974 Agreed Minutes confirm that these Minutes are a record of a conditional understanding reached during the course of negotiations, and not an agreement within the meaning of article 15 of the Convention. This is supported by the language of these Minutes, in particular, in light of the condition expressly contained therein that the delimitation of the territorial sea boundary was to be part of a comprehensive maritime boundary treaty.[12]

In reaching its conclusion the Tribunal also took into account the level of authority of the signatories. It noted that "the head of the Burmese delegation was not an official who, in accordance with article 7, paragraph 2, of the Vienna Convention, could engage his country without having to produce full powers,"[13] a situation different "from that of the Maroua Declaration which was signed by the two Heads of State concerned".

As a preliminary conclusion, we may observe that the main criteria used in the two decisions just commented relate to the contents of the agreement and the context in which it was signed.

We may now move to the other decisions, two of which concern instruments invoked as a basis for the jurisdiction of the ICJ. The other two were invoked in order to object to the jurisdiction of the ICJ or an arbitral tribunal.

C. Aegean Sea Continental Shelf (Greece v. Turkey) (I.C.J. Reports 1978)

The case of the Aegean Sea is well known; it relates to the Joint communiqué - the "Brussels communiqué" - issued during a meeting between the Prime ministers of Greece and Turkey. The communiqué stated that the prime ministers had "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". For Greece, the terms of the Communiqué recorded the agreement of the two heads of government to submit the dispute to the Court pursuant to article 36, paragraph 1, of the Statute of the Court.[14]

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[12] Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, para. 92.

[13] Ibid., para. 96.

[14] Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, para. 97: "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

In its judgment, the Court did not expressly pronounce itself on the legal nature of the communiqué. There was probably no need for the Court to make a finding on this issue. It was sufficient for the Court to note, in light of the terms included in the communiqué and the circumstances surrounding its adoption, that the communiqué was not intended to constitute an immediate commitment "to accept unconditionally the unilateral submission of the present dispute to the Court".[15]

D. Qatar and Bahrain (I.C.J. Reports 1994)

It is useful to compare the Aegean Sea case with the case between Qatar and Bahrain which involves similar aspects. In this case, the question related to the legal nature of "Minutes" signed in 1990 by the ministers of foreign affairs of Qatar and Bahrain. The minutes stated that the two States had agreed that the good offices of the Kingdom of Saudi Arabia will continue until May 1991 and that, at the end of this period, the two States may "submit the matter to the International Court of Justice in accordance with the Bahraini formula,[16] which the State of Qatar has accepted, and with the procedures consequent on it."[17]

Contrary to what it decided in the Aegean Sea case, the Court in 1994 concluded that the signed minutes constituted a legally binding agreement enabling the submission of the dispute to it. A close look at the text of the signed minutes may explain the reasons for such a conclusion. The 1990 signed minutes are more precise than the 1975 joint communiqué; they contain a commitment to submit the case to the Court within a certain time frame and on the basis of the agreed terms of a special agreement.

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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."

[15] Ibid., para. 107: "Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court's jurisdiction to entertain the Application filed by Greece on 10 August 1976."

[16] Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, para 18: "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."

[17] Ibid., para *19* (translation provided by Bahrain): "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 141 1 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".

In the view of the Court, “[t]he two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement.”[18]

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

An issue dealt with by the arbitral tribunal in the South China dispute concerned the legal status of the “China–ASEAN Declaration on the Conduct of Parties in the South China Sea, signed on 4 November 2002”. [19] In its non-paper, China considered that this text was a legally binding agreement by which the parties had agreed to engage in a process of negotiation and that, therefore, on the basis of article 281 of UNCLOS, recourse to Part XV of the Convention was excluded.

In addressing this question, the arbitral tribunal followed the road traced by the existing jurisprudence: “an instrument must evince a clear intention to establish rights and obligations between the parties. Such clear intention is determined by reference to the instrument’s actual terms and the particular circumstances of its adoption. The subsequent conduct of the parties to an instrument may also assist in determining its nature.”[20]

As noted by the tribunal, the declaration presented certain characteristics of a treaty (formal document containing a preamble, signed by foreign ministers and the signatory States are described as “Parties”). [21] However, the tribunal observed that the provisions included in the declaration did not create any new obligations.[22] On this particular point, the finding of the tribunal may not be entirely convincing in light of the

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[18] Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, para. 27.

[19] 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.

[20] An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of Philippines v. The People’s Republic of China), Award on Jurisdiction, PCA Case No. 2013-19 (Oct. 29, 2015) para. 213.

[21] See ibid., para. 214.

[22] See ibid., para. 215.

wording of paragraph 4 of the Declaration, which contains some mandatory language (i.e. "to undertake to resolve their … disputes by peaceful means… through friendly consultations and negotiations by sovereign states directly concerned"). The tribunal, while noting the undertaking to negotiate in paragraph 4 of the declaration, however, came to the conclusion, in light of the purpose and circumstances surrounding its adoption, that the declaration was not intended to "be a legally binding document, but rather an aspirational political document".[23]

F. Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment (I.C.J. Reports 2017)[24]

The last example refers to the case concerning the Maritime Delimitation in the Indian Ocean and, in particular, the legal status of the MoU signed on 7 April 2009 by the Minister for Foreign Affairs of the Government of Kenya and the Minister for National Planning and International Co- operation of the Transitional Federal Government of Somalia.

The MoU recorded an agreement between the two States in the context of their submissions on the outer limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS). Paragraph 6 of the MoU stated that "[t]he "delimitation of maritime boundaries in the areas under dispute … 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

[23] Ibid., para. 217.

[24] Ibid., para. 37: "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:

…

[5] The two coastal States agree that at an appropriate time, in the case of the Republic of Kenya before 13 May 2009, each of them will make separate submissions to the Commission on the Limits of the Continental Shelf (herein referred to as 'the Commission'), that may include the area under dispute, asking the Commission to make recommendations with respect to the outer limits of the continental shelf beyond 200 nautical miles without regard to the delimitation of maritime boundaries between them. The two coastal States hereby give their prior consent to the consideration by the Commission of these submissions in the area under dispute. The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles.

[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…"

States …". Kenya considered that the MoU constituted an international agreement by which the parties had agreed on a specific method of settlement (negotiation) regarding their maritime dispute and had agreed to wait for the CLCS's recommendations before any such settlement could be reached. On that basis, it claimed that the Court had no jurisdiction to entertain the case brought by Somalia.

In its reasoning, the ICJ came to the conclusion that the MoU is a legally binding agreement. It observed that the MoU records the agreement of Somalia and Kenya "on certain points governed by international law."[25] It also noted the inclusion of a provision addressing the entry into force of the MOU, which in its view " is indicative of the instrument's binding character." It further referred to the position of Kenya, which "considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations"[26] as well as of Somalia, "which did not protest that registration until almost five years thereafter."[27] The Court then examined - and rejected - the claims of Somalia against the validity of the MoU, before concluding "that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law."

III. **Observations**

In light of this overview of international jurisprudence, some comments may be made as regards the criteria used by international courts and tribunals in assessing the status of instruments whose legal nature is disputed.

The intention of the parties is generally considered as the key element in identifying whether an instrument is a (non-)binding agreement. However, a clear intention as to the legal nature of an instrument is rarely expressed.[28]

It will then be necessary to interpret what was intended by the authors of the act on the basis of a series of criteria.

In this respect, a strong emphasis is put on the content and terms of the instrument. To qualify as a legally binding agreement, an instrument whose legal nature is uncertain needs to pass a test as regards its content. It should contain clear commitments, obligations, or undertakings.

At the same time, this condition is not in itself sufficient to label the instrument as a legally binding agreement. The context in which the agreement was signed and the

[25] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, para. 42.
[26] Id.
[27] Id.
[28] See, however, para. 6 of the final provisions of the OSCE Document on Small Arms and Light Weapons of 24 November 2000: "The norms, principles and measures in this document are politically binding".

circumstances surrounding its adoption will also be taken into account to determine its legal nature.

Incidentally, it may be noted that the subject matter of the agreement in some instances appears to reinforce the legal character of an instrument. For example, a clear and unconditional commitment to submit a dispute to an international court will be presumed to constitute a legal obligation.

It may also be noted that the agreements which were considered as legally binding in the cases examined above were concluded by officials having the authority to represent their State.

The conduct of the parties may give further information as to the nature of the instrument, at least if the parties share the same approach.

The form, modalities of conclusion, and the title of the instrument seem to play a residual role in assessing the legal nature of an instrument. Nevertheless, this criterion should not be underestimated. Indeed, doubts regarding the legal nature of an instrument do not usually arise vis-à-vis agreements which do possess all the characteristics of a treaty.

In considering formal characteristics of instruments, international courts and tribunals do not seem to pay great attention to the use of a specific terminology ("commitments" rather than "obligations"; "participating States" rather than "contracting parties"; "enter into effect" rather than "enter into force"…). What matters, however, is the presence, in the text of the instrument, of formal clauses which are usual in treaties such as clauses relating to the entry into force and registration of the agreement or the reference to the fact that the signatories were "duly authorized".

(Non) compliance with constitutional requirements applicable to treaties is rather considered in the context of the determination of the validity of the agreement (e.g., on the basis of articles 7 and 46 of the 1969 Vienna Convention).[29]

[29] See, however, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, para. 97, where the Tribunal considered that "[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding".