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non-legally binding instruments**

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Possible indirect legal effects under international law of non-legally binding instruments*

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Abstract:

As part of the current overall process of de-formalization in international law States increasingly chose informal, non-legally binding agreements or 'Memoranda of Understanding' ('MOUs') to organize their international affairs. The increasing conclusion of such legally non-binding instruments in addition to their flexibility, however, also leads to uncertainties in international relations. Against this background, this article deals with possible indirect legal consequences produced by MOUs. It discusses the different legal mechanisms and avenues that may give rise to secondary legal effects of MOUs through a process of interaction with and interpretation in line with other (formal) sources of international law. The article further considers various strategies how to avoid such eventual possible unintended or unexpected indirect legal effects of MOUs when drafting such instruments and when dealing with them subsequent to their respective 'adoption'.

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1. Introduction

International law is currently undergoing a process of de-formalization. As part of this tendency, one also witnesses a development where States increasingly shy away from concluding international treaties. Instead, they conclude an ever-increasing number of non-legally binding agreements or ‘non-treaties’.³ Increasingly, States choose such informal, legally non-binding instruments, which hereinafter are referred to as ‘Memoranda of Understanding’ or ‘MOUs’, to organize their international affairs⁴ because of the numerous advantages that arise from their mere informal and political character compared to international treaties,⁵ and thus promising greater flexibility:⁶ they may be kept confidential since they are not subject to Art. 102 UN Charter, they come ‘into effect’ quickly and normally without any parliamentary involvement, and they can easily be amended or terminated.⁷ It is precisely because they do not constitute treaties that such non-legally binding instruments are not subject to the same procedures and formalities inherent in the conclusion of formal treaties,⁸ which procedures are perceived as being too tedious and time-consuming.

This rise in the importance and relevance of non-legally binding instruments, as distinct from treaties, in international relations, however, requires *first* clear criteria to determine whether an agreement is legally binding or not under international law. Hence, much has already been written about the legal classification of MOUs as such, as well as how to distinguish them from international treaties in the first place.⁹ At the same time, the equally important, if not even more important,

³ Ginsburg, *Authoritarian International Law?*, AJIL 2020, 221-260, p. 231; Wouters, *International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism*, in: Krieger/Nolte/Zimmermann (eds), *The International Rule of Law: Rise or Decline?*, OUP 2019, 242-264, pp. 248-250; Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, 91st Regular Session, August 7-16, 2017, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc.542/17corr.1, 30 August 2017, para. 32; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 28-29; *id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, pp. 46, 54.

⁴ *Ibid.* Note, however, that Lord McNair has observed a “general tendency towards informality” already in 1961 (McNair, *The Law of Treaties*, Clarendon 1961, p. 19).

⁵ Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81, pp. 67-73; Crawford, *Brownlie’s Principles of Public International Law*, 9th edn, OUP 2019, p. 400; Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020).

⁶ Crawford, *Brownlie’s Principles of Public International Law*, 9th edn, OUP 2019, p. 400; Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81, pp. 67-73; Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787-812 (1986), pp. 789, 811.

⁷ Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 4; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 40-43; *id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, pp. 58-62.

⁸ Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 4; Gautier, *Non-binding Agreements*, MPEPIL, OUP 2006, para. 5.

⁹ Hollis, *Defining Treaties*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 11-45; Klabbbers, *Governance by Academics: The Invention of Memoranda of Understanding*, ZaöRV 2020, 35-72; *id.*, “*Qatar v. Bahrain: the concept of ‘treaty’ in international law*”, 33 AVR, 361-376 (1995); Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81; Pellet/Müller, in: Zimmermann/Tams (eds), *The Statute of the International Court of Justice*, 3rd edn, OUP 2019, Art. 38 para. 110; Schmalenbach, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 38 paras. 35-40; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 28-54; *id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72; *id.*, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787-812 (1986); Gautier, *Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États*, in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*, Bruylant 2007, 425-454; *id.*, *Non-binding Agreements*, MPEPIL, OUP

second question as to what are possible dangers and legal uncertainties linked to the increasing conclusion of legally non-binding agreements has so far been largely neglected and, if at all, has only been addressed marginally.

Since States normally use MOUs for the very purpose of avoiding international legal obligations, it is however highly relevant for the daily process of international diplomacy and law-making to be aware of possible *indirect* legal effects that might be produced by MOUs, once concluded. As a matter of fact, and notwithstanding that MOUs are not meant to create any legal rights or obligations in and by themselves, they nevertheless bear the risk of *indirectly* giving rise to important legal consequences – through a process of interaction and interpretation – and running counter to the original intention of at least one of the States involved in the ‘conclusion’ of such non-legally binding instruments.

In order to shed some light on this very issue, this article elaborates on the possible indirect legal effects of MOUs. It will analyze how eventually non-legally binding instruments might generate legal effects under international law. It will further detail the various ‘legal hooks’ that may allow such non-legally binding MOUs to enter the stage of international law.

2. What are “non-legally binding instruments”?

At the outset it is necessary to adopt a working definition of what the term ‘non-legally binding instrument’ encompasses. For present purposes, the term ‘non-legally binding instruments’ shall be understood as designating instruments, which, albeit concluded between States or between States and international organizations, are not legally binding, but establish political commitments only.¹⁰ Such instruments are frequently referred to as ‘gentlemen’s agreements’ or MOUs¹¹ and may be of a bilateral or a multilateral character.¹²

2006; Eisemann, *Le gentlemen’s agreement comme source du droit international*, 106 *Journal du Droit International* 326-348 (1979); Lauterpacht, ‘Gentleman’s Agreements’ in: Flume (ed), *International Law and Economic Order. Essays in Honour of FA Mann on the Occasion of his 70th Birthday on August 11, 1977*, 381-398 (1977); Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 *AJIL* 296-304 (1977).

¹⁰ Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 28; Hollis, *Defining Treaties*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 11-45, p. 35; *id.*, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: *Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary)*, p. 57; Gautier, *Non-binding Agreements*, MPEPIL, OUP 2006, para. 1; Jennings/Watts (eds), *Oppenheim’s International Law, Vol. I – Peace Parts 2 to 4*, 9th edn, Longman 1992, para. 582; Aust, *The Theory and Practice of Informal International Instruments*, 35 *ICLQ* 787-812 (1986), p. 787; Münch, *Non-binding Agreements*, 29 *ZaöRV* 1-11 (1969), pp. 1-2.

¹¹ Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81, p. 60-61; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 28; *id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 46; *id.*, *The Theory and Practice of Informal International Instruments*, 35 *ICLQ* 787-812 (1986), p. 787; Gautier, *Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États*, in: *Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon, Bruylant 2007*, 425-454, p. 437; Jennings/Watts (eds), *Oppenheim’s International Law, Vol. I – Peace Parts 2 to 4*, 9th edn, Longman 1992, para. 582; Eisemann, *Le gentlemen’s agreement comme source du droit international*, 106 *Journal du Droit International* 326-348 (1979), pp. 326-328, in particular fn. 4 and fn. 11.

¹² The “Global Compact for Safe, Orderly and Regular Migration” may serve as an example for a multilateral, non-legally binding instrument; see A. Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 3: “[Lying] in the grey zone between law and non-law, between law and politics. [...] This means that on the one hand, the Compact will not generate legally binding obligations but that it is on the other hand,

Non-legally binding instruments or MOUs are not treaties.¹³ While defining treaties is not an easy task,¹⁴ it suffices for present purposes to note that treaties, in contrast to MOUs, generally create international legal rights and obligations. Indeed, it is for this very reason that treaties are concluded in the first place.¹⁵

On the other hand, MOUs are also distinct from the broader notion of soft law.¹⁶ Whereas soft law comprises acts emanating from a multilateral forum, including secondary acts of international organizations, MOUs are mostly concluded by States in a bilateral setting¹⁷ or between a State and an international organization. It might also be said that while soft law instruments are characterized by an aspiration to eventually ‘upgrade’ the legal value of their content, MOUs in turn are normally concluded with a view to ‘downgrade’ their legal weight,¹⁸ *i.e.* make sure they do not create legal obligations in the first place.

To sum up, MOUs *per definitionem* are meant to not create any legal rights and obligations in and by themselves.¹⁹ As a matter of fact, States normally use MOUs as a means of *avoiding* international legal obligations.²⁰ This, however, necessarily leads to the question whether, and if so to what extent, this ambition may be satisfied.

3. Possible indirect legal effects of MOUs

The fact that MOUs are non-legally binding as such does not remove them entirely from the realm of

not legally irrelevant”; cf. also German Constitutional Court, Order of the second Chamber of the Second Senate [Beschluss der 2. Kammer des Zweiten Senats], 7.12.2018, docket no. 2 BvQ 105/18, paras. 14-17.

¹³ Meyer, Alternatives to Treaty-Making – Informal Agreements, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 59-81, p. 60; Gautier, Non-binding Agreements, MPEPIL, OUP 2006, para. 2; Klabbbers, The Concept of Treaty in International Law, Kluwer 1996, p. 261; Aust, The Theory and Practice of Informal International Instruments, 35 ICLQ 787-812 (1986), pp. 794, 811.

¹⁴ D’Aspremont, Current Theorizations about the Treaty in International Law, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 46-58, pp. 50-51; Hollis, Defining Treaties, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 11-45, pp. 26-27; Fitzmaurice, The Practical Working of the Law of Treaties, in: Evans (ed), International Law, 5th edn, OUP 2018, 138-173, p. 139; Münch, Non-binding Agreements, 29 ZaöRV 1-11 (1969), p. 1.

¹⁵ Hollis, Defining Treaties, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 11-45, pp. 24-29; Gautier, in: Corten/Klein (eds), The Vienna Conventions on the Law of Treaties, OUP 2011, Article 2 Convention of 1969, para. 28; *id.*, Non-binding Agreements, MPEPIL, OUP 2006, para. 11.

¹⁶ Some perceive MOUs as a subcategory of “soft law”; cf. Gautier, Non-binding Agreements, MPEPIL, OUP 2006, para. 4.

¹⁷ Klabbbers, Governance by Academics: The Invention of Memoranda of Understanding, ZaöRV 2020, 35-72, p. 58; Aust, Modern Treaty Law and Practice, 3rd edn, CUP 2013, p. 50; *id.*, Alternatives to Treaty-Making: MOUs as Political Commitments, in: Hollis (ed), The Oxford Guide to Treaties, 1st edn, OUP 2012, 46-72, p. 68.

¹⁸ Klabbbers, Governance by Academics: The Invention of Memoranda of Understanding, ZaöRV 2020, 35-72, p. 58; cf. Aust, Modern Treaty Law and Practice, 3rd edn, CUP 2013, pp. 46-47.

¹⁹ Hollis, Defining Treaties, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 11-45, p. 35; *id.*, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 57; Pellet/Müller, in: Zimmermann/Tams (eds), The Statute of the International Court of Justice, 3rd edn, OUP 2019, Art. 38 para. 110; Schmalenbach, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 2 para. 37; Verdross/Simma, Universelles Völkerrecht, 3rd edn, Duncker & Humblot 1984, reissued 2010, para. 545; McNair, The Law of Treaties, Clarendon 1961, p. 6; Fawcett, The Legal Character of International Agreements (1953) 30 BYIL 381-400, p. 395.

²⁰ Aust, Alternatives to Treaty-Making: MOUs as Political Commitments, in: Hollis (ed), The Oxford Guide to Treaties, 1st edn, OUP 2012, 46-72, p. 65.

international law.²¹ Rather, they may give rise to legal implications indirectly, interacting with other instruments that are formal sources of international law.²² Such interaction is not strictly limited to formally binding instruments, but may also include formally non-binding instruments.²³ It is through this process of interaction, or interpretation in a broader sense, that MOUs may give rise to important legal consequences.²⁴ This then necessarily leads to the question what legal mechanisms might provide for such interaction.

a) MOUs as preparatory acts for legally binding instruments

For one, MOUs may generate legal effects, that is they may constitute precursors for the conclusion of a future treaty²⁵ and may thus possess a ‘pre-law-function’.²⁶ At an early stage, non-legally binding agreements may already lay down the terms which States may be willing to accept in the future as

²¹ Pellet/Müller, in: Zimmermann/Tams (eds), *The Statute of the International Court of Justice*, 3rd edn, OUP 2019, Art. 38 para. 110; Kolb, *La Bonne Foi en Droit International Public*, PUF 2000, pp. 389-392; Boyle, *Soft Law in International Law-Making*, in: Evans (ed), *International Law*, 5th edn, OUP 2018, 119-137, p. 120; Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AJIL* 296-304 (1977), p. 301; Gautier, *Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États*, in: *Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon*, Bruylant 2007, 425-454, p. 453; Eisemann, *Le gentlemen’s agreement comme source du droit international*, 106 *Journal du Droit International* 326-348 (1979), p. 338; Aust, *The Theory and Practice of Informal International Instruments*, 35 *ICLQ* 787-812 (1986), p. 807; McNair, *The Law of Treaties*, Clarendon 1961, p. 15. This is not entirely undisputed.

For the view that MOUs cannot create *any* legal consequences at all, cf. the references in: Hollis, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 58.

²² Hollis, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex I: Draft OAS Guidelines for Binding and Non-Binding Agreements, no. 5.3.2; *ibid.*, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), pp. 58 f. For the previous reports see Hollis, *Binding and Non-Binding Agreements: Fifth Report*, 94th Regular Session, 30 July to 9 August 2019, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. XXX/XX, 22 July 2019, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 62; *id.*, Preliminary Report on Binding and Non-Binding Agreements, 91st Regular Session, August 7-16, 2017, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc.542/17corr.1, 30 August 2017, para. 65; Gautier, *Non-binding Agreements*, MPEPIL, OUP 2006, para. 14; Kolb, *La Bonne Foi en Droit International Public*, PUF 2000, pp. 391-392.

²³ This however creates a challenge for the consent-based conception of the international legal order as famously advanced in the PCIJ’s 1927 *Lotus* judgement, cf. PCIJ, Judgement No. 9, *The Case of the S.S. “Lotus”*, PCIJ Series A No. 10, 7 September 1927, p. 18.

²⁴ Hollis, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex I: Draft OAS Guidelines for Binding and Non-Binding Agreements, no. 5.3.2; *ibid.*, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), pp. 58 f. For the previous report see *id.*, *Binding and Non-Binding Agreements: Fifth Report*, 94th Regular Session, 30 July to 9 August 2019, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. XXX/XX, 22 July 2019, Annex I: Draft OAS Guidelines for Binding and Non-Binding Agreements, no. 5.3.2; *ibid.*, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 62; Wouters, *International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism*, in: Krieger/Nolte/Zimmermann (eds), *The International Rule of Law: Rise or Decline?*, OUP 2019, 242-264, p. 261-262; Boyle, *Soft Law in International Law-Making*, in: Evans (ed), *International Law*, 5th edn, OUP 2018, 119-137, p. 121; Gautier, *Non-binding Agreements*, MPEPIL, OUP 2006, para. 14.

²⁵ Wouters, *International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism*, in: Krieger/Nolte/Zimmermann (eds), *The International Rule of Law: Rise or Decline?*, OUP 2019, 242-264, p. 262; Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 3.

²⁶ Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 3.

part of a then legally binding treaty.²⁷ In that regard, one may refer to two examples. For one, the 1988 Baltic Sea Ministerial Declaration and the 1992 Baltic Sea Declaration paved the way for the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area ('Helsinki Convention').²⁸ Besides, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade had been preceded by political 'agreements' negotiated under the auspices of UNEP and FAO.²⁹ In this way, non-legally binding instruments may inform the content of later treaties. It goes without saying that such precursory documents do not formally create legal rights or obligations by themselves for which another deliberate act – *i.e.* the conclusion of a formal treaty – is required, which then creates legal rights or obligations under international law only.³⁰ At the same time, however, it can hardly be denied that in practice, such non-legally binding instruments do, at least to a certain degree, exercise a 'normative pull'.³¹ As a matter of fact, many treaties would not have come about were it not for its non-legally binding predecessors. What is more, the content and even the specific language of a future treaty is often predetermined by such prior instruments, their lack of a legally binding effect notwithstanding. Or to put it differently, States involved in treaty negotiations might find it difficult to have text elements accepted that would depart from and be inconsistent with previously agreed language contained in a MOU or some other non-legally binding text.

b) MOUs as a necessary precondition for another act to produce legal effects under international law

The content or fulfilment of a given MOU might also constitute a *necessary precondition* for another act or instrument to produce legal effects under international law. By incorporating a MOU into an international legally binding norm, the MOU, while itself intrinsically being non-legally binding, thereby might obtain certain legal relevance. A pertinent example is Security Council Resolution 2231, in which the Council endorsed the Joint Comprehensive Plan of Action ('JCPOA'), making some of its originally non-legally binding provisions mandatory via its Chapter VII authorities.³² In this regard, the JCPOA, which itself is not legally binding, still produces legal effects. Another example is Security Council Resolution 1244 (1999), in which the Security Council referred to several non-legally binding

²⁷ Schmalenbach, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 2 para. 39; Gautier, Non-binding Agreements, MPEPIL, OUP 2006, para. 5.

²⁸ Fitzmaurice, The Practical Working of the Law of Treaties, in: Evans (ed), International Law, 5th edn, OUP 2018, 138-173, p. 142 fn. 15.

²⁹ Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 58; for the previous report see *id.*, Binding and Non-Binding Agreements: Fifth Report, 94th Regular Session, 30 July to 9 August 2019, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. XXX/XX, 22 July 2019, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 63; Redgwell, Sources of International Environmental Law, in: Besson/d'Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 939-959, p. 947.

³⁰ Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 58.

³¹ Peters, The Global Compact for Migration: to sign or not to sign?, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 3; Boyle, Soft Law in International Law-Making, in: Evans (ed), International Law, 5th edn, OUP 2018, 119-137, p. 128; Verdross/Simma, Universelles Völkerrecht, 3rd edn, Duncker & Humblot 1984, reissued 2010, paras. 656-657.

³² Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 58.

instruments as establishing the essential basis for the political solution to the Kosovo crisis.³³ In doing so, the resolution incorporated the general principles which had previously been adopted by the G-8 Foreign Ministers (Annex I), as well as certain political principles for a settlement of the Kosovo crisis which had previously been agreed by the parties to the dispute (Annex II). In the preamble of Security Council Resolution 1244 (1999), the Council welcomed and reaffirmed those commitments and, besides, also made reference to the Helsinki Final Act. While all of these instruments were in themselves non-legally binding, they still gained legal relevance by such incorporation.

It is, however, important to carefully analyze, in each and every instance, whether in a given case any such reference to a non-legally binding instrument is only made *en passant*, e.g. in the preamble of a Security Council resolution, whether the text of such non-legally binding instrument is reproduced *verbatim* in the operative part of an ensuing decision or resolution thereby making it legally binding or at least legally relevant, or whether finally such resolution or decision contains a *renvoi* to a MOU.

In any case, States ‘concluding’ a MOU must be aware that situations might arise when a third party might take the content of a MOU as such as a starting point for legally binding decisions. This might occur despite the fact that the MOU was not meant to be legally binding in the first place and even notwithstanding any disclaimer to that effect. Third parties might even take such steps against the will, or at least without the consent, of the ‘parties’ of the MOU. This might even include institutions such as the Security Council, in which the ‘parties’ of the original MOU may not even be represented.

c) MOUs as interpretative guidance for legally binding instruments

MOUs can, however, also produce legal effects below this threshold by at least guiding the interpretation of legally binding instruments, above all treaties. Many modern treaty regimes rely heavily on complementary non-binding agreements or soft law to spell out in somewhat more detail hard law commitments and make them more specific.³⁴ For instance, one might consider attempts to rely on the Global Compact for Safe, Orderly and Regular Migration³⁵ in order to flesh out pre-existing obligations flowing from various conventions related to nationality³⁶ and from the United Nations Convention on Transnational Organized Crime.³⁷ Another example are bilateral air services

³³ S/RES/1244 (1999), 10 June 1999:

„Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the aper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper, Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2, 1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2; [...]”.

³⁴ Boyle, *Soft Law in International Law-Making*, in: Evans (ed), *International Law*, 5th edn, OUP 2018, 119-137, p. 135.

³⁵ Global Compact for Safe, Orderly and Regular Migration, Annex to UNGA Res 73/195 of 19 December 2018, UN Doc A/RES/73/195.

³⁶ Cf. its objective 4:

“Ensure that all migrants have proof of legal identity and adequate documentation” (para. 20).

³⁷ Cf. its objective 10, as well as Peters, *The Global Compact for Migration: to sign or not to sign?*, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 4.

agreements, which are commonly supplemented by detailed MOUs.³⁸ In this way, MOUs allow States to easily concretize and further develop over time mutual hard law commitments on a micro scale.³⁹ Likewise, international courts and tribunals regularly draw on non-legally binding agreements when interpreting treaties.⁴⁰ This means that in international diplomacy and in courtrooms, MOUs effectively influence how treaties are understood and thus produce legal effects.

The question remains, though, what legal mechanisms legitimize such practice of ‘mixing up’ treaties and MOUs, or more generally law and non-law (or politics). Under Art. 31(1) Vienna Convention on the Law of Treaties⁴¹ (‘VCLT’) “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in *their context* and in light of its object and purpose.”⁴² Art. 31(2) VCLT then spells out that such ‘context’⁴³ refers to the ‘internal’ context of the treaty⁴⁴, *i.e.* agreements (lit. a) or instruments (lit. b) that have been made in connection with the conclusion of the treaty and relating to the treaty. Even a MOU may qualify as such an agreement or instrument within the meaning of Art. 31 VCLT, provided it was concluded in connection with the conclusion of the treaty itself and relates to the treaty,⁴⁵ given that such ‘accompanying’ agreements or instruments need not themselves be legally binding.⁴⁶ Hence, provided a MOU accompanying a treaty provides clear evidence of an agreement between the parties as to the treaty’s meaning, there is no reason to exclude it from the interpretative exercise.⁴⁷ These conditions will often be satisfied, for example, regarding MOUs accompanying air services agreements.⁴⁸

Moreover, according to Art. 31(3) VCLT, the ‘external’ context of the treaty shall also be taken into account when interpreting it.⁴⁹ Art. 31(3) VCLT thus refers to “any *subsequent* agreement”⁵⁰ (lit. a) or “any *subsequent* practice”⁵¹ (lit. b) regarding the interpretation or application of the treaty. Even

³⁸ Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787-812 (1986), p. 788.

³⁹ Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81, p. 72.

⁴⁰ Pellet/Müller, in: Zimmermann/Tams (eds), *The Statute of the International Court of Justice*, 3rd edn, OUP 2019, Art. 38 para. 110; Schmalenbach, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 2 para. 40.

⁴¹ Vienna Convention on the Law of Treaties, signed 23 May 1969, United Nations Treaty Series vol. 1155, p. 331.

⁴² Emphasis added.

⁴³ Dörr, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 31 para. 61.

⁴⁴ Sorel/Boré Eveno, in: Corten/Klein (eds), *The Vienna Convention on the Law of Treaties*, OUP 2011, Art. 31 Convention of 1969, para. 38.

⁴⁵ Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 44, 53.

⁴⁶ *Ibid.*, p. 211; Dörr, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 31 paras. 66 f.; Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in: Hollis, *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 459-488, p. 467.

⁴⁷ Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in: Hollis, *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 459-488, p. 467.

⁴⁸ Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 71.

⁴⁹ Sorel/Boré Eveno, in: Corten/Klein (eds), *The Vienna Convention on the Law of Treaties*, OUP 2011, Art. 31 Convention of 1969, para. 42.

⁵⁰ Emphasis added.

⁵¹ Emphasis added.

MOUs, despite their lack of binding effect as such,⁵² entered into subsequent to the conclusion of the respective treaty, may qualify as such subsequent agreements.⁵³

As concerns Art. 31(3)(b) VCLT, it almost goes without saying that MOUs may also inspire subsequent practice provided States parties live up to their political commitments.⁵⁴ In such cases, however, it is not the MOU as such that carries legal weight but rather the State practice implementing the political commitment contained in a MOU,⁵⁵ provided that such subsequent practice establishes the agreement of the parties regarding the interpretation of the treaty under consideration.

Moreover, Art. 31(3)(c) VCLT⁵⁶ refers to “any relevant *rules of international law applicable* in the relations between the parties”⁵⁷ to also be taken into account in treaty interpretation. It seems, though, that the wording of this provision, by referring to “rules of international law” that are “*applicable*”, indicates that non-legally binding instruments such as MOUs do *not* constitute such applicable rules, given that the provision thereby refers back to the list of sources of international

⁵² Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 59. For the previous report see *id.*, Binding and Non-Binding Agreements: Fifth Report, 94th Regular Session, 30 July to 9 August 2019, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. XXX/XX, 22 July 2019, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), pp. 62 ff; Gautier, Non-binding Agreements, MPEPIL, OUP 2006, para. 14; see also International Law Commission (ILC), Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), A/73/10, Conclusion 3, Commentary, para. 4; *ibid.*, Conclusion 6, Commentary, para. 23; *ibid.*, Conclusion 10 Nr. 1, Commentary, paras. 7, 9 ff.

⁵³ Redgwell, Sources of International Environmental Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 939-959, p. 956 (referring mainly to soft law); but cf. for a contrary position Regan, Sources of International Trade Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 1047-1065, p. 1056, who infers the requirement of (legal) bindingness from the wording “regarding the interpretation of the treaty or application of its provisions” and concludes: “This means the parties must regard it as binding, a point to remember when we are asking, for example, about the relevance of Ministerial Declarations or Committee Decisions in the WTO.” Gardiner, Treaty Interpretation, 2nd edn, OUP 2015, pp. 244, 250; Nolte, Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings, in Nolte (ed), Treaties and Subsequent Practice, OUP 2013, pp. 307-385, 375; Aust, Modern Treaty Law and Practice, 3rd edn, CUP 2013, pp. 44, 53, 213; *id.*, Alternatives to Treaty-Making: MOUs as Political Commitments, in: Hollis (ed), The Oxford Guide to Treaties, 1st edn, OUP 2012, 46-72, p. 71; *id.*, “The theory and practice of informal international instruments”, 35 ICLQ 787-812 (1986), pp. 789-790, 807; Chanaki, L’adaptation des traités dans le temps, Bruylant, 2013, pp. 313-315; Benatar, From probative value to authentic interpretation: the legal effects of interpretative declarations, 44 RBDI 170-195 (2011), pp. 194-195; Fox, Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili Sedudu Island Case, in: Fitzmaurice/Elias/Merkouris (eds), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on, Brill Nijhoff, 2010, pp. 61-62; Gautier, Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États, in: Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon, Bruylant 2007, pp. 425-454, 431; *id.*, Non-binding Agreements, MPEPIL, OUP 2006, para. 14.

⁵⁴ Cf. Aust, The Theory and Practice of Informal International Instruments, 35 ICLQ 787-812 (1986), pp. 787, 807; Hafner, Subsequent agreements and practice: between interpretation, informal modification, and formal amendment, in Nolte (ed), Treaties and Subsequent Practice, OUP 2013, pp. 105-122, 110-113; Fox, “Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili Sedudu Island Case, in: Fitzmaurice/Elias/Merkouris (eds), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on, Brill Nijhoff, 2010, pp. 61-62; Gautier, Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États, in: Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon, Bruylant 2007, pp. 425-454, 434.

⁵⁵ Gautier, Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États, in: Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon, Bruylant 2007, 425-454, p. 431; Gautier, Non-binding Agreements, MPEPIL, OUP 2006, para. 14.

⁵⁶ Regan, Sources of International Trade Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 1047-1065, p. 1058.

⁵⁷ Emphasis added.

law as laid down in Art. 38(1) ICJ-Statute.⁵⁸ While this interpretation of Art. 31(3)(c) VCLT is widely shared,⁵⁹ it is not undisputed.⁶⁰ *Inter alia* international courts and tribunals⁶¹ have from time to time also considered non-legally binding instruments to be relevant for treaty interpretation, albeit not expressly under this heading.⁶²

Finally, MOUs may also constitute part and parcel of the *travaux préparatoires* of a treaty in accordance with Art. 32 VCLT⁶³ where MOUs have been concluded during the drafting process leading to the final text of the respective treaty.⁶⁴

d) State responsibility in case of violations of MOUs and related enforcement mechanisms

Given that a MOU does not constitute a legally binding treaty, it does not by and of itself create rights and obligations under international law. Hence, its breach can neither give rise to State responsibility.⁶⁵ It follows that any non-performance of ‘obligations’ contained in a MOU can neither

⁵⁸ Dörr, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 31 para. 100; Regan, Sources of International Trade Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 1047-1065, p. 1058; Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Brill 2009, Art. 31, para. 25; McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of The Vienna Convention, 54 ICLQ 279-320 (2005), p. 292.

⁵⁹ Dörr, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 31 para. 100; Regan, Sources of International Trade Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 1047-1065, p. 1058; Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Brill 2009, Art. 31, para. 25; McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of The Vienna Convention, 54 ICLQ 279-320 (2005), p. 292.

⁶⁰ Cf. in this direction Gautier, Les Accords Informels et Law Convention de Vienne sur le Droit des Traités Entre États, in: Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon, Bruylant 2007, 425-454, p. 437: “Rien n’empêche en effet que soit pris en compte, aux fins de l’interprétation d’un traité, un accord verbal, une entente politique ou un accord implicite.”

⁶¹ This holds true for example for e.g. the ECtHR; cf. Dörr, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 31 para. 100 with further references.

⁶² As for example recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly or reports by various independent commissions, cf. ECtHR Demir and Baykara v Turkey (GC) App No 34503/97, ECHR 2008-V, paras. 74–75; Bayatyan v Armenia (GC) App No 23459/03, 7 July 2011, para. 107; the UN General Assembly’s Universal Declaration on Human Rights, e.g. ECtHR Al-Adsani v United Kingdom (GC) App No 35763/97, ECHR 2001-XI, para. 60; Guidelines and “Conclusions” published by the UN High Commissioner on Refugees, ECtHR Saadi v United Kingdom (GC) App No 13229/03, 29 January 2008, para. 65; as well as the (then) non-binding EU Charter of Fundamental Rights, ECtHR Goodwin v United Kingdom (GC) App No 28957/95, ECHR 2002-VI, para. 100; Sørensen and Rasmussen v Denmark (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para. 72; Eskelinen et al v Finland (GC) App No 63235/00, 19 April 2007, para. 60. And even the ECJ referred in the context of interpreting the Montreal Convention to the ILC Articles on State Responsibility, ECJ, Axel Walz C-63/09 [2010] ECR I-4239, para. 27; examples to be found as well in Dörr, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 31 para. 100.

⁶³ Regan, Sources of International Trade Law, in: Besson/d’Aspremont (eds), The Oxford Handbook on the Sources of International Law, OUP 2017, 1047-1065, pp. 1062-1064.

⁶⁴ Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Brill 2009, Art. 32, para. 3. In addition, MOUs may also guide the exercise of discretion by national or international institutions when they have been endowed with such discretion concerning a specific matter, thus opening up space for the taking into account of pertinent extra-legal considerations, including the content of MOUs. The Global Compact for Safe, Orderly and Regular Migration may serve as an example as it might in the future be taken into account by domestic administrative agencies and tribunals when interpreting municipal migration law and when exercising their discretion how to proceed in certain situations, cf. for such proposition Peters, The Global Compact for Migration: to sign or not to sign?, EJIL:Talk!, 21 November 2018, ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (last accessed 20 October 2020), p. 4; for another example see Aust, Modern Treaty Law and Practice, 3rd edn, CUP 2013, p. 53; *id.*, Alternatives to Treaty-Making: MOUs as Political Commitments, in: Hollis (ed), The Oxford Guide to Treaties, 1st edn, OUP 2012, 46-72, p. 71.

⁶⁵ Meyer, Alternatives to Treaty-Making – Informal Agreements, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 59-81, p. 65; Schmalenbach, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of

justify the imposition of countermeasures, given that they require a prior violation of a rule of international law,⁶⁶ as confirmed by relevant State practice.⁶⁷ At the same time, and notwithstanding their lack of binding force, MOUs still give rise to an expectation of compliance⁶⁸ and are often ‘complied with’ *de facto*.⁶⁹ Otherwise put, the underlying compliance-pull of non-binding MOUs can thus be very strong and, depending on the circumstances, political sanctions short of countermeasures triggered by instances of non-compliance with a MOU may be just as damaging as countermeasures.⁷⁰

What is more, a MOU may itself include at least some form of an enforcement mechanism, the JCPOA⁷¹ (‘Iran Deal’ or ‘Iran Nuclear Deal’) being a pertinent example at hand. While it is generally accepted that the JCPOA is not legally binding itself, it nevertheless includes an elaborated dispute resolution mechanism,⁷² the failure of which may eventually lead to the re-imposition of previous Security Council-induced measures.⁷³

e) MOUs and the principle of good faith

In any event, one might also wonder whether non-legally binding instruments such as MOUs may trigger legal consequences under international law in light of the overarching concept of good faith, or more specifically under the principle of estoppel.

aa) MOUs and the general notion of ‘good faith’

The principle of good faith in international law protects trust and reliance of States on other States’ behavior provided such reliance is well-founded and hence *reasonable*. It is only then that the other side is entitled to a reliance in good faith. In this regard, it is important to emphasize that the principle of good faith does not in itself create or impose any obligations under international law. In other words, the concept of good faith presupposes pre-existing obligations⁷⁴ and may thus only be invoked in relation to a legally binding obligation. Or, put otherwise, good faith as such does not possess a normative quality.⁷⁵ This was confirmed by the ICJ in the *Case Concerning Border and Transborder Armed Actions* where the Court stated that good faith “is not in itself a source of

Treaties, 2nd edn, Springer 2018, Art. 2 para. 37; Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787-812 (1986), p. 807; Eisemann, *Le gentlemen’s agreement comme source du droit international*, 106 *Journal du Droit International* 326-348 (1979), p. 347; Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AJIL* 296-304 (1977), p. 300.

⁶⁶ Münch, *Non-binding Agreements*, 29 *ZaöRV* 1-11 (1969), p. 11.

⁶⁷ Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AJIL* 296-304 (1977), p. 300.

⁶⁸ *Ibid.*, pp. 299, 303; Verdross/Simma, *Universelles Völkerrecht*, 3rd edn, Duncker & Humblot 1984, reissued 2010, paras. 656-657.

⁶⁹ Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AJIL* 296-304 (1977), p. 299.

⁷⁰ Cf. Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 63; *id.*, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 45.

⁷¹ Joint Comprehensive Plan of Action (JCPOA), Vienna, 14 July 2015, S/RES/2231 (2015), 20 July 2015, Annex A.

⁷² Joint Comprehensive Plan of Action (JCPOA), Vienna, 14 July 2015, S/RES/2231 (2015), 20 July 2015, Annex A, paras. 36-37.

⁷³ Meyer, *Alternatives to Treaty-Making – Informal Agreements*, in: Hollis (ed), *The Oxford Guide to Treaties*, 2nd edn, OUP 2020, 59-81, p. 65; Mahmoudi, *The Iran Nuclear Deal: Some International-Law Aspects*, in: Crawford et al. (eds), *The international legal order: Current needs and possible responses: essays in honour of Djamchid Momtaz*, Brill Nijhoff 2017, 23-40, p. 37.

⁷⁴ Fawcett, *The Legal Character of International Agreements* (1953) 30 *BYIL* 381-400, pp. 397-398.

⁷⁵ Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, Art. 31, para. 1.

obligation where none would otherwise exist”.⁷⁶ This understanding of good faith as a mere ‘modality’ in which States have to fulfil other obligations is now broadly accepted and has also been upheld in various investment arbitrations.⁷⁷

Having said this, one may doubt whether a political commitment contained in a MOU may trigger the reliance of another participant in terms of the concept of good faith to the effect that the acting party is, at least under certain circumstances, bound not to act contrary to the agreed behavior even if it is not required to do so under the underlying, originally non-binding agreement itself. If that were the case, the political commitment would gain legal relevance through the backdoor of good faith.⁷⁸

It is true, and indeed lies in the nature of MOUs, that they implicate an expectation of ‘compliance’ with the agreed behavior,⁷⁹ for why would States conclude such MOUs in the first place if that were not the case. To provide but one example, if a political agreement on voting in the United Nations is concluded, the participants assume that every participating State will vote in accordance with the agreement even if no legal sanctions were to apply in case of non-performance.⁸⁰ But be that as it may, it still remains that the concept of good faith cannot turn a mere policy declaration, that is not in itself binding, into a legally binding expectation.⁸¹

It necessarily follows that even in the context of ongoing treaty negotiations entailing the general obligation to conduct such negotiations in good faith,⁸² parties to a prior MOU related to the very subject-matter of the envisaged treaty retain, in legal terms, their freedom to retract from negotiation positions reflected in terms of a previously agreed MOU.

bb) MOUs and the concept of *pacta sunt servanda*

It goes without saying that, given that the rule of *pacta sunt servanda* constitutes a specific expression of the general notion of ‘good faith’ in international law, the very same considerations do apply. This is due to the fact that the principle of *pacta sunt servanda* is not a rule which creates legal obligations but rather constitutes a statement about obligations that do already exist based on a binding agreement.⁸³ It follows that for the principle of good faith to be invoked there must already exist a treaty relationship having created legally binding obligations for the parties to which the principle of *pacta sunt servanda* would then apply. By definition, non-binding agreements such as

⁷⁶ ICJ, Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Rep. 1988, 69, para. 94.

⁷⁷ Futhazar/Peters, Good Faith, in: Vinuales (ed), The UN Friendly Relations Declaration at 50, CUP 2020, 189-228, p. 208.

⁷⁸ Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 59.

⁷⁹ Schachter, The Twilight Existence of Nonbinding International Agreements, 71 AJIL 296-304 (1977), pp. 299, 303.

⁸⁰ *Ibid.*, p. 303.

⁸¹ For a strong statement on the issue see Rubin, The International Legal Effects of Unilateral Declarations, 71 AJIL 1-30 (1977), p. 9, who claimed that “to argue that ‘good faith’ alone creates the obligation is to argue in support of an obvious absurdity.”

⁸² Cf. for such proposition ICJ, North Sea Continental Shelf (Germany v. Netherlands; Germany v. Denmark), Judgement, ICJ Rep. 1969, pp. 3, 47, para. 85; ICJ, Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, ICJ Rep. 1974, pp. 3, 33, para. 78.

⁸³ Fawcett, The Legal Character of International Agreements (1953) 30 BYIL 381-400, p. 396.

MOUs therefore do not fall within the scope of *pacta sunt servanda*:⁸⁴ if no legal obligation was intended by the parties in the first place, there can neither be a question of later ‘being bound’ by them by virtue of the concept of *pacta sunt servanda*.⁸⁵

cc) MOUs and the concept of estoppel

The most immediate way in which MOUs may arguably generate legal effects is by way of estoppel.⁸⁶ The basic idea of estoppel is that, under certain circumstances, a State may become bound by its conduct or representation, on which another State then has legitimately relied to its detriment.⁸⁷ The underlying idea of estoppel is thus that States ought to behave consistently in their international relations.⁸⁸

For the purpose of considering possible indirect legal effects of MOUs, the pertinent question therefore is *if and under what circumstances* MOUs may qualify as a ‘conduct or representation’ that binds the State by way of estoppel.⁸⁹ This question is highly controversial.⁹⁰ While some firmly reject the idea of MOUs as a basis for estoppel, others take a different view and consider that MOUs may, at least as a matter of principle, give rise to an estoppel. The first question that arises in that regard is whether the concept of estoppel covers State *conduct* such as the conclusion of a MOU which was *not* intended to create any legal rights or obligations, the binding force of which would then

⁸⁴ Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296-304 (1977), p. 301.

⁸⁵ Hollis, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 57; Widdows, *What is an Agreement in International Law?*, 50 BYIL 117-149 (1979), p. 121.

⁸⁶ Cf. Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 50-52.

⁸⁷ *Id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 69; Crawford, *Brownlie’s Principles of Public International Law*, 9th edn, OUP 2019, pp. 406-407.

⁸⁸ Sep. Op. Alfaro, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, ICJ Rep. 1962, p. 39, p. 40; MacGibbon, *Estoppel in International Law*, 7 ICLQ 468-513 (1958), pp. 468, 512; Bowett, *Estoppel before international tribunals and its relation to acquiescence*, 33 BYIL 176-202 (1957), p. 177; cf. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, CUP 1953, reprinted 2006, pp. 141-142 and pp. 142-149 with further references to early international jurisprudence.

⁸⁹ As to the general requirements for an estoppel see in detail: PCIJ, *Serbian Loans*, Judgement, PCIJ Ser. A, No. 20 (12 July 1929), pp. 38, 39; ICJ, *North Sea Continental Shelf (Germany v. Netherlands; Germany v. Denmark)*, Judgement, ICJ Rep. 1969, p. 3, para. 30; Sep. Op. Fitzmaurice, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, ICJ Rep. 1962, pp. 52, 62- 65; Sep. Op. Alfaro, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, ICJ Rep. 1962, pp. 39 – 42; ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Rep. 1984, p. 246, paras. 130, 139, 142, 145; ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)* Application by Nicaragua for permission to intervene, ICJ Rep. 1990, p. 92, para. 63; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, ICJ Rep. 1998, p. 275, para. 57; ITLOS, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* List of cases: No. 16 (2012), Judgement, para. 124; PCA, *Railway Land Arbitration (Malaysia v. Singapore)*, PCA Case No. 2012-01, Award (30 October 2014), paras. 199-206; PCA, *Chagos Marine Protected Area Arbitration*, Award, 18 March 2015, paras. 437 – 448; ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, ICJ Rep. 2018, p. 1, para. 158. As to the current state of the debate as to the contours of the concept of estoppel see ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, ICJ Rep. 2018, p. 1, paras. 158-159 and in particular the written pleadings by Bolivia (Reply, paras. 319-349) and by Chile (Rejoinder, para. 2.21); Crawford, *Brownlie’s Principles of Public International Law*, 9th edn, OUP 2019, pp. 406-408; Kolb, *La Bonne Foi en Droit International Public*, PUF 2000, pp. 357-393 with further references; Kolb, *Good Faith in International Law*, Hart 2017, pp. 100-118.

⁹⁰ Schmalenbach, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 2 para. 39; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 50.

nevertheless crystalize over time depending on the prevailing circumstances.⁹¹ If that were the case, applying the concept of estoppel to MOUs would lead to quite the contrary result to what the States involved had wished to achieve in the first place,⁹² namely to only become politically bound by such a MOU. But even if one were to qualify MOUs as an expression of possible conduct eventually giving rise to a situation of estoppel, the further requirements of estoppel, and notably the detrimental reliance of the other State, must also be met.

The necessity of such legitimate reliance follows from the characterization of estoppel as a doctrine of qualified non-contradiction⁹³ based on the principle of good faith.⁹⁴ Estoppel is thus based on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position.⁹⁵ However, any such reliance, in order for it to be relevant for purposes of estoppel, must appear to be 'legitimate', *i.e.* a behavior that could reasonably be expected in the given circumstances.⁹⁶

Making a finding of a *bona fide* reliance based on a MOU seems to be problematic, given the exclusively political character of the commitments contained therein, when such character was deliberately chosen to avoid legal consequences to flow from such MOUs in the first place.

Hence, at least as a matter of principle, every State concluding a MOU must be presumed to be aware of the non-legally binding nature of the concluded MOU. It follows that it seems quite difficult to establish a reliance in good faith on the binding force, or at least on the unlimited continuity of the underlying commitments.⁹⁷ To the contrary, any such assumed reliance would seem to constitute a reliance on a binding force of the MOU, that, however, has been purposely excluded from the very outset.

Still, there are important voices that emphasize the rule of consistency as a prevailing principle in international relations. *Inter alia*, in his dissenting opinion in the *Temple Case*, Judge Alfaro stated that the *rule of consistency* must be observed even in the case of ordinary, *non-contractual relations* between States, and that "a State cannot challenge or injure the rights of another in a manner which is contrary to its previous acts, conduct or opinions during the maintenance of its international

⁹¹ Crawford, *Brownlie's Principles of Public International Law*, 9th edn, OUP 2019, p. 408.

⁹² Kolb, *La Bonne Foi en Droit International Public*, PUF 2000, p. 377.

⁹³ Kolb, *Good Faith in International Law*, Hart 2017, p. 101.

⁹⁴ ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, 1CJ Rep. 1984, p. 246, para. 130; Pan, *A Re-Examination of Estoppel in International Jurisprudence*, 16 *Chinese Journal of International Law* 751-786 (2017), p. 761; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 51; MacGibbon, *Estoppel in International Law*, 7 *ICLQ* 468-513 (1958), p. 471; Bowett, *Estoppel before international tribunals and its relation to acquiescence*, 33 *BYIL* 176-202 (1957), pp. 176, 184; Lauterpacht, *First Report on the Law of Treaties*, UN Doc. A/CN.4/63, *YILC* 1953, vol. II, 90-162, p. 144. On the nature and operation of good faith in public international law, see exhaustively Kolb, *Good Faith in International Law*, Hart 2017, p. 101 fn. 266 (with further references to the notion of estoppel in international law); *id.*, *La Bonne Foi en Droit International Public*, PUF 2000, pp. 378-379.

⁹⁵ Mosler, *The International Society as a Legal Community – General Course on Public International Law*, 140 *Recueil des Cours* 1-320 (1974-IV), p. 147 (quoted in: Kolb, *La Bonne Foi en Droit International Public*, PUF 2000, p. 359).

⁹⁶ Kolb, *Good Faith in International Law*, Hart 2017, p. 104.

⁹⁷ Cf. Schmalenbach, in: Dörr, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 2 para. 39.

relationships”⁹⁸ – a position that might then also include MOUs.⁹⁹ In the same vein, the Tribunal in the *Chagos Case* considered the existence of a binding declaration not to be mandatory in order to establish a reliance in good faith. Otherwise, any distinction between estoppel and the doctrine on binding unilateral acts would be erased.¹⁰⁰ It is thus the idea of consistency involving at least a requirement of a certain *minimum of loyalty* and *constancy* in order to trigger expectations giving rise to a situation of estoppel.¹⁰¹ It is then, however, the fact that one side acts in a certain manner, such action being caused by the conclusion of the MOU in question and the ensuing action by the parties, rather than the conclusion of the MOU as such that gives rise to the estoppel. This may be shown by way of an example:

Suppose State A and State B conclude a MOU in which State A expresses its ‘intention’ to pay State B four billion euros over a period of ten years to pay half the cost of building a dam, State B otherwise not being able to build the said dam. State B then starts building the dam using the money provided by State A. After five years, the dam is half-built and State A has paid out two billion euros. It then has a change of government, and the new government of State A decides to stop the funding without giving prior notice.¹⁰²

While much depends on the specific circumstances of the given situation and the precise terms of the MOU in question, in such a situation it cannot, and indeed should not be excluded that the MOU read in conjunction with the ensuing behavior of the parties to the MOU implementing its content may not only constitute, when seen in combination, estoppel-relevant conduct, but may also have caused reliance.¹⁰³

There are, however, as the Chagos Arbitral Tribunal rightly noted, *limits* as to when one might make such a finding of *bona fide* reliance. The Tribunal thus rightly emphasized that “a State that elects to rely to its detriment upon an *expressly* non-binding agreement does not, by so doing, achieve a

⁹⁸ Sep. Op. Alfaro, Temple of Preah Vihear (Cambodia v. Thailand), Merits, ICJ Rep. 1962, p. 39, p. 42.

⁹⁹ See for such proposition P. Gautier: «Tout accord, qu'il soit ou non «politique», est la manifestation d'un comportement et, sous cet angle, il peut être pris en compte notamment par les notions d'acquiescement ou d'estoppel, ou encore en tant que preuve d'une possession paisible et non contestée sur un territoire, comme justification historique d'une méthode de délimitation.», Gautier, *Les Accords Informels et La Convention de Vienne sur le Droit des Traités Entre États*, in: *Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon*, Bruylant 2007, 425-454, p. 453.

¹⁰⁰ PCA, *Chagos Award*, para. 446. Notably the tribunal held that even if not all reliance could be considered as legitimate, the threshold for establishing such a legitimate reliance as grounds for an estoppel, however, would be well below the one of a binding unilateral act, since both concepts were related, but distinct in their legal origins and the sphere of estoppel was not that of unequivocally binding commitments.

¹⁰¹ As one author put it: «Il existe même pour ces actes non obligatoires, le besoin d'un minimum de loyauté et de constance, une nécessité de pouvoir se fonder sur certaines attentes que l'acte a pour but de susciter [...]», cf. Kolb, *La Bonne Foi*, 2000, pp. 390 f. He then further stated that, «[c]es objections [Bothe, Heusel] sont valables, [...] Mais il est impossible d'affirmer a priori qu'une confiance légitime n'est jamais possible à leur propos », cf. *ibid.*, pp. 391 f. See also Eisemann, *Le gentlemen's agreement comme source du droit international*, 106 *Journal du Droit International* 326-348 (1979), p. 347, who explains the possibility of indirect legal effects of a gentlemen's agreement by means of good faith and estoppel in view of the created expectations.

¹⁰² Example to be found in Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 51; *id.*, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 69.

¹⁰³ If, to provide another example, two States choose to record the settlement of an international dispute between them in an informal instrument rather than a treaty, perhaps for reasons of confidentiality, they might then be estopped from denying that the terms of the settlement were binding, cf. Aust, *The Theory and Practice of Informal International Instruments*, 35 *ICLQ* 787-812 (1986), p. 811.

binding commitment by way of estoppel”,¹⁰⁴ and that a State, by relying upon an *expressly* revocable commitment, would not render that commitment irrevocable.¹⁰⁵ The burden will therefore be on the party claiming estoppel based on a MOU and ensuing reliance to show that despite clearly non-binding commitments contained in a MOU, the other State’s reliance on continued performance in a legal sense may nevertheless be established.¹⁰⁶ Indeed, MOUs are meant to constitute a means of *avoiding* international legal obligations.¹⁰⁷ As a matter of fact, it might be said that the very decision to conclude a non-legally binding agreement in the sense that it is not governed by international law and therefore “outside the law”¹⁰⁸ must at the very least be presumed to include the deliberate decision to also exclude the agreement of the scope of other principles of international law such as the concept of estoppel. To hold otherwise might *prima facie* be perceived as an attempt by the party of a MOU trying to rely on the concept of estoppel to simultaneously blow hot and cold, something the very notion of estoppel is supposed to prevent.¹⁰⁹ The existence of a non-legally binding agreement does therefore rather *oppose* than support the operation of the estoppel principle.¹¹⁰

Having said this, one cannot categorically exclude in each and every instance indirect legal effects on grounds of MOUs through an estoppel, as the above example seems to confirm. This is notably the case where there exists uncertainty as to whether or not the parties intended to become legally bound by a given MOU.¹¹¹ It is in this vein that in the *Chargos Case*, the Arbitral Tribunal described the scope of application of estoppel as a “grey area of representations and commitments whose original legal intent may be ambiguous or obscure”, and exceptionally found an uncertainty to exist regarding the legal nature of the agreement between the United Kingdom and Mauritius.¹¹² In *Obligation to Negotiate*, Chile relied on the same argument, *i.e.* that the principle of estoppel could only come into play in cases of uncertainty regarding the legal nature of the conduct, whereas its application would be excluded in a situation where there had been unequivocally no intention to become legally bound at all.¹¹³ It is for this very reason advisable for States, that also want to exclude

¹⁰⁴ PCA, Chagos Award, para. 445; emphasis added. This position is shared by Kolb when he states that “the law does not protect those who rely on all and believe every word [...]”, Kolb, *Good Faith in International Law*, Hart 2017, p. 104.

¹⁰⁵ PCA, Chagos Award, para. 445.

¹⁰⁶ Hollis, *Binding and Non-Binding Agreements: Sixth Report*, 96th Regular Session, 2-6 March 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, 3 February 2020, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 59. For the previous report see *id.*, *Binding and Non-Binding Agreements: Fifth Report*, 94th Regular Session, 30 July to 9 August 2019, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. XXX/XX, 22 July 2019, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), p. 64; Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, pp. 51-52.

¹⁰⁷ Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in: Hollis (ed), *The Oxford Guide to Treaties*, 1st edn, OUP 2012, 46-72, p. 65.

¹⁰⁸ Cf. Klabbers, *The Concept of Treaty*, Kluwer 1996, p. 112:

“To conclude an agreement outside the law would imply to also withdraw it from the workings of good faith and estoppel”.

¹⁰⁹ *Ibid.*

¹¹⁰ Schmalenbach, in: Dörr, in: Dörr/Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd edn, Springer 2018, Art. 2 para. 39.

¹¹¹ PCA, Chagos Award, para. 446; Chile, *Rejoinder*, para. 2.21, in the proceedings: ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, ICJ Rep 2018, p. 1.

¹¹² PCA, Chagos Award, para. 446; Futhazar/Peters, *Good Faith*, in: Vinuales (ed), *The UN Friendly Relations Declaration at 50*, CUP 2020, 189-228, p. 204: “[The Chagos Arbitration 2015] shows that, under specific conditions, the principle of good faith [via estoppel] can serve as a basis for the binding character of an agreement even if that agreement does not appear to be a formal source of international law.”

¹¹³ Chile, *Rejoinder*, para. 2.21, in the proceedings: ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, ICJ Rep 2018, p. 1.

further legal consequences eventually flowing from a given MOU, to explicitly and unequivocally use language that it is not meant to create legal consequences under international law.¹¹⁴

On the whole, one has to carefully examine on a case by case basis whether the requirements for an estoppel are fulfilled.¹¹⁵

f) MOUs as possible elements in the formation of new rules of customary international law

Finally, one has to also consider whether MOUs might, one way or the other, contribute to the formation of new rules of customary international law as either itself constituting, or at least giving rise to, relevant State practice or as constituting an expression of *opinio juris*.

As to the element of *State practice*, one has to draw a distinction between the conclusion of MOUs as such on the one hand and the ensuing behavior of States that falls in line with the content of such MOUs on the other. It goes without saying, however, that in that regard, the regular prerequisites when it comes to the formation of new rules of customary law apply, notably the requirement of a generalized practice.¹¹⁶ In line with the recent work of the ILC on the identification of customary international law, acts related to the negotiation and conclusion of MOUs, as well as those related to their implementation, just like acts by States related to the conclusion and implementation of treaties, may be perceived as part of relevant State practice:¹¹⁷ Even when merely entering into a MOU, States may engage in practice in the domain to which the MOU relates. One example may be MOUs between States and international organizations on immunities of an international organization and their employees.¹¹⁸ However, it is mostly practice on the basis of multilateral MOUs, *e.g.* State practice based on the Paris Memorandum of Understanding on Port State Control 1982¹¹⁹ and the Memorandum of Understanding on Port State Control in the Caribbean Region (1996),¹²⁰ that may be considered evidence of a general practice when it comes to a specific rule of customary international law.¹²¹ As far as bilateral MOUs are concerned eventually triggering such generalized practice, this may only be the case when a large number of States is involved in the conclusion of MOUs of almost identical content.¹²²

It is the required latter element of *opinio juris* that will normally constitute the stumbling block for MOUs and the practice under such MOUs to contribute to the formation of new rules of customary international law. It goes without saying that one may not simply draw an inference of *opinio juris*

¹¹⁴ Cf. Gautier, *Non-binding Agreements*, MPEPIL, OUP 2006, para. 14: “These notions require a cautious approach, however. When concluding a non-binding agreement, States are consciously avoiding legal obligations and there is then no reason for attempting at any price to attach legal effects to it”.

¹¹⁵ *Ibid.*

¹¹⁶ As to the requirement of a generalized State practice see in detail ILC, *Draft conclusions on identification of customary international law with commentaries* (2018), A/73/10, Part III, Conclusions 4 – 8 with commentaries.

¹¹⁷ See ILC, *Draft conclusions on identification of customary international law with commentaries* (2018), A/73/10, Conclusion 6, Commentary, para 5.

¹¹⁸ See *e.g.* the MOUs concluded between various OSCE member States and the OSCE, OSCE Doc PC.DEC/383 of 26 November 2000, Annex 1, p. 6, para. 23.

¹¹⁹ 21 ILM (1992).

¹²⁰ 36 ILM (1997) p. 237.

¹²¹ Aust, *Modern Treaty Law and Practice*, 3rd edn, CUP 2013, p. 53; Churchill/Lowe, *The Law of the Sea*, 3rd edn, Manchester University Press, 1999, pp. 274 ff.

¹²² See *mutatis mutandis* on the issue of the conclusion of a plethora of bilateral treaties as possible evidence of *opinio juris* ILC, *Draft conclusions on identification of customary international law with commentaries* (2018), A/73/10, Conclusion 11, para. 8.

from neither the conclusion of a given MOU nor the practice arising thereunder since “acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature”.¹²³ The very fact that States conclude a MOU rather than entering into a formal treaty suggests that they act solely for reasons of comity, political expediency or convenience rather than on the basis of a feeling of being legally obliged to act in such a manner.¹²⁴ At the same time, it might be the case that States act in accordance with the content of one or more MOUs *vis-à-vis* third States that are not parties to these very MOUs. Such behavior might then be considered as evidence of the existence of *opinio juris* of the State that is party to such MOU as to the customary nature of the underlying rule reflected in the MOU in the absence of any explanation to the contrary.¹²⁵

In any event, States concluding MOUs with a certain content and behaving in accordance with such MOUs thereby lose the status they might otherwise have as persistent objector with regard to an evolving rule of customary international law also reflected in such MOU, the non-legally binding character of the respective MOU notwithstanding.¹²⁶

4. Avoiding indirect legal effects of MOUs

As shown, MOUs might create indirect legal effects, their lack of binding effect under international law notwithstanding. Given such legal ‘shades of grey’, it is advisable to consider what steps can be taken to prevent such unintended legal consequences to occur.

It goes without saying, as shown, that the mere use of the term ‘MOU’ does not preclude any form of indirect legal effects, given it does not even preclude such instrument to constitute a treaty under international law as per Art. 2(1)(a) VCLT.¹²⁷ Nor may such indirect legal effects be *ipso facto* excluded by the avoidance of typical ‘*treaty language*’ in a given MOU.

Hence, it might be advisable to explicitly confirm on a regular basis in the very text of the MOU the intention to not only not create *direct* legal obligations *as such* when entering into a MOU, but also to exclude possible *indirect* legal consequences, as discussed above, flowing therefrom.

Such indirect legal effects may, however, flow from the behavior of States related to or following the conclusion of a given MOU. States should thus, when performing acts of State practice that fall in line with a prior MOU, make sure that such behavior may not be misunderstood or perceived as constituting the ‘fulfilment’ of a pre-existing or emerging obligation under a norm of international law – unless, obviously, they deliberately want to enter into a law-creating process that, over time,

¹²³ ICJ, North Sea Continental Shelf (Germany v. Netherlands; Germany v. Denmark), Judgement, ICJ Rep. 1969, pp. 3, 44, para. 76; see also ILC, Draft conclusions on identification of customary international law with commentaries (2018), A/73/10, Conclusion 3, para. 7.

¹²⁴ See ICJ, Asylum (Colombia v. Peru), Judgment, ICJ Rep. 1950, pp. 266, 277 and 286.

¹²⁵ See *mutatis mutandis* ILC, Draft conclusions on identification of customary international law with commentaries (2018), A/73/10, Conclusion 9, Commentary, para. 4.

¹²⁶ The situation is thus somewhat comparable to a State that has signed, but not ratified, a multilateral treaty, the content of which later becomes a norm of customary law and where the signatory State is then similarly barred from claiming the status of a persistent objector as to this very rule, despite the fact that its previous signature did (just like a MOU) neither make the content of the treaty legally binding for that State.

¹²⁷ Hollis, Defining Treaties, in: Hollis (ed), The Oxford Guide to Treaties, 2nd edn, OUP 2020, 11-45, pp. 27, 30 f., Schmalenbach, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties, 2nd edn, Springer 2018, Art. 2 paras. 5, 33, 35; Aust, Modern Treaty Law and Practice, 3rd edn, CUP 2013, pp. 21-23, 28-31.

would render the content of one single or a whole set of parallel MOUs binding upon them, either in a bilateral or multilateral setting.

At the same time, States may very well use the conclusion of MOUs as a first step to further concretize existing rules of customary international law, notably in more technical areas of international law, where mere State practice consisting of 'action on the ground' might not be specific enough to do so.

Moreover, States entering into a MOU can neither exclude negative political (rather than legal) repercussions when reneging on the content of a MOU once 'concluded' nor can they avoid that third actors, such as the Security Council, might use the content of a given MOU or a 'violation' of its terms as a springboard for legally relevant and potentially binding action, the deliberate decision of the 'parties' of a MOU not to enter into a legally binding agreement notwithstanding.

In any event, States should also be aware of the possible interpretative effects of MOUs for related legally binding instruments. Therefore, they may wish to 'disassociate' a MOU from a treaty that at first glance might be interrelated with the MOU in question by stating that a given MOU is not meant to 'implement' such treaty. If they do, however, to the contrary wish to reach such result they may just do that, *e.g.* by explicitly referring in the preamble of a MOU to the treaty that such MOU is meant to spell out in more detail.

Finally, while neither the principle of good faith nor the doctrine of *pacta sunt servanda* are applicable to MOUs, there remains, however, the possibility of MOUs eventually creating indirect legal effects by means of estoppel, provided the general prerequisites of estoppel are met in a given case. While the establishment of a reasonable reliance on an originally non-legally binding commitment is highly unlikely in most cases, it rests imaginable, especially in cases of uncertainty and doubt as to the legal nature and the binding effect (or not) under international law of the underlying MOU. In order to exclude such risk of possible legal effects by way of a situation of estoppel, it is thus strongly advisable to avoid any such uncertainty as to the status of the agreement by a clear and unambiguous formulation of the MOU and to emphasize its unequivocal non-legally binding character.

Overall, when it comes to possible legal effects of MOUs under international law, there is more than just a mere black and white picture. Rather, there exist various 'shades of grey', and States, when concluding such MOUs and later 'implementing' them *bona fide*, ought to be aware of these possible legal effects arising under international law, so as to avoid disputes with the respective other participants as to the exact preconditions and the scope of any such possible indirect legal effects flowing from a given MOU. All in all, it has also become obvious that even when States try to evade the rigorousness of international law generally, and international treaty law more specifically, by concluding non-legally binding MOUs, they cannot avoid that it is international law which nevertheless determines whether or not there might exist 'secondary' legal effects of such instruments arising under international law, their mere political character notwithstanding.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

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