OBSCURITY AND NONBINDINGNESS IN THE REGULATION OF LABOR MIGRATION

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Labor migration is often regulated internationally through bilateral treaties signed between states, determining the conditions under which migrants from one state (or both) may travel to the other state and reside there in order to work. These instruments are sometimes designated as memoranda of understanding and regarded as nonbinding agreements. Many remain unpublished and undisclosed. This Article assesses these design choices critically. It considers the interaction between bilateralism, obscurity and nonbindingness. It evaluates and rejects possible justifications for obscurity and nonbindingness. Finally, it argues that these design choices should be resisted. Since bilateral labor agreements do not regulate strictly the bilateral relationship between two states, but rather create rights and obligations for various third-party individuals, they should be required to meet a rule of law requirement of transparency.

Introduction

In a memorable exchange in front of the cameras at the Oval Office, former U.S. President Donald Trump expressed his displeasure with the term memorandum of understanding (MOU) in connection with efforts to conclude a trade deal with China. "I don't like MOUs because they don't mean anything . . . I think you're better off just going into a document," he explained. To his obvious irritation, Robert Lighthizer, the U.S. trade representative, hastened to correct the president: "An MOU is a contract, it's the way trade agreements are generally used. People refer to it like it's a term sheet. It's not a term sheet, it's an actual contract between the two parties."[1] Aside from providing an insight into political or interpersonal dealings in the administration, this exchange provides an indication of the lack of consensus regarding the degree to which an international agreement designated as an MOU is legally binding.

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1 Kate Lyons, *Memo of Misunderstanding: Trump Clashes with Trade Adviser over China Talks*, The Guardian (Feb. 25, 2019), http://www.theguardian.com/business/2019/feb/25/memo-of-misunderstanding-trump-clashes-with-trade-adviser-over-china-talks.

In recent years we have witnessed a global trend on the part of states to withdraw from global and multilateral arrangements and a professed shift to bilateralism. While this move was championed by the Trump administration, it was also evident elsewhere, including in the United Kingdom's exit from the European Union.[2] In addition to trade, another field of international law that is often regulated bilaterally and where the term MOU is widespread and may therefore raise similar questions regarding a treaty's degree of bindingness is the regulation of labor migration. A bilateral labor agreement (BLA) is an international agreement entered into between two sovereign states, in which they agree on the terms on which the nationals of one state (or both) may temporarily migrate to the other state for work. I will refer to states' intention or perception that certain bilateral arrangements are not legally binding upon their signatories as one of "nonbindingness."

On the assumption that the choice to designate labor migration instruments "MOUs" is indeed meant to signal that they are not binding, a question arises. According to the 1969 Vienna Convention on the Law of Treaties (VCLT), an international instrument's designation makes no difference as to the degree of its bindingness.[3] Nonetheless, state practice has shown that states opt for a designation as "MOU" out of awareness (or intent) that this may have implications in terms of bindingness.[4] Moreover, regardless of a bilateral instrument's designation, nonbindingness can also be achieved through "soft"[5] formulation of the parties' undertaking as part of the document, using hortatory rather than determinative language, setting general guidelines rather than specific rules or goals, or refraining from establishing enforcement mechanisms.

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2 *See* Heike Krieger, *Populist Governments and International Law*, 30 Eur. J. Int'l L. 971, 979 (2019) (discussing the tactics of populist governments from Hungary to Venezuela as including a turn to bilateral and regional agreements and a rejection of multilateralism).

3 "For the purposes of the present Convention: (a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation," Vienna Convention on the law of treaties art. 2, ¶1(a), May 23, 1969, 1155 U.N.T.S 331; *see also* Kathleen Claussen, *Trade's Mini-Deals*, 62 Va. J. Int'l L. 315 (2022).

4 Duncan B. Hollis, *Binding and Non-Binding Agreements: Final Report*, *in* Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements 9, 11-13 (Inter-Am. Jurid. Comm. ed., 2020).

5 Multiple definitions have been offered for the concept of "soft law." Some view international legality as a continuum. For example, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 424 (2000); Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law*, 94 Minn. L. Rev. 706, 716 (2010); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 173 (2010). However, others such as Jan Klabbers draw a binary distinction between hard law and soft law and a bright line between the legal and nonlegal, binding and nonbinding. For example, Jan Klabbers, *The Undesirability of Soft Law*, 67 Nordic J. Int'l L. 381, 381 (1998). I understand soft law to refer to norms that do not purport to be legally binding and are not perceived to be legally binding by those whose action they nonetheless seek to guide. This definition seems to fall within what scholars writing on the subject would accept. For example, Guzman & Meyer, *supra*, at 172 (defining soft law norms as those that "fall short of" binding rules); Shaffer & Pollack, *supra*, at 714-15, 717; Abbott & Snidal, *supra*, at 421-22. According to this understanding, instruments such as recommendations of international organizations, standards, declarations, and possibly advisory opinions, among others, would be classified as soft law.

Alongside their purported nonbindingness, BLA signing is under-reported and many BLAs are not registered with the United Nations (UN) secretariat or deposited in the major international treaty series.[6] Certain countries do not make treaties accessible, neither voluntarily nor on request,[7] or refuse to publish adjoining documents essential to the interpretation or implementation of the treaty, such as implementation annexes.[8] States therefore seem to have a wide range of practice with respect to their willingness to disclose BLAs. I will collectively refer to this set of practices as practices of "obscurity." Many BLAs are therefore purportedly nonbinding, obscure, or both.

This Article explores the prevalence of obscurity and nonbindingness in the bilateral regulation of labor migration and probes the connection between these design choices. Certain explanations and justifications have been offered in the international law literature for states' opting for obscurity and nonbindingness, suggesting that these design choices may be acceptable in certain circumstances. My argument is that the justifications offered for these design choices do not stand with regard to the regulation of labor migration. This is because labor migration instruments, by definition, create rights and obligations for third parties, who therefore have a legitimate expectation to be informed of those rights and obligations.

The Article's contribution lies, first, in problematizing these sometimes taken-for-granted design choices—obscurity and nonbindingness—and highlighting their potentially pernicious effects, particularly in the context of labor migration. Second, the Article proposes a novel conceptual distinction between contract-like treaties and those akin to lawmaking, arguing that treaties identified with the latter end of the scale must adhere to rule of law requirements. Finally, it calls for rethinking and resisting common design choices in the international regulation of labor migration, which it reveals to be potentially harmful to migrant workers.

Following a brief review of BLAs in Part I, the Article introduces in Parts II and III the recent scholarship about secrecy in international relations, and the more longstanding literature about nonbindingness in international law. Part IV examines critically the relationship between bilateralism, obscurity and nonbindingness, and suggests that treaties classified as akin to lawmaking must adhere to rule of law principles, including transparency. Part V examines the prevalence and desirability of these design choices in the regulation of labor migration. The final Part concludes.

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6 For instance, of the 779 BLAs counted by Peters, only 218 were registered with the U.N. Treaty Series. Margaret E. Peters, *Immigration and International Law*, 63 Int'l Stud. Q. 281, 282 (2019).

7 Piyasiri Wickramasekara, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* (Mar. 2015) (manuscript at 15), http://www.ssrn.com/abstract=2636289.

8 *Id.*; Yuval Livnat, *Israel's Bilateral Agreements with Source Countries of Migrant Workers: What is Covered, What is Ignored and Why?* (Dec. 17, 2019) (manuscript at 10-11), https://papers.ssrn.com/abstract=3523087.

I. BLAs: A Review

Owing to the failure of efforts to conclude international multilateral regulation on labor migration,[9] bilateral treaties remain the primary type of international document regulating the rights and obligations of migrant workers in the destination country. They further regulate the rights and obligations of other third parties, such as employers and recruiters.

According to the highest estimate in the literature, offered by Margaret Peters, states have entered into some 779 BLAs (MOUs included) between the years 1945-2015. After a downturn during the Cold War years, the conclusion of BLAs by states has picked up since the 1990s.[10] Adam Chilton and Eric Posner have dubbed this period the new "Golden Age"[11] of BLAs.

Nevertheless, many of these BLAs are designated as MOUs, rather than as formally binding agreements. Whereas in Africa, Europe and the Americas, 70-80% of bilateral arrangements on labor migration are formally designated as bilateral "agreements," almost 70% of Asian states designate their cross-border labor arrangements as MOUs,[12] which are sometimes deemed to provide a "looser" framework.[13]

Moreover, scholars agree that the true dimensions of the phenomenon probably remain unknown.[14] States' practice of obscurity ranges from refraining from registering a treaty with the UN secretariat, through refraining from voluntarily publishing its text or refusing to expose its content upon demand, to altogether concealing or denying its existence. An ILO report mapping BLAs reported that whereas in Africa, Europe and the Americas, BLAs were, on the whole, publicly accessible, Asia's performance was mixed, with a number of countries refusing to disclose the texts of agreements publicly.[15] There is also no formal international database that collects or analyses BLAs, unlike other kinds of bilateral treaties.[16] Therefore, BLA signing is significantly under-reported and nontransparent.

BLAs' obscurity and purported nonbindingness have several implications. In the first instance, to the extent that these treaties establish rights for individuals, including migrant workers, employers, recruiters or others, these individuals cannot

9 Tamar Megiddo, *Learning from the BITs: Bilateral Labor Agreements in Comparative Perspective* (Aug. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672931.

10 Peters, *supra* note 6, at 282.

11 Adam S. Chilton & Eric A. Posner, *Why Countries Sign Bilateral Labor Agreements*, 47 J. Legal Stud. S45, S49 (2018).

12 Wickramasekara, *supra* note 7, at 21.

13 *Id.*

14 *Bilateral Labor Agreements Dataset*, Univ. Chi. L. Sch., https://www.law.uchicago.edu/bilateral-labor-agreements-dataset (last visited Nov. 10, 2021) ("We identified 582 Bilateral Labor Agreements through this process. However, this list is almost certainly underinclusive."); Peters, *supra* note 6.

15 Wickramasekara, *supra* note 7, at 24 ("A number of countries such as Bangladesh, China, Indonesia, Malaysia, Pakistan and Vietnam, among others, do not disclose the texts of agreements publicly. The Philippines, India, and Thailand have consistently followed good practice in this regard by placing copies of relevant agreements online, while some others like Sri Lanka would make copies available to stakeholders.").

16 *See, e.g.*, *International Investment Agreements Navigator*, U.N. Conf. Trade & Dev., https://investmentpolicyhub.unctad.org/IIA (last visited Nov. 10, 2021).

learn of their rights from the treaties when they are unpublished. They also cannot rely on their rights in interaction with each other. Nor can they rely on them before enforcement agencies or courts in either the sending or receiving country, or before international bodies such as the UN Special Rapporteur on the Human Rights of Migrants, who is formally authorized to receive individual complaints. To the extent that the treaties create obligations for either of these actors, they remain unaware of them and are therefore unable to adjust their behavior accordingly or to challenge the obligations placed on them. Although some BLAs do include provisions regulating the dissemination of information to workers of their rights and obligations, without a publicly available record of the BLA itself, workers are unable to rely on it or to directly attack its terms. Moreover, if BLAs are also nonbinding, can they even be said to be creating rights in the first place?

Obscurity also has implications for the international relationship between the sending and receiving states. First, according to Article 102 of the UN Charter, treaties that have not been registered with the UN secretariat cannot be invoked before any organ of the UN. This means that states cannot seek assistance in enforcement or pursue legal action before the International Court of Justice (ICJ), even where otherwise the Court would have jurisdiction to adjudicate disputes between the relevant state parties.

Another implication is at the level of the international community. As Wolfgang Alschner and Dmitriy Skougarevskiy have shown, states mimic and copy from each other's bilateral treaties when these are public.[17] This widespread practice has rendered the universe of bilateral investment treaties (BITs) a much more homogenous body of law than might otherwise have been expected. This is the case to such an extent that some have suggested that certain customary law norms can now be derived from their widespread presence in BITs.[18] Whether that is necessarily a benefit or a disadvantage remains to be seen, but it is clear that the obscurity of BLAs bars any similar development.

II. Obscurity

As Megan Donaldson illustrates, publicity has never been an absolute norm in international relations.[19] In the early twentieth century, concerns were raised with respect to secret treaties' undemocratic nature, precluding the possibility of parliamentary oversight or public debate. Further concerns were raised with respect to their propensity to foster an atmosphere of suspicion and apprehension which could lead to international conflict.[20] U.S. President Woodrow Wilson's famous Fourteen

17 Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. Int'l Econ. L. 561 (2016).

18 Stephan W. Schill, The Multilateralization of International Investment Law (2009).

19 Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 Am. J. Int'l L. 575 (2017).

20 *Id.* at 581.

Points speech derided secret treaties as a threat to world peace and championed "[o]pen covenants of peace, openly arrived at . . . ."[21]

The League of Nations Covenant Article 18 purported to render null the binding force of secret treaties and required that treaties be registered and thereafter published. However, in practice, the substance of this provision was consistently and increasingly eroded.[22] Its successor, UN Charter Article 102, significantly waters down the publication requirement. Although Article 102 sets publicity as the norm and conditions the assistance of UN organs on it, it does not prohibit or render null secret treaties.

As Donaldson shows, states have always relied on a variety of techniques of secrecy, including recourse to texts of ambiguous status (informal agreements, gentlemen's agreements, etc.) and the division of treaties into a public principal text and a secret ancillary one.[23] Another technique entails recognizing categories of treaties that are exempt from the publication requirement, such as technical or financial treaties, especially when the latter may expose inconvenient details about military operations[24] or unpopular concessions.[25] As Donaldson shows, nonbindingness is a not only a self-standing choice but also a technique of secrecy. If an instrument is not a formal treaty, it is not formally binding and therefore may be claimed to be exempt from Article 102's registration requirement.

As both Donaldson and Ashley Deeks have argued, secrecy should not inevitably be understood to cover for illegality, or to be a token of disrespect for the rule of international law.

> The fact that some secret treaties made arrangements for conduct in violation of international law tends to reinforce the notion that secrecy and power politics went together, in opposition to publicity and respect for law. On the other hand, many secret treaties did not contemplate action in violation of law. Indeed, precisely because they were secret, and signatories lacked an institutional and rhetorical apparatus for their enforcement, some secret treaties might actually be seen as a mark of faith in the power of legal obligation alone to guide states' conduct.[26]

While indeed compelling, one may note that this argument does not extend to secret instruments that also purport to be nonbinding.

Reviewing U.S. secret treaties, Deeks has suggested five subject-matter categories in which secret treaties have been concluded: intelligence cooperation, military cooperation, nuclear-related agreements, weapons-related commitments, and economic commitments.[27] She suggests that such agreements are defensible both in respect of the substance of the commitments contained in them and in respect of

21 Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 Ariz. St. L.J. 713, 735 (2017).
22 Donaldson, *supra* note 19.
23 *Id.* at 597.
24 *Id.* at 597-98.
25 Deeks, *supra* note 21, at 751.
26 Donaldson, *supra* note 19, at 604-05; *see also* Deeks, *supra* note 21, at 717 (similarly defending certain uses of secret international undertakings).
27 *Id.* at 741-51.

the reasons for their being concluded in secrecy.[28] Deeks identifies five reasons for secrecy: first, publicity could defeat the commitments' legitimate purpose; second, secrecy allows the negotiating states to be more transparent with each other and share sensitive core information; third, deference to one of the parties' sovereignty and an attempt to avoid signaling its political or military weakness; fourth, lack of public support for the treaty; and fifth, facilitating illegality.[29] While she agrees that the two latter reasons are problematic, she maintains that the first three reasons are defensible.[30]

But obscurity is a broader term that captures more than just secret treaties. Can the fact that states merely do not publish treaty texts of their own accord, only reluctantly hand them over when asked, or simply do not register them with the UN secretariat be explained as being due to the same reasons?

We have already established that the non-registration of treaties with the UN secretariat does not invalidate a treaty's legality and binding force. It merely bars access to various forms of dispute settlement that are offered by UN organs, chiefly the ICJ. While this does impact the enforceability of treaties, it does not preclude it entirely, as states remain free to settle their differences through bilateral negotiation, third-party arbitration, and more. In terms of Deeks' five reasons for secrecy, non-registration in and of itself cannot achieve any of the either legitimate or nefarious goals that may motivate secrecy.

However, Deeks' explanations may plausibly account for at least some instances of failure to publish treaties of states' own accord and, moreover, refusing to publish treaty texts even when the treaties' existence is public knowledge. Either choice is likely to be motivated by a government's wish to shield itself from public or parliamentary scrutiny, by a concern that publication could undermine the treaty's purpose (legitimate or not), or by a desire to enable more transparency between the parties. While this may indeed explain states' turn to obscurity in the regulation of labor migration, the question remains whether these reasons also justify it. As I argue in Part V, below, they do not. Obscurity may further be motivated by the two more pernicious reasons suggested by Deeks: a lack of public support for the treaty or a desire to facilitate illegality.

Anne Peters has suggested that in recent decades a norm of transparency has increasingly established itself in international law.[31] But a requirement of publicity of legal norms is a fundamental requirement in any legal system, especially when it purports to guide the behavior of individuals.[32] As I elaborate in Part IV below, to the extent that third parties other than the signatory states are granted rights or

28 *Id.* at 741.
29 *Id.* at 751-59.
30 *Id.*
31 Anne Peters, *The Transparency Turn of International Law*, 1 Chinese J. Glob. Governance 3 (2015); Anne Peters, *Towards Transparency as a Global Norm*, *in* Transparency in International Law 534 (Andrea Bianchi & Anne Peters eds., 2013).
32 Lon L. Fuller, The Morality of Law 39-40 (rev. ed. 1969).

are saddled with obligations that arise from an international treaty, such a treaty must be published in order for them to orient their behavior accordingly.

III. Nonbinding Agreements: Oxymoron or Reality?

According to the 1969 Vienna Convention on the Law of Treaties, an international instrument's designation makes no difference as to the degree of its bindingness.[33] Customary international law, as pronounced by the ICJ, also provides that "an international agreement concluded between States in written form and governed by international law constitutes a treaty."[34] In line with this principle, the Court has found an MOU signed between Somalia and Kenya to be a valid, binding international treaty notwithstanding its formal designation.[35] In this case, Kenya registered the MOU with the UN secretariat in accordance with Article 102 and Somalia did not protest.

Furthermore, the Court classified the "Agreed minutes" of a meeting between the foreign ministers of Qatar and Bahrain as a binding treaty, even though Bahrain did protest when Qatar registered the minutes with the UN secretariat under Article 102.[36] The Court explained: "[t]hey enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement."[37] The Court's analysis reflects a preference for assessing the treaty according to its text and context over relying on the parties' intentions regarding creating a legal obligation or refraining from doing so. In the Pulp Mills case, the Court held that a jointly-issued press release constitutes an international agreement with binding force.[38]

Jan Klabbers has posited that the mere concept of a nonbinding treaty is somewhat of an oxymoron.[39] Klabbers denies the existence of nonbinding treaties.[40] As he explains, purportedly nonbinding agreements

> are drafted with the same care and intensity as treaties; they often look like treaties; they are supposed to have the same effects as treaties . . . ; they are subject to rules

33 "For the purposes of the present Convention: (a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" Vienna Convention on the law of treaties, *supra* note 3.

34 Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Preliminary Objections, 2017 I.C.J Rep. 3, ¶42 (Feb. 2) [hereinafter Somalia v. Kenya].

35 *Id.* at ¶50. The Court did also take note of the subsequent registry of the MOU by Kenya pursuant to UN Charter art. 102, without soliciting any protest from Somalia. However, this does not seem to replace its analysis under customary law, only to give it further support.

36 Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), Jurisdiction and Admissibility, 1994 I.C.J. Rep. 112, ¶¶21-30 (July 1) [hereinafter Qatar v. Bahrain].

37 *Id.* at ¶13.

38 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 132, ¶138 (April 20).

39 Jan Klabbers, The Concept of Treaty in International Law 121 (1996).

40 *Id.*

> which look remarkably like the rules of the law of treaties; and they must be read and interpreted as if they are treaties. So why not call them treaties?[41]

As opposed to Klabbers, Anthony Aust has pointed out that states turn to MOUs explicitly in order to avoid creating international legal obligations, and do so often.[42] Aust finds support for the possibility of nonbinding treatymaking in the International Law Commission's work towards the drafting of the VCLT. The discussion there over the definition of a treaty referenced the intention of the parties to create legal obligations, and the practice of generally not registering MOUs with the UN secretariat.[43] He maintains that no rule supports referring to every transaction between states as legally binding.[44]

Similarly, as Tim Meyer has noted, states seem to be of the opinion that "the bindingness of an agreement can be traded off against other features of an agreement, such as the language or precision of obligations or the existence of dispute settlement provisions."[45] Indeed, a recent report by the Inter-American Juridical Committee, a body of the Organization of American States, indicates that the idea of a nonbinding treaty is a reality, oxymoron or not, even though there remain questions pertaining to MOUs' legal implications.[46] The report differentiates between treaties binding under international law and what it terms "political commitments," for which law does not provide any normative force.[47] The report presents two possible tests to assess whether an instrument is binding or nonbinding. The first is the "intent test," an examination of the subjective intentions of the parties. The second is an "objective test," assessed according to the instrument's subject-matter, text and context.[48] The report further includes a list of evidence in treaty text and formulations that are indicative of whether an instrument should be classified as a treaty or a political commitment. On this list, the word "understanding" in the title of an instrument or the use of terms such as "expectations," "understandings," "should," "seek," "promote" or "coming into effect" is an indication that an instrument should be classified as a political commitment. Conversely, designation as an "agreement" and terms such as "parties," "articles," "rights," "shall," "agree," indication of place and time of signing, discussion of authentic or authoritative text, or of entry into force, amendment, termination and more, are indicative of a binding agreement.

As this list implies, and even Klabbers recognizes,[49] nonbindingness can also be achieved through "soft" formulations of the parties' undertakings as part of the document, using hortatory rather than determinative language, setting general

41 Jan Klabbers, *Not Re-visiting the Concept of Treaty*, *in* 40 Years of the Vienna Convention on the Law of Treaties 29, 34 (Alexander Orakhelashvili & Sarah Williams eds., 2010).
42 Anthony Aust, Modern Treaty Law and Practice 46-7 (2013).
43 *Id.* at 47.
44 *Id.*
45 Timothy Meyer, *Alternatives to Treaty-Making—Informal Agreements*, *in* The Oxford Guide to Treaties 59, 62 (Duncan B. Hollis ed., 2d ed. 2020).
46 Hollis, *supra* note 4, at 12.
47 *Id.* at 23-4.
48 *Id.* at 27.
49 Klabbers, *supra* note 41, at 29.

guidelines rather than specific rules or goals, etc. Indeed, already in his 1983 article "Towards Relative Normativity in International Law," Prosper Weil notes states' use of flexible withdrawal terms in addition to "soft" formulations[50] as indicating a shift whereby states view their legal obligations as a matter of degree rather than kind.[51] He terms these "precarious norms."[52]

In his 1991 discussion of informal agreements, Charles Lipson explains: "[i]nformality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels." He lists three tentative advantages to informality: informal agreements are flexible and easy to amend, they do not require formal ratification, and they are less public and prominent, if not secret.[53] "This lower profile," he notes, "has important consequences for democratic oversight, bureaucratic control, and diplomatic precedent."[54] As Donaldson and now Lipson too show, obscurity and nonbindingness often go hand in hand, featuring together as design choices for certain types of international instruments. Donaldson highlighted nonbindingness as a technique of secrecy. Lipson notes obscurity as an advantage of nonbindingness. The next Part considers the connection between these design choices, particularly in the context of bilateralism.

IV. Bilateralism, Obscurity and Nonbindingness

The previous discussions reveal a connection between obscurity and nonbindingness. The two design choices often go hand in hand and seem to strengthen each other: nonbindingness serves as a technique of obscurity and obscurity serves as a reason to favor nonbindingness. This Part examines this connection and assesses the extent to which the two design choices exacerbate each other's disadvantages. It further explores the extent to which they are tied to a third choice in treaty design—bilateralism.

Deeks and Donaldson both are willing to accept that, subject to certain conditions, the conclusion of secret bilateral treaties may be legitimate, and that it sometimes correlates with, rather than contradicts, principles of the UN Charter, by resolving disputes and tensions and entrenching peaceful pacts. Discussions of nonbinding agreements echo a similar sentiment: they are easier to conclude, do not require cumbersome ratification proceedings, are quicker to amend, and are able to pass under the radar of domestic politics without attracting pushback. In other words, it is easier for governments to choose the nonbinding route than to embark on the drafting process of a formal treaty. This narrative should be qualified: easier, that

50 ". . . . whereby the parties undertake merely to consult together, to open negotiations, to settle certain problems by subsequent agreements; and the purely hortatory or exhortatory provisions whereby they undertake to 'seek to,' 'make efforts to,' 'promote,' 'avoid,' 'examine with understanding,' 'act as swiftly as possible,' 'take all due steps with a view to,' etc.," Prosper Weil, *Towards Relative Normativity in International Law*, 77 Am. J. Int'l L. 413, 414 (1983).

51 *Id.* at 414.

52 *Id.*

53 Charles Lipson, *Why are Some International Agreements Informal?*, 45 Int'l Org. 495, 500 (1991).

54 *Id.*

is, unless the instrument's end is to guide the behavior of third parties by creating rights and obligations for them.

International treaties can be placed on a scale between a treaty resembling a contract on the one hand, and a lawmaking treaty on the other hand. This assertion is not a new one, and scholars have used the distinction between contract and lawmaking to highlight different attributes of international treaties.[55] One point of interest in assessing a treaty on this scale is the identity of the parties to it. I suggest that, generally speaking, bilateral treaties are situated closer to the contractual end of the scale. This is particularly clear when bilateral treaties regulate strictly the bilateral relationship between the two state parties and do little to create rights or obligations for third parties.

Multilateral treaties are more often located at the opposite end of the scale. This is because multilateral treaties often aim for ambitious regulation of whole issue-areas, such as human rights, trade, or climate change, but even more so due to their frequent inclusion of provisions that not only regulate inter-state relations but also create rights and obligations for third parties who are not signatories, and often were not involved in the negotiation and drafting of the treaties. These third parties may range from the international institutions established by the said treaties to individual people whose rights were recognized or curtailed, or on whom the said treaties placed legal obligations. Thus, treaties that create or regulate rights and obligations for third parties, particularly for individual people, are conceptually closer to lawmaking.

For a legal system to succeed in mobilizing the subjects whose action it seeks to guide, it must ensure that the conditions exist in which it is possible for them to perform the required action. This entails, in the first place, that law's guidance must be known to a person prior to the moment in which the conduct is required.[56] Third parties may legitimately expect to learn of the content of treaties which create rights or obligations for them. Therefore, as a rule, lawmaking-like treaties should be published. This is also the case regarding bilateral treaties when they create rights and obligations for third parties, particularly, individuals.

Against this background, one can revisit Deeks and Donaldson's defense of secret treaties. The kind of treaties whose secrecy they were willing to defend seems to conform overall to what could be referred to as "strictly bilateral treaties"—those

55 For an early account distinguishing contractual treaties from lawmaking treaties, see Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 British Y.B. Int'l L. 100, 106-07 (1930). For a more recent use of the distinction, albeit for different purposes than the present Article, *see* Timothy Meyer, *From Contract to Legislation: The Logic of Modern International Lawmaking*, 14 Chi. J. Int'l L. 559, 567-68 (2013) (note that Meyer suggests that the quintessential contractual agreement is the bilateral investment treaty. According to my approach, however, since BITs create rights and obligations for investors, who are not parties to the treaty, they would probably be situated closer to the lawmaking end of the scale—unlike a trade treaty).

56 Fuller, *supra* note 32, at 36-44; *cf.* John Finnis, Natural Law and Natural Rights 270 (2d ed. 2011); John Rawls, A Theory of Justice 236-39 (1971); Joseph Raz, The Authority of Law: Essays on Law and Morality 214-19 (2009); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137, 154 (2002).

treaties at the end of the scale that regulate only the bilateral relationship between the state parties and do not create rights or obligations for third parties. Conversely, treaties that do create rights and obligations for third parties may legitimately be required to meet a stricter standard of transparency, warranted from a rule of law perspective—even if they are bilateral and not multilateral treaties.[57]

Bindingness can be evaluated along a similar vector: does an instrument purport to create rights or obligations for third parties? How does the purported nonbindingness affect these stakeholders' ability to exercise their rights or learn of their obligations, or perform them? If the instrument's subject matter, text and context indicate that it does indeed create rights and obligations for third parties, and that the third parties would legitimately expect to have such rights protected and be required to perform their obligations, this should weigh in favor of characterizing the instrument as legally binding. This would be the case despite the signatory states' intent that is supposedly contained in the choice of designating an instrument an "MOU" rather than an "agreement."

Obviously, the category of instruments that raises the most concern in terms of design-choice effects on third parties is that of treaties that are both nonbinding and unpublished. The following Part evaluates the international regulation of labor migration in light of this discussion.

V. Obscurity and Nonbindingness in the Bilateral Regulation of Labor Migration

I have suggested that obscurity and characterization of a treaty as nonbinding should be resisted when bilateral agreements regulate the rights and obligations of third parties. I have further explained that this is warranted from a rule of law perspective. Considered in the context of labor migration, it is clear that bilateral agreements that give migrant workers a right, or place obligations on them, on their employers, or on others, must be accessible so that these actors can exercise their rights or orient their behavior to accord with the agreement's guidelines. This Part discusses the prevalence of these design choices in labor migration, and evaluates their desirability.

A. The Prevalence of Obscurity and Nonbindingness in BLAs

State practice in the bilateral regulation of labor migration exhibits both obscurity and nonbindingness. In a report published by the ILO, Piyasiri Wickramasekara finds that whereas in Africa, Europe and the Americas, 70-80% of bilateral arrangements on labor migration are formal agreements, almost 70% of Asian states choose what he terms the "looser MOU framework."[58] He explains this choice as being related to the greater ease of negotiation and implementation of MOUs, and the greater

57 Fuller, *supra* note 32, at 39-40.
58 Wickramasekara, *supra* note 7, at 21.

flexibility to modify and adapt them to economic and labor-market conditions. However, he suggests that a stronger explanatory factor is the ready availability of many countries of origin, especially in the Gulf or Southeast and East Asia, from which to draw migrant labor.[59] In other words, Wickramasekara suggests that receiving states find no need for "hard" undertakings, due to the high supply of workers whose states have little negotiating leverage. Further, he notes, "they also might fear that an agreement with one country may raise the possibility of further requests from other origin countries for similar agreements."[60]

Concerns arise when one is reminded that those countries which are least inclined to formally title their instruments as agreements and most insistent on designating them as MOUs are also those least inclined to publish their agreements.[61] They also include certain countries that have highly troubling track records in their treatment of migrant workers.[62]

Should the nonbindingness of an agreement hinge only on its designation as an MOU rather than a BLA? An anecdotal review of available instruments collected by Chilton and Posner[63] suggests that despite the different designation, many MOUs do indeed create rights and obligations for third parties and may bear considerable similarity to BLAs.

Take, for instance, Nepal's BLAs with Qatar, the United Arab Emirates (UAE) and Bahrain. The first of these is titled an Agreement; the latter two, MOUs. However, the content and structure of all three documents are rather similar. All three set terms for the recruitment of Nepalese employees,[64] require an individual work contract between employee and employer,[65] and specify the rights and conditions of work (the Qatar Agreement and UAE MOU require further that the contract be authenticated by a host state ministry).[66] All three protect, to some extent, the rights of workers, including vis-à-vis the employer, labor law rights, and the right to remit money home;[67] determine mechanisms for settling disputes between employer and

59 *Id.* at 21.
60 *Id.* at 22.
61 *Id.* at 24.
62 *Gulf Countries: Bid to Protect Migrant Workers*. Hum. Rts. Watch (Dec. 22, 2015), https://www.hrw.org/news/2015/12/22/gulf-countries-bid-protect-migrant-workers.
63 Chilton & Posner, *supra* note 11.
64 Agreement between His Majesty's Government of Nepal and the Government of the State of Qatar Concerning Nepalese Manpower Employment in the State of Qatar, Nepal-Qatar, art. 2-4, Mar. 21, 2005 [hereinafter Nepal-Qatar BLA]; Memorandum of Understanding between the Government of Nepal and the Government of the United Arab Emirates in the Field of Manpower, Nepal-U.A.E., art. 3, July 3, 2007 [hereinafter Nepal-UAE MOU]; Memorandum of Understanding in the Areas of Labour and Occupational Training between the Government of Nepal and the Government of the Kingdom of Bahrain, Bahr.-Nepal, art. 9, Apr. 29, 2008 [hereinafter Nepal-Bahrain MOU].
65 Nepal-Qatar BLA, *supra* note 64, art. 7; Nepal-UAE MOU, *supra* note 64, art. 6; Nepal-Bahrain MOU, *supra* note 64, art. 6.
66 Nepal-Qatar BLA, *supra* note 64, art. 10; Nepal-UAE MOU, *supra* note 64, art. 6.
67 Nepal-Qatar BLA, *supra* note 64, art. 4, 6 & 13; Nepal-UAE MOU, *supra* note 64, art. 4-6 & 8; Nepal-Bahrain MOU, *supra* note 64, art. 6-8.

employee;[68] and establish joint committees to oversee implementation.[69] The Qatar Agreement and the Bahrain MOU further authorize the joint committee to settle disputes relating to the agreement between the state parties.[70] While the MOUs are slightly less detailed on some of the issues, they do use determinative language, and clearly seek to guide the behavior of not only the state parties but also third parties and to establish mechanisms to ensure implementation and compliance. All three instruments are signed on behalf of the respective governments.

Labor migration MOUs often include multiple terms that the Inter-American Juridical Committee report names as evidence of formal, binding treaties: they specify what the parties 'agreed' to, and discuss ratification processes, entry into force, expiration and authentic language texts; they address implementation and create rights and obligations for employees and employers, and more.[71] Some of the same treaties also alternately use terms mentioned as evidence of nonbindingness, such as "enter into effect" or a determination that a commission shall "exert all possible efforts."[72] However, the degree of specificity, determinacy and formality in some MOUs renders them distinguishable from BLAs only due to their designation as MOUs.[73]

Weil suggests the concept of a "normativity threshold" beyond which an instrument is binding. I submit that we should be more critical in assessing which instruments have passed this threshold, and that designation as an MOU alone cannot suffice to determine nonbindingness.[74] Indeed, according to the ICJ's jurisprudence, especially its 2017 decision in *Somalia v. Kenya*, written documents concluded between states on issues governed by international law should be considered binding treaties even if designated as MOUs rather than agreements. It seems that this covers most bilateral arrangements on labor migration, including those designated as MOUs.

However, even if one rebukes the practice of designating labor migration instruments as MOUs, one must still recognize that nonbindingness is achieved in labor migration agreements and MOUs alike not only through instrument designation

68 Nepal-Qatar BLA, *supra* note 64, art. 11; Nepal-UAE MOU, *supra* note 64, art. 9; Nepal-Bahrain MOU, *supra* note 64, art. 11.

69 Nepal-Qatar BLA, *supra* note 64, art. 14; Nepal-UAE MOU, *supra* note 64, art. 6; Nepal-Bahrain MOU, *supra* note 64, art. 16.

70 *Id*.

71 *E.g.*, Memorandum of Understanding between the Government of the United Arab Emirates and the Government of India, India-U.A.E., Sept. 13, 2011 [hereinafter UAE-India MOU]; Memorandum of Understanding between the Government of the Republic of the Philippines and the Great Socialist People's Libyan Arab Jamahiriya, Libya-Phil., July 17, 2006 [hereinafter Libya-Philippines MOU]; Memorandum of Understanding between the Public Services Commission of Papua New Guinea and the Overseas Employment Development Board of the Government of the Republic of the Philippines, Papua N.G.-Phil., Mar. 14, 1979 [hereinafter PNG-Philippines MOU]; Nepal-UAE MOU, *supra* note 64.

72 *E.g.*, PNG-Philippines MOU, *supra* note 71; Libya-Philippines MOU, *supra* note 71.

73 *E.g.*, UAE-India MOU, *supra* note 71; Nepal-UAE MOU, *supra* note 64.

74 Weil, *supra* note 50, at 415.

but also through a variety of other means.[75] These include the use of hortatory language, lack of enforcement or dispute settlement mechanisms, and more.[76]

In other words, even if all BLAs were formal and public, one would still have to contend with the prevalent "softness" of some of the commitments contained in them and their inability or unwillingness to provide robust protection for the rights of migrant workers. This is where publicity comes back into the picture. When labor migration treaties are public, drafting and design choices can be challenged by migrant workers, employers, or civil society in either the sending or receiving states, or by international bodies, through advocacy, litigation, public relations campaigns, diplomatic pressure, and more.[77] Obscurity precludes the possibility of such action. Nonbindingness undermines the legal basis for challenging these instruments.

B. The Desirability of Obscurity and Nonbindingess in BLAs

Could BLAs' obscurity be justified along the lines of Deeks or Donaldson's defense of certain secret treaties? As already noted, scholarly patience for obscurity seems to owe a lot to the fact that the treaties under discussion in this context are perceived to be much closer to contracts than to lawmaking, on the scale presented in Part IV. Defense or weapon-related treaties do generally regulate strictly the bilateral relationship between the two state parties, and usually do not establish rights and obligations for third parties.

Conversely, almost by definition, BLAs address more than strictly state-to-state interaction. They facilitate, regulate and organize the movement of individual people from their state of citizenship to the receiving state where they will reside for an extended period of time and work. BLAs set the terms under which migrant workers may be allowed to travel, to settle temporarily elsewhere; to work, make a living; send remittances home, and return once their visa expires. Even when BLAs are completely silent about the rights of workers once in the receiving state, this silence is arguably a lacuna rather than a determination that there are no such rights for migrants. The migrants carry the question of the content and scope of their rights as they cross the border into the receiving state. Even though most BLAs in practice do little to protect or entrench the rights of migrant workers, they are,

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75 On the soft law debate, and soft law norms' success in attracting a state following despite not presuming to legally bind them, see Tamar Megiddo, *The Missing Persons of International Law Scholarship: A Roadmap for Future Research*, *in* International Law as Behavior 230, 252 (Harlan Grant Cohen & Timothy L. Meyer eds., 2021).

76 Jennifer Gordon, *People are Not Bananas: How Immigration Differs from Trade*, 31 Immigr. & Nat'y L. Rev. 649, 668 (2010).

77 *See, e.g.*, HCJ 2405/06 Kav LaOved v. Manager of the Foreign Workers Adjacent Unit, Nevo Legal Database (Dec. 17, 2018) (Isr.), where a long 12-year litigation by civil society led to the Israeli government committing to address excessive recruitment fees by negotiating bilateral treaties with sending countries to curtail the problem. The Court monitored government policy change on this issue and denied the petition only after several BLAs had been concluded and successfully addressed the phenomenon. The Court noted: "There is no disputing the need of signing international treaties to eradicate, or at lease reduce the outrageous phenomenon of collecting excessive recruitment fees at the expense of workers" (trans. by the author).

at their core, treaties about the rights of these third-party individuals, who take no part in negotiation and have no influence on their terms. Moreover, migrant workers are not the only third parties whose rights and obligations are determined by BLAs: so are employers, recruiters, placement agencies, companies providing money transfer services and many other actors involved in facilitating the migrant's journey, work and life in the receiving state.

In this sense, in entering into BLAs, states engage in action that is public in essence, rather than inter-state alone.[78] They engage in a practice that is much closer to lawmaking than it is to brokering a contract. When BLAs are not transparent, these third parties are unable to access knowledge of their rights and obligations. Rule of law dictates that they meet a stricter standard for transparency and publication than, say, defense treaties.[79]

In a discussion of BLAs, one might suggest that obscurity may in fact support the goal of achieving more labor mobility and therefore it may not be entirely pernicious, but rather, in certain circumstances, a small price to pay. It is true that obscurity may also shield a BLA from public objection to the entrance of migrant workers, and therefore work to increase opportunities for migrant workers. I would argue, however, that obscurity may similarly serve to shield pernicious treaty provisions, such that restrict, undermine or even violate the rights of workers. Bilateral instruments cover critical aspects of workers living and working conditions, create mechanisms to settle disputes between them and their employers, and have the power to legitimize or provide cover for abusive recruitment and employment practices.

One may further deny that BLAs create any human rights and insist that BLAs do strictly regulate the bilateral relationship between the two state parties and nothing else. On this view, many BLAs, which are silent or address only minimally the rights of migrant workers, regulate merely their labor force. Such a position may suggest that the key goal of these instruments is international coordination and regulation remains focused on high-level issues such as visa agreements, quotas and cooperation between enforcement agencies regarding the repatriation of migrants whose visas have expired. On this analysis, BLAs are equated to trade treaties, merely regulating the cross-border movement of another kind of good: workers, or their labor force.

This argument should be rejected. As Jennifer Gordon excellently put it, "people are not bananas."[80] There is a genuine and grave difficulty with treating them as a good. In fact, allowing for the classification of BLAs as contracts entails accepting the premise that migrant workers' labor force can somehow be dissected from their persons and regulated separately, without any effect on their human rights. However, that is not possible. Any regulation of people's labor force inherently entails regulation of their rights and obligations.

78 *Cf.* Sarah Thin, *Community Interest and the International Public Legal Order*, 68 Neth. Int'l L. Rev. 35, 54-6 (2021).

79 Fuller, *supra* note 32, at 39-40.

80 Gordon, *supra* note 76.

I have argued elsewhere against the perception of individuals as passive objects of international law. I have suggested, to the contrary, that individuals are in fact the ultimate subjects and practitioners of international law.[81] If one accepts this premise, then individuals have a legitimate expectation to be privy to the norms—soft as their formulation may be—which are laid down in BLAs that cover them. Refusing to recognize their subjectivity and allowing states to regulate individuals' workforce as if it were an object in and of itself takes BLAs dangerously close to becoming treaties that traffic migrant workers.

Another troubling point is the following: Donaldson and Deeks have underscored that secrecy does not inevitably reflect a lack of legal obligation and may, to the contrary, reflect respect for and faith in the legal obligation's standalone power to compel states, even without the threat of enforcement mechanisms that are unavailable for secret treaties.[82] However, when obscurity is coupled with nonbindingness, this defense cannot stand. In fact, what this combination seems to gravitate towards is a denial of the legal force of the undertaking. One may still ask why a state would choose to enter into a nonpublic, nonbinding MOU, but it should be pointed out that this is a different conversation.[83] Nonpublic, nonbinding labor migration MOUs do not reveal a similar respect for or recognition of legal obligation as the kinds of secret treaties discussed by Deeks and Donaldson.

Finally, the obscurity and nonbindingness of BLAs also bar the development of a possibly favorable outcome of bilateral regulation: a race to the top in terms of protecting the human rights of migrant workers. As I have argued elsewhere,[84] the transparency of BLAs may foster a race to the top, akin to the one evidenced in BITs. Briefly, almost all BITs include a Most Favored Nation (MFN) clause.[85] This clause requires states to treat investments made by nationals of one state "no less favourabl[y] . . . than investments of nationals of any third country."[86] In other words, MFN clauses work to forbid discrimination between foreign investors (the third parties whose rights are regulated by BITs) and aspire to standardize the treatment provided to them. MFN clauses further have the effect of reducing room for specificities in treaty negotiations, and they work to harmonize investment protection and establish a level playing field for all covered investors, regardless of nationality.[87] The result is a race to the top, where the gains won by one capital-

81 Megiddo, *supra* note 75; Tamar Megiddo, *The Domestic Standing of International Law: A Non-State Account*, 57 Colum. J. Transnat'l L. 494 (2019); *see also*, Tamar Megiddo, *Methodological Individualism*, 60 Harv. Int'l L.J. 219 (2019).

82 Donaldson, *supra* note 19, at 604-5; Deeks, *supra* note 21, at 717.

83 Chilton and Posner, among others, have attempted to answer this question, Chilton & Posner, *supra* note 11. So has Peters. Peters, *supra* note 6.

84 Megiddo, *supra* note 9.

85 Stephan W. Schill, *Ordering Paradigms in International Investment Law: Bilateralism—Multilateralism—Multilateralization*, *in* The Foundations of International Investment Law 109, 119 (Zachary Douglas et al. eds., 2014).

86 *Id*.

87 *Id*. at 120-21.

exporting state in negotiations with the capital-importing state are enjoyed by all BIT-covered investors regardless of their nationality.

Transparency in BLAs may lead to a similar race to the top, even without a formal MFN mechanism, if states become aware of improved conditions granted to other sending states by the receiving state and consequently demand that equal terms be provided to their nationals. Obscurity is an obstacle to the formation of a similar virtuous cycle. Nonbindingness also works to undermine this possibility. Wickramasekara has suggested that this is no coincidence: states fear exactly this type of scenario.[88] In other words, obscurity and nonbindingness are used to prevent an MFN-type race to the top.

Conclusion

At first glance, one may consider the choice to designate an international instrument as nonbinding, or to refrain from registering it with the UN, to be a design choice fully subject to the discretion of state parties to the instrument. If states want to sign a document that has no binding effect and keep it a secret, there is no apparent basis to preclude them from doing so.[89] But this Article challenges this supposed international law axiom.

As I have argued, treaties that create rights and obligations for third parties who were not part of the negotiation on their terms should be classified as akin to lawmaking and be held to rule of law principles. This is the case in the particular context of labor migration. Bilateral instruments purport to regulate the movement of individuals across countries; to shape the conditions of their lives and work; to determine dispute settlement mechanisms between workers and employers; to sanction abusive recruitment practices and create rights and obligations for the various individual actors involved in the migrant's journey – rights and obligations which they are expected to enjoy and perform. BLAs therefore ought to be classified as akin to lawmaking and therefore are expected to meet transparency requirements, among others.

I have further suggested taking with a grain of salt states' designation of labor migration arrangements as purportedly nonbinding MOUs. While it is clear that certain states do indeed intend for this designation to generate nonbinding treaties, the text and context of these documents, and the ICJ's jurisprudence militate against recognizing the validity and effectiveness of such intentions.

Finally, explanations and justifications provided for secret treaties do not extend to BLAs, whose offhand attempts to write off legal effect by designating a document as an MOU should be resisted.

88 Wickramasekara, *supra* note 7, at 22.

89 The Case of the S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).