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Diplomacy at the Crossroads of Culture and Language: Contrasting the French and Anglophone Practice Regarding Binding and Nonbinding Instruments

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Abstract*: The French government's diplomatic approach to treaties and nonbinding instruments is discussed in comparison to the realities of British and American practices, along with practical recommendations of realistic guidelines for diplomats and negotiators.*

1. Introduction

The French model of diplomacy, coupled with the far-reaching influence of the French language, were instrumental in the global development of the diplomatic practice in the 19th and 20th century [1]. To this day, French remains one of the two major official languages at the United Nations and African Union among other international organizations [2]. Accordingly, international agreements are often drafted and adopted in several official languages, of which English and French are the most common.

There is no question however that the diplomatic culture and practice of the French government is not entirely identical with that of the UK Foreign and Commonwealth Office (FCO). As we shall see, there are also specific features of both languages that may be of diplomatic import but may not be easy to translate accurately, thus requiring specialized expertise and training to properly render.

In this paper, in view of the emergence and popularization of international instruments that are viewed as nonbinding, it seems useful to compare and contrast the French and British approach to this issue, both in theory and practice.

2. The French approach

The official French approach to international instruments is to place the discussion under the field of study of international law [3]. As a result, the French government's position is that international instruments not governed by international law (because they are purposely drafted as nonbinding) fall outside the scope of international law [4]. It does not mean that they cannot exist, but it is a reminder that the French government is aware that "participating" in nonbinding instruments is fundamentally at odds with the basic principle of diplomacy which is to have a good faith intention to comply with the terms of duly signed international instruments ("*Pacta sunt servanda*").

The French guidelines demonstrate a keen awareness that French diplomats (and by extension French-speaking diplomats representing governments that are influenced by French diplomatic practice) have to deal with proposed instruments - typically offered by English-speaking counterparts - that are intended to be non-binding. The instructions are as follows:

> *In their contacts with Anglo-Saxon countries, French negotiators can see proposed a "memorandum of understanding". These instruments are not always considered by jurists as international agreements, but as good faith commitments that do not bind the signatories. However, this distinction is unknown in the French conception of international law [5].*

The official directive is clear: nonbinding instruments are to be avoided, and in particular the "memorandum of understanding" designation. At the same time, the directive acknowledges that this approach may be "imposed" on French negotiators within a multilateral framework [6]. Indeed, a search of the United Treaty Series indicates that the "memorandum d'entente" designation is rarely used in French bilateral agreements [7].

3. The UK FCO approach

The UK Foreign and Commonwealth Office guidelines on nonbinding documents is embodied in a guide entitled "Treaties and MOUs: Guidance on Practice and Procedures" (second edition dated 2000 but revised in 2004, 2012 and 2014) [8]. The original author seems to have been Anthony Aust, author of the authoritative textbook "Modern Treaty Law and Practice" [9].

In both documents, it is proposed that in recent practice, diplomats are faced with either a "treaty" or an "MoU". This dichotomy is offered with the caveat that a document with a title that includes "Memorandum of Understanding" may in fact be a treaty, whereas an instrument with a treaty-sounding name such as "Accord" or "Charter" may in fact be an "MoU" under this classification. In other words, an M.O.U. could be a treaty (not an MoU) and an "Accord" may well be an MoU, which seems counter-intuitive to say the least [9].

This categorization was rightly criticized by Scully *et al.* as "confusing" and causing "cause of perplexity" [10]. An alternative categorization (binding and registrable agreement or BRA vs nonbinding instrument or NBI) was proposed by the authors to avoid giving the impression that all instruments designated as Memorandum of Understanding are non-binding. In spite of this disagreement on how to best designate these two broad types of instruments, Scully *et al.* agree with Aust on the textual features that distinguish binding from non-binding instruments in English language practice. Scully *et al.* also discuss the need to explain the difference, within the binding instrument category (or "treaties"), between treaties in solemn form and treaties in simplified form. This distinction is also made in the French directive, which envisages four types of instruments:

(1) Treaty in solemn form signed by the Head of State (or a representative with full powers)
(2) Treaty in simplified form signed by the Minister of Foreign Affairs (or a representative with full powers)
(3) Nonbinding multilateral instruments which are sometimes designated as Accord, Charter, or Memorandum of Understanding, ideally to be avoided.
(4) Limited agreements between Ministers strictly within their domain of competence and which are not treaties in any sense and also to be used with restraint and caution.

4. Recent Developments

In spite of the French insistence that international agreements should best be treated as belonging to the category of international law, we observe that the Paris Charter for New Europe (1990), albeit seemingly a legally binding instrument on account of this name, is quite obviously a political and therefore nonbinding instrument [11]. It is quite remarkable that this nonbinding charter was used to established an organization (Organization for Security and Cooperation in Europe) which could not by definition possess international legal personality [12].

The Copenhagen Accord is another example of the French willingness to step outside the carefully delimited realm of international law in order to achieve a political agreement. The Copenhagen Accord presents an interesting mixture of binding and nonbinding features [13].

The COP21 Paris agreement, finally, was drafted to be a binding treaty for most State parties, but also with the intention that the President of the United States, at the time Barack Obama, could sign it without Senate ratification, which was politically impossible to obtain at the time. The French Minister of Foreign Affairs, Laurent Fabius, was on the record for stating:

> *We must find a formula which is valuable for everybody and valuable for the U.S. without going to Congress…. Whether we like it or not, if it comes to the Congress, they will refuse [14].*

In the end, this approach was proved to be of limited success in view of the election of Donald Trump who announced the withdrawal of the United States from the Paris Accord by presidential decision. It is interesting, however, that the withdrawal was not immediate but rather respected certain commitments associated with the initial US ratification on the international (not domestic) plane [15]. In other words, an international accord that has been ratified on the international plane but not under domestic processes (i.e. the US Congress) may be temporarily considered as a nonbinding instrument.

This highly pragmatic approach, at odds with the purist discourse of the official directive, demonstrates the flexibility and creativity of diplomatic practice. Still, the French concern with the proliferation of nonbinding instruments is legitimate: the level of good faith determination on the part of the other parties is unclear and may create not only confusion but also asymmetry in the fulfilment of the parties' commitments (which are not obligations).

5. Conclusion

Even though the French government has not issued formal guidelines on the specific French language terms that should be used to draft nonbinding agreements, it is safe to say that translating the already adopted English language terms into French is an acceptable solution.

Inasmuch as the United States Department of State and the UK foreign office concur on what terms to use, the following table can be proposed [16]:

Table 1. Bilingual terminology

English	French	Binding?
Shall	Present tense	Yes
Will	Future tense	Non
Force	Vigueur	Yes

Effect	Effet	No
Agree	S'accorder	Yes
Decide	Décider	No
Parties	Parties	Yes
Participants	Participants	No
Done	Fait	Yes
Signed	Signé	No

The official French approach has the merit to remind negotiators that the customary principle of *Pacta Sunt Servanda* should ideally apply not only to 'pacts' but also to an overall pattern of clarity and intentionality. It is also a reminder that as soon as governments step outside the realm of international law, the level of commitment to abide by the terms of a nonbinding instrument is graduated and therefore unpredictable. Last but not least, the risk is considerable that governments are creating a 'cloud of international paper' that exist in a kind of legal gray zone, as a result of a modern and convenient diplomatic practice which may ultimately result in less stability and predictability in international relations.

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