Expert Workshop on Non-Legally Binding Agreements in International Law

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Perspectives in Practice: Experience of Legal Advisor with MoUs

- First of all, I would like to thank Germany for organizing this workshop on an important, practical issue that should perhaps even from part of the CAHDI´s standing agenda.
- During my presentation, I would like to focus on the following **four questions** that I consider relevant:

1. Why are the MoUs and other non-binding documents used?
2. What makes them different from treaties?
3. What problems are in this context encountered in practice?
4. What are the solutions to these problems?

1) Why are the MoUs and other non-binding documents used?

- There has been recently **a general trend** in international law – for different reasons - **towards the soft law**, both in bilateral and multilateral relations. In other words, in many areas of international law, where our predecessors would have most likely concluded a treaty, we have just prepared a non-binding document.
- One of the reasons for this trend might be – at least in my view – the fact that it is simply easier for States to create a non-binding document than a treaty. While the process of conclusion of treaties is strictly regulated by their domestic law (including by their Constitution) and often the Parliament must be involved, **the process of preparation of non-binding documents in most States is unregulated** and could be finalized solely by the executive.
- Another reason could be that it is politically more acceptable for States to reach compromise on **divisive issues** in the form of a non-binding document than of a treaty.
- To provide some **examples**, some pressing questions of international law have recently been covered by non-binding documents, such as the Montreux Document on Private Military and Security Companies, the Global Compact for Safe, Orderly and Regular Migration, JCPOA or the recent Declaration Against Arbitrary Detentions in State-to-State Relations.
- This trend can be seen also in case of outcomes of work of the **International Law Commission** that in most cases now produces "draft conclusions" or "draft principles" rather than "draft articles" that would be later adopted as a treaty.
- On **bilateral level**, there is often a political interest to sign a document during a foreign official visit by a head of State or Government or by a Minister. Since there is usually no time or reason to conclude a treaty, an MoU on political consultations or some other less important, rather symbolic subject could be a welcome alternative.

2) What makes these documents different from treaties?

- It goes without saying that the key difference between the non-binding documents and treaties is that the former are not covered by the *pacta sunt servanda* principle codified in Art. 26 of the Vienna Convention on the Law of Treaties (although there is an expectation that even the non-binding document will be followed by the participants) and, if violated, no responsibility for internationally wrongful acts arises.
- Given this difference as for the legal effects, there should be always **legal clarity** with regard to every document whether it is a non-binding document or a treaty.
- Therefore, when an MoU is drafted, we make sure in our practice that it does not contain any expression or provisions that are typically used in treaties.
- When it comes to the differences between **legal terminology**, I can refer to the Guidance on Practice and Procedures on Treaties and MoUs issued by the Treaty Section of the Legal Directorate of the UK Foreign and Commonwealth Office (or to the practical publication "Modern Treaty Law and Practice" by Anthony Aust).
- To provide examples, in treaty language, we use the words "agree / agreement / enter into force / obligations / Parties / shall", while in the MoUs we prefer terms like "decide / arrangement / come into operation / commitments / Participants / will." In other words, we aim to avoid any expression that could possibly imply our intention to conclude a treaty.
- In this context – and I hope that the German organizers will forgive me this remark – I consider the **title of this workshop** "Non-legally Binding Agreements in International Law" to be a *contradictio in adjecto*, since "agreement" *(pactum)* is an established term for a binding document, *i.e.*, for a treaty, so the title "non-legally binding agreement" is a bit misleading. As set out in Art. 2 para. 1(a) of the Vienna Convention on the Law of Treaties: "treaty" means an international agreement.
- Furthermore, in order to maintain the declaratory (not constitutive) nature of MoUs, we also do not include into them **provisions on termination, amendments and entry into force** (if a document is not legally binding and did not enter into force, it cannot be terminated) and **final clauses** typical for treaties (testimonium, choice of language decisive for interpretation if an MoU is signed is several languages etc.).

3) What problems are in this context encountered in practice?

- Currently, we are facing **the problem of overuse of MoUs** and other non-binding documents, particularly on the bilateral level. As I have already stated, this phenomenon is most often connected with official visits of the head of State or Government, Ministers and sometimes of Deputy Ministers too. Sometimes, an MoU is signed on a similar or even the same subject matter as another one signed with the same State just a couple of years before.
- Another issue that we have encountered is that, during preparation of MoUs, we communicate on the other side exclusively with **political officers**, i.e., the legal advisers of the other side are not part of the process. When dealing with negotiators without any legal support, our efforts to avoid treaty language in the text of an MoU are usually misunderstood by our partners.
- Finally, while some States have made public their best practice in this area like the UK with its Guidance on Practice and Procedures on Treaties and MoUs – which I find

extremely helpful and practical – there is a certain **lack of a universal best practice** with regard to MoUs and other non-binding documents that could be referred to during the negotiation.

4) What could be the solutions to these problems?

- A smart solution to the overuse of MoUs has been found by our Canadian colleague, Alan Kessel, who presented a couple of years ago during the legal advisors' dialogue in New York an idea of **a register of signed MoUs**. In most States, there is an official register of published treaties (an official gazette), nevertheless, there is a gap when it comes to MoUs, so such register makes sense.
- At the Czech MFA, we adopted the Canadian solution and established at my department an informal register of the signed MoUs too. Our MoUs are, however, not published and the register is just for our internal use. In order to achieve the intended impact, such register must be kept and updated over a longer period of time. Then the register may become an "effective weapon" in the hands of a legal adviser against a political department that intends to sign a second or third MoU on political consultations with a country "X". This solution's weakness is, however, that not all MoUs in practice reach my department and get registered.
- The second problem, i.e., political officers drafting and negotiating MoUs out of legal control, is closely connected with **the role of legal advisers on public international law at the Ministries of Foreign Affairs**. It is my belief that the legal advisers should be actively involved in the legal review of non-binding documents. Based on my experience, such involvement is not always appreciated and could be the reason why we are sometimes seen as "troublemakers" delaying and complicating the process of preparation of MoUs. I see this perhaps as an inevitable price to be paid for being a legal adviser.
- In relation to the last problem, I would like to recall that with regard to some aspects of conclusion of treaties, we can use the **Treaty Handbook** prepared by the Treaty Section of the Office of Legal Affairs of the UN Secretariat or the **Practical Guide** prepared by the Treaty Office of the Council of Europe (that was distributed at the last CAHDI meeting in Prague in September 2020).
- It would be very practical, therefore, to have **a similar manual on preparation of MoUs and other non-binding documents**, in particular on the terminology to be used etc. Based on the debates we had within the legal advisors' dialogue in New York on this issue, there is a demand among the legal advisers for such a manual, guidelines or a "model MoU".
- Thank you for your attention and I am looking forward to participating in the discussion.