INTERNATIONAL DOCUMENTS OF A NON-LEGALLY BINDING CHARACTER

It has long been recognized in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations. In recent decades, this has become a common means of announcing the results of diplomatic exchanges, stating common positions on policy issues, recording their intended course of action on matters of mutual concern, or making political commitments to one another.

These documents are sometimes referred to as non-binding agreements, gentlemen's agreements, joint statements or declarations. The title of the document is not determinative as to whether it establishes legal obligations, but rather the intent of the parties, as reflected in the language and context of the document, the circumstances of its conclusion, and the explanations given by the parties.

Two of the better known older twentieth-century examples involving the United States are the Lansing-Ishii exchange of notes of November 2, 1917, on Japanese immigration to the United States (often described as a "Gentleman's Agreement") that both countries considered not to be legally binding, and the Joint Declaration made on August 14, 1941, by President Franklin Roosevelt and Prime Minister Churchill, a document more commonly known as the Atlantic Charter.

The existence of a large number of such non-binding documents led the International Law Commission, when developing the Vienna Convention on the Law of Treaties, to consider whether or not such documents should be included within its definition of "treaty". The Commission decided against their inclusion by incorporating in its definition the requirement that an international agreement must be "governed by international law" in order to be a treaty. That this was the Commission's intention is confirmed by legislative history of the article. See Report of the International Law Commission to the General Assembly (1959 2 Y.B. Int.Law Comm. 96-97 (1959).

The leading article on this subject is Munch, "Non-Binding Agreements" 29 Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht 1 (1969)--an article that appeared six months before the adoption of the Convention. Munch summarizes the Commission's discussion on this issue and sets out a comprehensive collection of non-binding documents of which the Commission had taken note. In light of the evidence adduced by the Commission documenting this practice, the Conference on the Law of Treaties held in Vienna in May 1969 refused to adopt an amendment that would have led to the application of the Convention's rules to non-binding documents.

In 1965, the American Law Institute adopted the Restatement (Second), Foreign Relations Law of the United States. The subject of non-binding documents was discussed in comments f. and g. of Section 115. The former, subtitled Intention to create legal relationships, read as follows:

> A question may arise as to whether statements or declarations of heads of state or government, foreign ministers, or other officials engaged in the conduct of foreign relations create international legal agreements as distinguished from statements of policy or political objectives. In order to create an international agreement as defined in ... this Section, the statement of the parties must express more than a present intention or a personal or political commitment....
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> The distinction between an agreement that results in a binding commitment under international law and one that does not is not always clear, and there are no absolute tests for determining whether an agreement constitutes a binding commitment....(p.365).

Following the adoption of the Case-Zablocki Act, which requires the Secretary of State to transmit to the Congress the text of "any international agreement...other than a treaty, to which the United States is a party" within a specified time, the question arose as to what documents should be reported. In order to permit a uniform determination of that question, the Act was amended in 1979 to provide that the President, acting through the Secretary of State, should promulgate such rules and regulations as might be necessary to carry out the Act. Pursuant to that authority, the Department of State issued regulations on the reporting of international agreements on July 13, 1981. The regulations established general criteria to be applied in deciding whether a document constituted an international agreement for the purposes of the Act. Each of four specified criteria had to be met in order for a document to be reportable. The first criterion is the most relevant to the subject of this memorandum

> (1) Identity and intention of the parties.--A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements...In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law.

The intention of the parties standard referred to above was also used by the International Court of Justice in the only instance in which a party to a case sought to establish the Court's jurisdiction on the basis of a document that was not legally binding. In the Aegean Sea Continental Shelf Case (Greece v. Turkey), Greece alleged that the Court had jurisdiction on the basis of a joint communique issued at Brussels on May 31, 1975, following an exchange of views between the Prime Ministers of Greece and Turkey. Language to the effect that they had decided that the problems dividing the two countries, including the Aegean Sea continental shelf, should be resolved by the Court at the Hague was not regarded by the Court as sufficient to establish jurisdiction. Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 3 at 44.

Documents of a non-legally binding character were concluded between the time of the original enactment of the Case-Zablocki Act in 1972 and its amendment in 1977 and 1978. A notable example was the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on August 1, 1975 by President Ford and other national leaders. Clearly, the intention of the parties was that this was a politically binding not a legally binding document. Later that year, Secretary of State Kissinger, accompanied by the Legal Adviser of the Department, Monroe Leigh, testified before the Senate Foreign Relations Committee on memoranda of agreement between the Governments of Israel and the United States. He observed that not all of the provisions in documents containing U.S. commitments submitted to the Committee amounted to binding undertakings. He noted that they included:

> Assurances by the United States of our political intentions. These are often statements typical of diplomatic exchange: in some instances they are merely formal reaffirmations of existing American policy. Other provisions refer to contingencies which may never arise and are related, sometimes explicitly, to present circumstances subject to rapid change.
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> The fact that many provisions are not by any standard international commitments does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and they engage the good faith of the United States so long as the circumstances that gave rise to them continue. But they are not binding commitments of the United States.

Subsequent documents of a non-binding character include the Bonn Declaration of 1978 and the Shanghai Communique of 1982. The former was a multilateral document; the latter, a bilateral one. The Department replied to a request from the Chairman of the Senate Foreign Relations Committee to explain the legal significance of the former as follows:

> While the Declaration issued in Bonn is an important political commitment, it is not an international agreement within the meaning of United States law or international law since the parties did not evidence an intent to be legally bound. There is no indication of intention to depart from the established international practice of concluding non-binding communiques at the conclusion of a summit meeting. Accordingly, while we expect that the Bonn summit participants will comply with the accord, it is not a legally binding commitment.

The Department has consistently taken a similar position with respect to the Shanghai Communique. For example, in his testimony before the Senate Foreign Relations Committee on August 17, 1982, Assistant Secretary of State John H. Holdridge said:

> We should keep in mind that what we have here is not a treaty or agreement but a statement of future U.S. policy. We fully intend to implement this policy, in accordance with our understanding of it.

A recent study prepared for the Senate Foreign Relations Committee by the Congressional Reference Service of the Library of Congress stated that non-binding documents existed in many forms, including declarations of intent, joint communique and joint statements (including final acts of conferences), and informal arrangements. It noted that even with respect to documents that are legally non-binding, the parties affected may to some degree expect adherence.

The study noted that the Department of State had described the difference between a legally binding obligation and a political obligation in connection with certain declarations, intended to be politically rather than legally binding, exchanged in connection with the START TREATY in the following terms:

> An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A "political" undertaking is not governed by international

law and there are no applicable rules pertaining to compliance, modification, or withdrawal. Until and unless a Party extricates itself from its "political" undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.

This brief summary of U.S. and international practice demonstrates the fact that States can and frequently do conclude statements of a political nature that are not legally binding. It also suggests that such practice is likely to continue. Indeed, the conclusion of a joint statement with Ukraine and a joint declaration with Georgia in connection with visits of the leaders of those two countries earlier this month confirms the persistence of this practice.