

**MEMORANDUM OF UNDERSTANDING BETWEEN ANGOLA AND DRC AS A
PROVISIONAL ARRANGEMENT FOR THEIR MARITIME BOUNDARIES
DELIMITATION'S DISPUTE- REALITY OR MYTH?**

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ABSTRACT : *Mostly, African States keep on carrying their activities with the boundaries inherited from their colonial powers' arrangements until they discover a vital interest on these colonial boundaries before they stand for redefinition of these colonial boundaries. Angola and DRC couldn't make exception to this behavior. Divergent points of views on the validity of a colonial treaty render this redefinition impossible. These two States concluded a Memorandum of Understanding (MoU) which may lead them to a provisional arrangement known as Joint Development Agreement under UNCLOS in August 2003. In 2004, the two countries created, in principle, the Common Interest Zone as a new special exploration area on which they were jointly expecting to carry out exploration and exploitation of hydrocarbon activities. Unfortunately, this project is not effective until today. While researching the reasons pertaining this statu quo, this paper questions the validity of 1884's treaty, and then find out, after deep analysis of that MoU that the lack of good faith may be preventing these States from cooperation.*

KEYWORDS: Memorandum of Understanding; Obligation to cooperate; UNCLOS; Good faith.

INTRODUCTION

Democratic Republic of Congo (DRC) shares two borders with Angola. One in the north with an administrative border in Cabinda and the second in the South a natural border with the Congo River overlooking the mouth. Continuing his tireless efforts to restore the Congolese state's rights on its maritime territory as defined in the provisions of the Conventions on the Law of the Sea, the Minister of Petroleum has signed with his Angolan counterpart a Memorandum of Understanding (MoU) on the establishment of an Area of Common Interest which operational rules will be established after ratification by both parties. This trade agreement is the first step in the resolution of disputes relating to oil and gas development off the Congolese coast. However, the provisions of this MoU invalidate the will of the Angolan to work transparently with the Congolese since analytical review reveals that this MoU contains hidden defects. But, before mentioning the facts of this dispute as well as these defects, we would like to notice that there are two possible causes for maritime boundary disputes: *disputed sovereignty over land* and *Overlapping entitlements to maritime rights and jurisdiction*. In fact, under the first category, two countries can claim the same island (eg: arbitration case *Eritrea v. Yemen*) or the same area of mainland (eg: Bakassi peninsula in ICJ *Cameroon v. Nigeria*). To resolve this issue, the relevant rules of international law include those on the acquisition of sovereignty; they look to human activity (occupation and administration) of the territory. According to the second category, there can be overlapping claims between adjacent or opposite States for 12 mile territorial seas, 200 mile EEZs, and continental shelves, which may extend beyond 200 miles. Given the extension of rights to a 200 mile limit, overlaps are now more common than they used to be. To resolve issues of overlapping claims, the relevant rules

of international law are those on the delimitation of maritime boundaries. These rules can be found in the UN Convention on the Law of the Sea (UNCLOS), states practice and jurisprudence. This latter will retain our attention in the course of this topic. But, since Angola and DRC has some divergent point of view on 1884's treaty which is the sole instrument delimiting their boundaries, we would like to question the validity of this treaty before analysing the MoU in depth. Thus, after a briefing on 1884's treaties, we will first try to demonstrate the validity of colonial treaties, especially those relating to boundaries delimitation in Africa under the auspices of the Organization of African Unity (OAU) as well as International Court of Justice's jurisprudence in order to call the two States towards cooperation. Then, the States in dispute, have referred to 'cooperation' as a necessity ignoring that cooperation is more than a necessity, it is an obligation. And this ignorance rushed them to the conclusion of a biased MoU which rendered that cooperation a 'myth' or impossible as a summary analysis of the provisions of that MoU will show.

Background Information and Facts on Angola and DRC Maritime Dispute

In this part, we could understand the history of 1884's treaty, assess its validity through Conventions, recall its validity by OAU to which the States in dispute are parties and demonstrate how ICJ helped contribute in the affirmation of OAU's position in disputes relating to such treaties.

History of 1884's treaties between colonial powers

The maritime dispute between DRC and Angola has its root on colonial treaties, especially a treaty concluded on 26 February, 1884 and the second one signed at Bruxelles on May 25, 1891.

Leopold II, King of the Belgians, finding himself at the head of a "crowded state," achieves its colonial expansion destiny on the mysterious river banks¹, known as 'nzadi' common name for any large river in this region, even though the real name of the river, according to the Minister for Hydrocarbons of Bas-Congo, September 21, 2007, was "Kwango, the Colossus" There were several incidents before and after the "Congo Free State"² legal fiction that the fourteen states gathered at the colonial Conference of Berlin (November 15, 1884 - February 26, 1885) legitimized in the colonial international law.

On 26 February, 1884, Portugal and England had concluded a treaty that recognized the Portuguese sovereignty over both banks of the river Congo in exchange for a privileged treatment that Portugal undertook to grant to British interests. Meanwhile, on February 14, 1885, Portugal and International Association of the Congo, made by King Leopold II to manage the Congo, concluded an agreement pursuant to which Portugal recovered, along the coast, Enclave consists of Landana, Cabinda and Molembo while giving up to the association (King of Belgium), Ponta Banana, Boma with twenty kilometers of the sides.

Regarding the limitation of river borders, above mentioned agreement stipulates in Article 3, paragraph 6 that "the common border borrowed the course of Congo from its mouth to its confluence, the small river Uango Uango". This treaty had been modified by another treaty signed at Bruxelles on May 25, 1891. Under this new treaty 'the partial borders delimitation under the terms of article 3 paragraph 6 of the former treaty (February 14, 1885) is interpreted,

¹ E. Banning, Mémoires politiques et diplomatiques Comment fut fondé le Congo belge, 1927, p. 9

² 'Congo Free State' is referred to 'Etat Independent du Congo in French' during colonial time.

precised and modified according to the following terms: 'in the river 'Congo ... and from its mouth to the parallel passing by Noki, the dividing line of the waters belonging to the two states will be on the average line of the waterway usually followed by deep draft vessels'. Thus, the treaties mentioned above and the way they have been modified may demonstrate that Portugal and Belgium have determined, however, with vagueness, only the borders between the two States (DRC and Angola) on the Congo River. Moreover, Portugal has increasingly acquired the current Cabinda enclave in which is Landana geographically located on the side of the DRC and separated by a land border.

In fact, the vagueness of this delimitation has resulted in significant reduction of DRC's coast pushing DRC in a situation of a geographically disadvantaged state as stipulated by Article 70 of the Convention of 10 December 1982. A situation which may benefited Angola to occupy the disputed area within the legal vacuum since the former colonial powers of the two countries had not determined the maritime areas (territorial sea, contiguous zone, continental shelf and exclusive economic zone) on which the 'two states would exercise their sovereignty. And even after the entry into force in 1994 of the UNCLOS ratified by both states, Angola may be occupying several oil blocks which are claimed by DRC according to UNCLOS.

The precise legal nature and effect of 1884's treaties in Africa are uncertain under international law, but the validity of many of the treaties could be easily questioned and rendered certain under traditional international law. However, in light of both the questionable tactics used by the colonial powers in inducing the Heads of their colonies to conclude the treaties, the exact nature of the legal status of those treaties in relation to the European colonial powers has already been resolved in international law after the advent of States' independences and the entering into force of 1978 Vienna convention on States succession with respect to treaties. After, independences, the former colonies recovered their sovereignty and acquire the legal capacity to conclude treaties in international affairs. Although the concept of sovereignty has different meanings and is prone to ambiguity, its most common application in the realm of international relations, as opposed to domestic law is derived by linking the two notions of 'independence' and 'statehood'. Since the State is the fundamental unit of international law, a fully sovereign State is an independent one. With respect to international considerations, this independence can exist only as a matter of law, such that a State is capable of creating a voluntary position of dependence through its treaty-making powers. Thus, Angola and Democratic Republic of Congo got their independence from their former colonies, each of them is considered as a State capable of being party to an international treaty.

If the term of 'statehood' implicitly or explicitly involves not only sovereignty but also population, effective power and territory, it is very important that many newly independent States ignored to reconstitute or redefine their boundaries with their neighbors. Mostly, African States keep on carrying on their activities with the boundaries inherited from their colonial powers' arrangements until they discover a vital interest on these colonial boundaries or just beside them before they stand for redefinition of these colonial boundaries. A good task, but source of instability and spoiling of relationship between neighboring States in Africa. Angola and DRC couldn't make exception to this task since they still want to redefine their maritime boundaries. Hence, after vain temptations to conclude a boundary agreement, these two States began negotiations in May 2003 and signed their first Memorandum of Understanding (MoU) in August 2003. This agreement established joint technical committees mandated to prepare proposals to resolve maritime border disputes. In 2004, the two countries created, in principle,

the common interest zone (CIZ) as a new special exploration area.³ The Angolan government approved this initiative in September 2004,⁴ but DRC only did so in November 2007.⁵ Although the DRC ratified the MoU, the decision was not unanimous. Senator Lunda Bululu opposed it because the area and coordinates of the CIZ were imprecise and the members of the Congolese Assembly did not have information on the extent of hydrocarbon reserves or the blocks where production was already underway. The MoU was all the more disadvantageous to the DRC because it did not provide compensation for the loss of a share of the royalties already received by Angola from blocks under production. Unfortunately, The CIZ has not resolved the dispute between Angola and the DRC for it is in a standby because the two States are sticking on their divergent points of views.

DRC wants the present maritime space taken from 40 km off the coast to 200 km, or an expanse of 4,000 square meters, an area that covers the oil zone, where Angola draws 500,000 barrels per day as DRC produces only 20,000 barrels/day. By doing so, DRC aims to receive its fees and take possession of half of oil deposits from two blocks exploited by several multinational companies for Angola. Then, to prevent this, Angola has approved the establishment of an agreement on the delimitation of its maritime borders with DRC on condition that the strict respect of the agreements signed between Portugal and Belgium are taken into consideration. To counter this assumption, DRC had referred to international arbitration by sending a request to the United Nations, for the extension of its continental shelf, within the delimitation of its maritime borders, in accordance with the sea rights.

From these two divergent contentions, we can notice that Angola is firmly basing its argument on the validity and the application of 1884's treaty between Belgium and Portugal while DRC is rejecting this treaty and requesting its rights of sea. But, can DRC actually deny this treaty when all the African States stood for the principle of inviolability of borders inherited from colonial powers? Thus, in this dispute, 2 main legal issues arise: the problem of validity of 1884 treaty and the question of inviolability of African borders inherited from colonial powers on one hand and the issue of Joint Development Agreement as a provisional arrangement between Angola and DRC.

The problem of validity of 1884 treaty

The problem of validity of 1884 treaty like any treaty cannot be discussed without mentioning what an international treaty is. Also, in order to see whether this treaty looks the same like nowadays treaties, the keys features of a treaty may be discussed first.

Generally, a treaty is an agreement between sovereign states that has been signed and ratified. Treaties are a source of international law as identified under Article 38 of the statute of the international court of justice alongside international custom, general principles of law, judicial decisions and writings of publicists. The term 'treaty' can be used as a common generic term or as a particular term which indicates an instrument with certain characteristics.

³ Common interest zones (CIZs), which can be established when a deposit is located on the maritime borders of two or more states, consist of an ad hoc arrangement for joint administration of the maritime area in question. On this basis, Angola created another CIZ in June 2003 with Congo-Brazzaville, in which both countries agreed to share the revenues from the Lianzi oil field. "Champ pétrolier de Lianzi: plus d'un milliard de dollars pour l'exploitation", *Journal de Brazza*, 2 March 2012.

⁴ "Zone pétrolière commune", *Africa Energy Intelligence*, no. 494, 22 September 2004.

⁵ Lambert Mendé Omalanga, minister of hydrocarbon, approved it on 30 July 2007, and the National Assembly ratified it in November. Law 07/004 of 16 November 2007 authorising ratification of the agreement on the development and production of hydrocarbons in the maritime common interest zone signed by the DRC and Angola in Luanda, on 30 July 2007.

The term 'treaty' has regularly been used as a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation. Both the 1969 Vienna Convention and the 1986 Vienna Convention confirm this generic use of the term 'treaty'. The 1969 Vienna Convention defines a treaty as "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". The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties. In order to speak of a 'treaty' in the generic sense, an instrument has to meet various criteria. First of all, it has to be a binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making power. Thirdly, it has to be governed by international law. Finally the engagement has to be in writing. Even before the 1969 Vienna Convention on the Law of Treaties, the word 'treaty' in its generic sense had been generally reserved for engagements concluded in written form. The 1884 treaty respond to all these requirements although the ways of its conclusion may be questionable. The problem which still arises with this treaty concerns the scope of their binding force. In other words can it continue to bind the newly independent States DRC and Angola?

The absence of customary law guiding this issue pushed the U.N. General Assembly in 1961 to ask the International Law Commission (ILC) to study state succession as a pressing international problem.⁶ After decades of discussions, the ILC finally proposed draft articles on state succession in respect of treaties and on state succession in respect of property, archives, and debts, in 1978 and 1983, respectively.⁷ These two sets of articles proposed elaborate taxonomies of types of state succession and rules governing the effect of each category of succession on treaties, property, archives, and debts. With some modifications, U.N. member states voted to finalise these provisions as the Vienna Convention on Succession of States in Respect of Treaties of 1978 (1978 Convention) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 (1983 Convention). But, in our current essay we are going to focus on 1978 Convention because unlike to 1983 Convention, 1978 Convention entered into force. The 1978 Convention binds its parties, but successor states will not be treaty parties prior to their succession. The 1978 Convention does not therefore address whether it binds successor states, thus it may not control whether successor states are bound by its substantive provisions on the continuity or discontinuity of treaties upon succession. Neither the 1983 Convention, which has seven parties, nor the 1978 Convention, which has twenty-two parties, have acquired the status of customary law through widespread acceptance of its provisions, which states would have indicated by acceding to the convention.⁸ They do not therefore bind any successor state as a matter of customary law. Since the subjects of the dispute are former succession States, I would like to discuss about the law of succession States and the theory developed towards such states in international law and specifically, another one developed under the auspice of OAU since 1964. Thus, I will demonstrate how

⁶ G.A. Res. 1686 (XVI), ¶3, U.N. Doc. A/RES/1686(XVI) (Dec. 18, 1961).

⁷ United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Volume II, Vienna, Mar. 1-Apr. 8, 1983, *Draft Articles on Succession of States in Respect of State Property, Archives and Debts Adopted by the International Law Commission at Its Thirty-Third Session*, U.N. Doc. A/CONF.117/4 ; United Nations Conference on Succession of States in Respect of Treaties, Volume III, Vienna, Apr. 4-May 6, 1977 and July 31-Aug. 23, 1978, *Draft Articles on Succession of States in Respect of Treaties with Commentaries Adopted by the International Law Commission at Its Twenty-Sixth Session*, U.N. Doc A/CONF.80/4

⁸ Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, in 5 ENCYCLOPEDIA OF LAW & ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 603, 613 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

DRC's rejection of the colonial treaty seems to be impossible under the auspice of OAU as well as according to ICJ's jurisprudence on borders inherited from colonial powers.

The Principle of Inviolability of African Borders Inherited From Colonial Powers vs. The Clean Slate Theory

As a term of art, State succession refers to what occurs to the international legal obligations of a State with sovereign control over a specific territory upon the surrender, either consensual or nonconsensual, of that control to another State. Upon a succession of States, there is agreement that a new State cannot escape compliance with customary legal practices.⁹ There is less agreement, however, as to when a new State is obligated to adhere to the conventional treaties of its predecessor State.

One major classification of successor States under international law is the newly independent nation. Conventional law broadly defines a newly independent State as a territory that, prior to securing independence, was 'dependent' upon another State for the conduct of international relations. DRC and Angola were dependent upon colonial powers, namely Belgium and Portugal. According to the representative for the United States to the International Law Commission (ILC), a successor State will be deemed to have been a 'dependent territory' if it previously had the status of a colony, as demonstrated by protectorate, colonial,¹⁰ trust, or mandate status. Having been dependent upon a predecessor State, such a territory was without sovereign, autonomous control over the conduct of foreign affairs during its colonial experience. Subsequent to independence, the newly independent State acquires sovereign authority over its territory and international relations, which previously was the responsibility of a predecessor power. As a result, a case of State succession involving the release of a dependent territory creates a new international identity. Conventional international law provides that a dependent successor State, as a newly independent entity, is not legally required to inherit a predecessor State's treaties because independence transforms its identity.¹¹ To provide the newly independent State latitude in developing foreign relations, international law affords a 'clean slate theory' regarding preexisting treaties. Under the 'clean slate theory', the ex-colonial dependent territory may renounce any or all treaties entered into under colonial domination.

The 'clean slate theory' gives a newly independent state the option to join selectively bilateral¹² and multilateral¹³ treaties of colonial origin, provided that they expressly, or impliedly by their conduct, consent to be bound. But this option hasn't been seized by DRC as well as Angola. Neither DRC, nor Angola expressly consents to be bound by the 1884's treaty like some newly independent States did. But, the long silence of DRC and Angola's occupation and exploitation of the disputed area since many years can be regarded as an implied consent to be bound by the 1884's treaties. To prevent estoppel, DRC could have behaved like Israel and Burkina Faso.

⁹ See International Law Association, *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of Their Predecessors*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-THIRD CONFERENCE 619 (L.C. Green ed., 1968)

¹⁰ See YASSIN EL-AYOUTY, THE UNITED NATIONS AND DECOLONIZATION: THE ROLE OF AFRO-ASIA 3 (1971) (defining colonialism as "the political control of an under-developed people whose social and economic life is directed by the dominant power")

¹¹ See Vienna Convention, art. 16. The Convention provides: A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

¹² See Vienna Convention, art. 24,

¹³ Ibid, art.17

The creation of Israel and Burkina Faso (formerly Upper Volta) represents two examples of the application of the 'clean slate theory'. Upon declaring independence, Israel announced that it was a new international actor unconstrained by the treaties of the Palestinian nation.¹⁴ Similarly, Burkina Faso argued for its right to renounce preexisting French treaties based on its sovereign independence from the French Government.¹⁵ Burkina Faso argued for its right to renounce preexisting French treaties based on its sovereign independence from the French Government. While the histories of Israel's and Burkina Faso's State succession are distinct, they have in common the declaration of newly independent nationhood and the assertion of the right to repudiate all treaties formerly applied to them as dependent territories. Nowadays, can DRC presume of its title of a newly independent nationhood and repudiate the 1884's treaty between Belgium and Portugal like Burkina Faso did so far?

In principle, a State should not be held answerable to treaties that it neither helped create nor ratified, but that nevertheless were imposed on its territory. But, the new State must consider the importance of fostering stability in international relations by maintaining some continuity of treaties. African States understood this latter contrast and opt for the continuity of boundary treaties inherited from colonial powers through the principle of inviolability of African borders inherited from colonial powers. Therefore, if Burkina Faso was able to do that it might be in a time prior to 1964. Later on, it also rejected the clean slate theory and based its arguments on the application of the inviolability principle of borders inherited from colonial powers in its boundary disputes against Mali in 1983.

Considering the form of 1884's treaties, we can assume that they are similar in all important respects to treaties made between European States. Therefore, they are similar to all treaties governing international relations during the colonization era. Thus, the way of concluding treaties at that time has nothing illegal according to the traditional international law. The available evidence shows that the colonizing powers regarded their treaty arrangements as having legal consequences. And this evidence has been reinforced in the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal). At some point in April 1960 an agreement ('1960 Agreement') was signed between France and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (a French territory) like DRC in the current case and Guinea-Bissau (a Portuguese territory) like Angola in the current case. Through the 1960 Agreement the parties duly established the maritime boundary between their respective territories. After independence, a dispute between the two countries arose regarding the delimitation of their colonial boundaries. After vain negotiations through which Senegal sought to reaffirm the validity of the 1960 boundaries which Guinea-Bissau were rejecting and calling for a fresh delimitation without reference to the 1960 Agreement, both parties had decided to refer the matter to a Tribunal in order to know whether '*the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?*' In responding to the question brought before it, the Tribunal observed:

¹⁴ See Succession in Fact, 2 Whiteman Digest § 2, at 807 (quoting statement of Israel Appeal Tribunal that "[t]he State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government"); Laws of State Succession, 2 Whiteman Digest § 10, at 972-73 (reproducing U.S. Department of State memorandum transmitted to the American Mission in Tel Aviv in 1949 which stated "[i]t is the view of the Government of Israel that, generally speaking, treaties to which Palestine was a party . . . are not in force in relation to the Government of Israel").

¹⁵ See generally UKON UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIE*, at 161 (noting the renunciation of French treaties by Burkina Faso)

The *Agreement* concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that *Agreement*, namely the territorial sea, the contiguous zone and the continental shelf.¹⁶

Although the 1884 treaty between colonial powers failed to appear much clear, determinative and precise as the 1960 agreement between France and Portugal, it is very important to notice how the Tribunal rejected the ‘clean slate theory’ in favor of borders inherited from colonial powers. Moreover, African States decided to reject the ‘clean slate theory’ and keep the borders inherited from colonial powers for the sake of stability in Africa. And this idea seems to fit well with the idea asserted in the 1978 Vienna Convention on Succession of States in respect to Treaties when it states that “a succession of States does not as such affect on a boundary established by a treaty; or over obligations and rights established by a treaty and relating to the regime of a boundary.”¹⁷ Furthermore, this position of African States will be supported by the ICJ in *Frontier Dispute (Burkina Faso v Republic of Mali)*.¹⁸

Burkina Faso and Mali were formerly a part of what was called French West Africa. The dispute centered on ownership of a 100 mile strip of land (commonly known as the Agacher Strip) between the two countries, an area reportedly rich in mineral resources. While the Organization of African Unity (‘OAU’) and other individual African countries had tried in vain to mediate the 2 countries in dispute, both parties decided to refer the matter to the Court in September 1983, by special agreement.

Burkina Faso’s claim to the area was grounded upon the frontier delimited by the French colonial administration and the principle of *uti possidetis*, which connotes that frontiers inherited from colonial powers cannot be altered without the voluntary consent of the parties.¹⁹ To prove its claim it relied on old colonial maps, which it considered to be authentic.²⁰ Mali challenged the assertion of Burkina Faso, contending that the disputed area had historically and geographically formed part of what was French Sudan. Mali also rejected Burkina Faso’s reliance colonial maps, arguing that such maps were contradictory and largely conflicted with existing legal documents. It further contended that most of the inhabitants of the area were ethnically Malian contrary to the assertion of Burkina Faso.²¹

The Court was requested to answer the following question:

What is the line of frontier between the Republic of Upper Volta and the Republic of Mali in the disputed area as defined [by the parties]? The disputed area consists of a band of territory extending from the sector Koro(Mali) Djibo (Upper Volta) up to and including the region of Beli.

In that case, when it comes to the court to see whether it could have applied a French law which was in force during the period, the Court observed that ‘becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power as

¹⁶ ‘Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau’, Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) [1989] ICJ Pleadings 1. 152–3 [88] (Mr Barberis)

¹⁷ Vienna Convention, art.11

¹⁸ (Judgment)[1986] ICJ Rep 554 (‘Frontier Dispute’)

¹⁹ See Gino Naldi, ‘Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective’ (1987) 36 International and Comparative Law Quarterly 894.

²⁰ *ibid*

²¹ *ibid*

part of the ordinary operation of the machinery of State succession.²² It further observed that the principle of *uti possidetis* freezes the territorial title. As such, French colonial law may play the role only as one factual element among others or as evidence indicative of what has been called the 'colonial heritage'.²³ Thus, in that case, we can notice that the Court relied on the principle of inviolability of African borders inherited from colonial power (also known as the principle of *uti possidetis*) and proceeded to delimit the line between Mali and Burkina Faso. Obviously, it is true that it was an express request by the parties that the Court resolve their dispute on the basis of *uti possidetis*, but the court could have declined this request if it did not find any interest in this request. The court, after having analyzed that request found the opportunity to express out the importance of the principle of inviolability or intangibility of African borders in order to bring and keep peace in this continent. Thus, on the importance of this principle, the Court observed that '[i]ts obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power'.²⁴ Interestingly, The Court also observed that the obligation to respect pre-existing international frontiers in the event of state succession derives from a general rule of international law whether or not it is grounded in the principle of *uti possidetis*.²⁵

The demonstration above is made not only to show how colonial treaties' repudiation is not easy but also to prove the sanctity of the principle of inviolability of African borders inherited from colonial powers in current international law. The need to maintain peaceful relations among African nations is a great necessity. And it could not be effective if States could not prevent themselves from irredentist claims based on previous colonial administrations. Also, it is the lieu to mention that if African Union finds through this principle a way to promote stability in Africa, the role of ICJ in peace keeping is not to be neglected. Angola and DRC, like many other States might have understood this assumption, that's why the practice nowadays tends to focus on productive negotiations rather than judicial decisions. Importantly, when the boundary dispute relates to a productive area, I mean, full of potential natural resources as it is the actual case between Angola and DRC, disputes become tough and consensus is hardly effective. Therefore, any reliance by DRC on the clean slate theory as well as the strict application of *uti possidetis* principle by Angola will render the resolution of this dispute impossible. Somehow, States have another tool to resolve their dispute when they come to unfruitful negotiations, especially in maritime boundaries dispute. This tool has been derived from the principle of cooperation in international law and embodied in the UNCLOS as a principle to cooperate. However, while some States consider this principle as an obligation, others consider it as a necessity.

Obligation To Cooperate In International Law: Real Obligation Or Just A Necessity?

Is there any obligation upon States to cooperate? International law has played a pivotal role in advocating for co-operative arrangements in the exploitation and exploration of cross boundary deposits. International Law primarily confers on coastal States sovereign rights to explore, conserve and manage the natural resources. But, when the natural resource straddle beyond the limits of a coastal State's jurisdiction and overlaps with another State (s), Obligation to

²² Frontier Dispute [1986] ICJ Rep 554, 568 [30].

²³ Naldi, 'Frontier Dispute', above n 17, 895

²⁴ Frontier Dispute [1986] ICJ Rep 554, 565 [20].

²⁵ Ibid 566 [24]

cooperate, otherwise, exercise of mutual restraints with respect to the unilateral exploitation of the resource by States has to prevail.

Article 77 (1) and (2) of the UNCLOS 1982 grants the coastal States inherent and exclusive sovereign rights to explore the seabed and exploit its natural resources; thus no one can undertake activities of exploration and exploitation without the express consent of the Coastal State. The analysis of this article can be understood in the sense that a coastal State has the sovereign rights to explore and exploit seabed resources. This positive right can be considered as an obligation to cooperate since paragraph 2 of the same article goes further in qualifying these sovereign rights as 'exclusive rights'. The fact that a coastal State excludes other States from exploring or/and exploiting the resources on its seabed does not mean that this coastal State has also the right not to cooperate with other States; rather, it is a way to call its neighbor(s) for cooperation in preventing any exercise of the rule of capture by its neighbors. In addition, this article could have stopped in its formulation to the first paragraph: "*The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources*". Therefore, the existence of the second paragraph through the word 'exclusive' presumes the obligation of the Coastal State to cooperate. Better, when the resources concern hydrocarbon such as oil and gas, States practice shows that these items help States to cooperate as soon as possible in order to fructify these resources. Finally, under UNCLOS, there is an obligation on States "*to make every effort to cooperate*".²⁶ Another provision of UNCLOS calling to cooperate is article 123, dealing with enclosed and semi-enclosed seas. It states: "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties". This provision is relevant both to JDA regarding semi-enclosed seas, e.g. Malaysia – Thailand, Malaysia – Vietnam and Indonesia – Australia agreements on the South China Sea and the Timor Sea, and to cross-border unitization agreements also related to semi-enclosed seas, e.g. the United Kingdom – Norway and the United Kingdom – the Netherlands on the North Sea. Similar examples can be found in the Persian Gulf.²⁷ The question arises whether this general requirement to cooperate applies to transboundary hydrocarbons found in such seas. Two facts leave some doubts. First, the wording of the article does not contain any specific and legally enforceable obligation; it is more exhortatory than obligatory. Second, the article specifies some objects it deals with. They are living resources of the sea, marine environment, and scientific research. It is hard to find place among them for hydrocarbon or another nonliving resources. Nevertheless, it is argued that it goes beyond a mere recommendation and constitutes a legal obligation, and even if it does not apply directly to nonliving resources it serves as a useful analogy.²⁸ Also, Article 5 of the UN Fish Stock Agreement expressly supports cooperation on utilization of transboundary resources when it states that "in giving effect to their duty to cooperate in accordance with the Convention", clearly implies that cooperation is more than just recommendation, though it concerns only marine living resources. Therefore, Even if a state is not a signatory to UNCLOS, there is ample evidence to support the view that, that obligation exists under International Customary Law.

Generally, States don't hesitate to cooperate in a situation of cross border unitization. However, the issue of cooperation as an obligation for States in dispute on an area seems to be a puzzle to which international community may respond. Interestingly, the UNGA tried it best in issuing

²⁶ Article 74 and 83, UNCLOS, 1982

²⁷ Ong, David M. *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?* In: American Journal of International Law. Vol. 93(1999) pp. 771-804, at 785.

²⁸ Ibid at 782

some resolutions. Better, Certain UNGA resolutions, in particular, adopted by overwhelming majority of the member states, have a more obligatory quality than others and indicate the willingness of the international community to be guided by the principles they embody.

Talking about UNGA resolutions on the present issue, some experts mentions the failure of the 1972 Stockholm UN Conference on the Human Environment to accept the general principle of cooperation between states sharing natural resources (of all kind, not only of common deposits of liquid minerals). Soon after that, in December 1973, UNGA adopted Res 3129 (XXVI) followed by Res 3281 (XXIX) prescribing the necessity for co-operation between countries in the exploitation of natural resources common to two or more States in order to achieve optimum use of such resources without causing damage to the legitimate interest of others. But, still, we can clearly see that instead of an obligation, the UNGA recommends cooperation for its necessity, not only for the benefit of States in cooperation but also for the peace and friendly relationship between States. The UNGA talked about necessity instead of obligation because its power is limited to making recommendations. And still we can see that its recommendation on this issue seems to follow the decision of the ICJ in the *North Sea Continental Shelf Cases* where it supported the view that obligations of countries to negotiate international border disputes including negotiation around development of common hydrocarbons reservoirs does not require the countries “to enter into agreements” as an obligation, but “to pursue them as far as possible with a view to conclude agreements” as a necessity. And here, it is important to mention that an obligation may be more restrictive than a necessity. Although necessity can call for an obligation in order to be reached or fulfilled, in the circumstance of maritime dispute settlement a party may differently appreciate what its neighbor qualifies as necessity if its interests are threatened. In the case of disputes relating to an area containing oil and gas, we have to mention that a mere necessity is not sufficient since States focus more on economic consideration than political one. Nevertheless, some scholars come to the conclusion that a rule of Customary International Law requiring co-operation is now applicable to common hydrocarbon deposits.

However, if the obligation to cooperate is still dividing the practitioners of international law, the mutual restraints with respect to unilateral exploitation of the resource seem to unify scholars of international law. We can also see the analogy of these views with that of the UNGA when it adopted in 1974 the Charter of Economic Rights and Duties of States. Article 3 of that reads: “In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others”.²⁹ Further, in *Guyana vs. Suriname*, the tribunal concluded that there is a developing rule of customary international law requiring cooperation among states with a maritime dispute.³⁰

Considering obligations to cooperate in general and that to cooperate in the form of unitization as a rules of international customary law, it can be firmly said that first requirement, settled state practice, is definitely fulfilled according to Article 38 of the Statute of the International Court of Justice which defines international custom as “evidence of general practice accepted as law”... But this definition distinguishes two constituent elements of international custom:

²⁹ Charter of Economic Rights and Duties of States (adopted by UN GA Resolution 3281(XXIX), 12 December 1974, UN Doc. A/Res/29/3281), article 3.

³⁰ Cameron, D, “The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and Caribbean” (2006) I.C.L.Q 559-585 at p.562.

general practice and acceptance of this practice as law by international law subjects, *opinio juris sive necessitates*. We can say that the first one is already fulfilled for we do have number of State practice of joint development. Nevertheless, although it is worth mentioning the importance of the concept of joint development in enhancing global peace, good relationship among States and also the economic revenue which States can draw from the practice of joint development, it is still considered as soft in international law. It hasn't been mandated by international law to be peremptory norm. Unfortunately, it appears that it has not acquired the status of *opinio juris* as to make it state practice of customary international law. The division between international practitioners and States practice evidenced that some consider this principle as an obligation whereas others think that it is a necessity. Moreover, the voting of UNGA Res 3129 (77 in favor, 5 against (mostly Latin America states), and 43 abstentions (industrialized states)), leaves some doubt whether it may be considered as a general *opinio juris*. Although State practice on joint development is rapidly growing, it is very important to notice that acceptance of joint development as a peremptory norm is still dividing States. Therefore, joint development is still soft law because the obligation to cooperate concerning joint development fails to fulfill the 2 requirements of international custom. Hopefully, the interest of States in opting for joint development on one hand and the number of scholarly views as well as some judicial decision inviting States to cooperation may later on bring State to accept their practice of joint development as a law. By this way, States could help to change the current status of joint development in moving from soft law or mere cooperation to customary international law although this voyage seems to be a little bite long because of States' selfish interests characterized by different political and economic systems, traditions of conflict and degrees of national sensitivity. Nevertheless, while calling the two States to utilize again the "principle of cooperation" provided by UNCLOS regarding the resources beneath the disputed areas, they may understand this principle as an obligation more than a necessity and use it with good faith since the lack of good faith constitutes a major obstacle of the implementation of the MoU resulted from their former cooperation.

Angola and DRC Joint Development Agreement: A Good Avenue For Cooperation?

Angola and DRC has decided to cooperate on a Common Interest Zone through a Joint Development Agreement (JDA) commonly known as "Protocol d'Accord" according to international law and especially the provisions of UNCLOS.

The UNCLOS Convention explicitly mentions arrangements similar to the JDA for the case of overlapping claims within the continental shelf or EEZ. Articles 74 (3) and 83(3) state:

the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

From this provision, we can understand that the obligation to cooperate include (1) duty to inform and consult; and, (2) duty to negotiate in good faith to reach an agreement which will not hamper the final delimitation. In fact, *the duty to inform and consult* broadly developed concerns the obligation to share information regarding mineral resources found in disputed areas, including the location of these resources and the intent to undertake together or alone exploration and exploitation activities. However, *the duty to negotiate in good faith*, although it relates to the manifest wills of the parties to make every effort to enter into a practical provisional arrangement, it seems to be one of the old and complex principles of international

law. It is not easy to explore all its implications and prove the bad faith of one party against the good faith of the other party(s).

What is “good faith”

The principle of good faith is an old and a complex one used in national level as well as international sphere. From national transactions to international commerce and through agreements, treaties, protocols and conventions, this principle plays an important role for the elaboration and the survey of friendship relations. However, it found various definitions from scholars as well as judicial courts.

Professor Forte³¹ rightly stated that “good faith as a concept or as a general principle is difficult to define”. Zaccaria³² sees the duty of good faith as one that requires a party to act reasonably as he would expect the other party to act towards him. Another writer defines good faith as “not only the standard of honesty in fact that applies ...but also and more significantly, reasonable standards of fair dealing”.³³ With particular reference to international trade, Powers³⁴ defines good faith as “an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act”. Zimmermann and Whittaker identify five constituents of good faith. These are: the exclusion of bad faith conducts, the requirement of parties to a contract to keep to its terms (pacta sunt servanda), the requirement on a party not to behave in a manner as to make the position of the other party worse; the prevention of the parties from relying on or being bound by an absurdity arising from their agreement and; the prevention of a deliberate breach of a contract.³⁵

Several international tribunals, including the ICJ, have illuminated fundamental elements of good faith negotiation: meaningful negotiations, willingness to compromise, compliance with temporal and procedural requirements, and serious efforts to reach an agreement. As a general concept in international law, good faith is an obligation of conduct rather than an obligation of result except in the context of NPT where both obligations are required.³⁶ That may be the reason which brings the ICJ in the Gulf of Maine case to assert that parties are under a duty to negotiate with a genuine intention to achieve a positive result.³⁷

In the 1969 North Sea Continental Shelf case, the ICJ asserted that negotiating parties should “not merely . . . go through a formal process of negotiation” but rather “are under an obligation so to conduct themselves that the negotiations are meaningful.”³⁸ In Lake Lanoux, the Arbitral Tribunal ruled that good faith would be violated “in case of unjustified breaking off of talks, of abnormal delay, [or] of failure to follow agreed procedures.”³⁹ Judge Higgins, in her

³¹ See, A.D.M Forte, “Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations in Scots Law” in ADM, Forte (ed.), Good faith in Contract and Property law (Oxford: Hart Publishing, 1999), 77, p. 101.

³² E.C. Zaccaria, “The Dilemma of Good Faith in International Commercial Trade” [2004] *MqBLJ* 5.

³³ M. Bridge, “Good Faith in Commercial Contracts” in R. Brownsword et al. (eds.) Good Faith in Contract: Concept and Context, supra, p. 139.

³⁴ P. J. Powers, Defining the indefinable: Good faith and the United Nations Convention on the Contracts for the International sale of Goods”, (1999) 18 *J.L. Com* 333 at 352 cited in W. Tetley, Q.C.

³⁵ S. Whittaker, and R. Zimmermann, “Coming to terms with good faith”, in R. Zimmermann, and S. Whittaker, (eds) Good Faith in European Contract Law. Cambridge, Cambridge University Press, 2000. pp. 690-693.

³⁶ In its 1996 Advisory Opinion, the ICJ held that Article VI of the NPT requires both conduct—good faith negotiations—and result—nuclear disarmament. However, A new advisory opinion by the ICJ is still needed in order to clarify the application of the principles of good faith in the nuclear context.

³⁷ Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 246, ¶ 87 (Oct. 12).

³⁸ North Sea Continental Shelf Case, F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 1947 at 3, ¶ 85.

³⁹ Lake Lanoux Arbitration (Fr. v. Spain), 12 R. Int'l Arb. Awards 281 (1957) at 281

Separate Opinion in the Wall Advisory Opinion, noted that in addition to existing substantive obligations, states should honor the “procedural obligation to move forward simultaneously.”⁴⁰ States also must not insert procedural flaws into the negotiations that result in susceptibility to delay or rupture or render it impossible to reach the agreement.

Analytical review of the MoU intended to establish the JDA between Angola and DRC

The first and general flaw which appears in this MoU is that the MoU made no mention of the United Nations Conventions on the Law of the Sea (UNCLOS) 1982 or the Geneva Convention on the Law of the Sea 1959 UNCLOS which singularly defines the rules for determining the Continental Shelf (CS), the limits of maritime space, the operational requirements when creating a Common Interest Zone (CIZ) and also the inviolability of the Economic Exclusive Zone (EEZ).

Had the Congolese authorities referred to 1982 UNCLOS and the 1959 Geneva Convention provisions during the negotiations, they could have claimed for the definition as well as the delimitation of maritime boundaries between DRC and Angola in order to determine the EEZ of DRC before determining the eventual common interest zones. However, it is important to mention that the current Common Interest Zone in question here relates to the one which confirms the lane Kalema, also known as Kalema corridor.

The MoU contains 10 articles. But my analysis of this MoU will focus on its articles which seem to pose problem. Thus, article 1 states:

It is created a Common Interest Zone (CIZ) between the Democratic Republic of Congo and the Republic of Angola.

The CIZ is situated in the maritime area between the North Block 1, the south of Block 14, the North of Block 15 and the North of Block 31 of the Angolan Oil concessions as defined in the Appendix to this Memorandum of Understanding. The parties are still considering the creation of one or more other areas of common interest in the maritime space.

According to Article 1, paragraph 2 and 3, the area of common interest is in the range of maritime region between Northern part of Block 1, the southern part of block 14, the Northern part of Block 15 and also the Northern part of Block 31 of Angolan oil concessions as defined in the annex to this Memorandum of Understanding which unfortunately we couldn't find. However, although we couldn't find the geodesic coordinates of the CIZ, we might think that it would be in the Angolan Exclusive Economic Zone. If this hypothesis has been confirmed, we may understand under article 1, paragraph 2 and 3 that Angola is inviting DRC to come and exploit the natural resources of its EEZ upon which it has *exclusive sovereign rights* so that if it doesn't explore, nor exploit its continental shelf, *no State can undertake such activities without its express consentment*. So, under UNCLOS, this kind of undertaking is only possible with *express consentment*, I mean “*express invitation*”. Therefore, in the current case, may we see the generosity of Angola in inviting DRC to share its natural resources? Or is it an error through negotiations? The practice on this issue showed that Coastal States rely more on the provisions of UNCLOS, specifically article 77 to refute all ideas of sharing their resources. Perhaps, through such an invitation, Angola would like to be generous and cooperative to DRC and innovative in the sphere of international relation. But, such an invitation still retains my

⁴⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (separate opinion of Judge Higgins, ¶ 18)

quest for I do believe it could either be a joke or an error. Unsurprisingly, it is neither a joke, nor an error because Angolan might know that oil concessions designated cross both maritime spaces throughout otherwise, they won't shape such an offer. In other words, these concessions straddle the two continental shelves. Moreover, apart the ambiguity of article 1, paragraph 2 which relates to the imprecision of the CIZ, paragraph 3 raises the question as whether the said zone is delimited in consideration of UNCLOS articles 73-77.

The identified corridor crosses the common maritime border of Angola and the Republic of Congo (ROC). How to interpret the scope of the CIZ beyond maritime boundary between the Congo Brazzaville and Angola? Could the Republic of Congo agree that a third State with which it does not share a maritime border operate in its maritime space without being invited in accordance with the regulations of Article 77 paragraph 2 UNCLOS? Obviously, no. And it is the lieu to remind that due to these problems, the Congolese delegation to the negotiation of 2003 MoU has rejected the Kalema corridor. But, unfortunately, the same corridor has been reintroduced to the Agreement establishing the CIZ of 30 July 2007 between Angola and DRC.

Article 2 can be read as followed:

CIZ includes leads, prospects and deposits, present and future, regardless whether they are in the stages of exploration, development, on horseback, in operation, returned back and / or abandoned.

The analysis of Article 2 is based on the rating of development phases relating to the exploitation of a hydrocarbon reservoir. Thus, the CIZ as defined in Article 2 does not show actual attractions in terms of proven reserves. The terms of this MoU cover operations which could result in very high risk for the Congolese for it can cause huge capital expenditure in the DRC while it had to devote its resources in income-generating activities. Also, commercial and strategic interests in the DRC will not be represented by discoveries that are in the exploration phase according to the terms of article 2. Supposed, regarding the petroleum potential, confidentiality agreements do not allow the Congolese to access technical information currently held by the Angolan side, by which legal mechanism the DRC could reimburse expenses incurred by Angola in an activity that it does not know the structure of exploration.

Therefore, under the terms of Article 4, alinea 1 we can understand that with no technical or cost information on drilled prospects, the DRC can not under any circumstances agree to reimburse expenses already incurred while it was not a party to the decision enforcing the beginning of the exploration. A commercial contract whether national or international, is based on the knowledge of goods and services well identified. If article 7 requires the DRC to ratify the MoU before the terms of references of modalities of partnership for the exploration and exploitation of the CIZ be negotiated and agreed by the parties,⁴¹ DRC could require Angola to provide access to technical information to assess its level of commitment to the economic interests, otherwise it could abandon the MoU prior to its consideration or defeat by the Parliament. By the way, this unilateral requirement seems to be an Angolan trick during negotiations. There are many models of CIZ in Africa and worldwide. But in any model we do not find such a requirement. Practice in matters of joint management of natural resources between two coastal states teaches us that the terms of reference are part of the negotiations. Ratification must be a complete package, not conditionality prior to negotiations of working arrangements. Therefore, they should be well defined and accepted by the parties before the

⁴¹ Both parties will each appoint five (5) experts who will be responsible, in the month following the ratification of this Memorandum of Understanding, to draw up the terms of references of partnership modalities for the exploration and exploitation of the CIZ.

ratification occurs. What may be the aim of Angola in imposing such a requirement to its partner? Without much digging behind Angolan's thought, we can pretend that Angola would like to put the Congolese before their contractual responsibility under international law. Thus, with the ratification, the DRC would have to honor its commitment under the principle of *pacta sunt servanda*. This is a trick on which the DRC couldn't prevent from falling because the parliament has ratified that protocol regardless of the vices that it contains. But, still, the implementation of that MoU is postponed to a Greek calendar since neither DRC nor Angola can tell us when the CIZ will be effective. With this status quo, the question arises as whether Angola can call DRC to cooperate under the principle of *pacta sunt servanda* before an international judicial court? Without skipping this question, we'd like to mention that Good faith is said to require more than just honesty⁴² or reasonableness⁴³; as it also requires affirmative acts and fair dealing⁴⁴. Some may consider it as a moral requirement to not harm others.⁴⁵ However, when we focus on the consequences of the ratification of an international agreement, we may assume that although, these virtues seem to be missing, Angola could still call DRC to cooperate by honoring its engagement since DRC has ratified that MoU despite the vices it contains.

According to international law, the ratification of a bilateral or multilateral agreement is a discretionary legal act which does not create a bound competence. Therefore, a State which has signed an international agreement subject to ratification accomplishes it when it wants, unless the delay of ratification is fixed in the text as is the case through article 8 of the MoU in examination.⁴⁶ In all cases, the State has the right not to ratify, in other words, not to conclude the agreement signed since the ratification is the act by which the State expresses its will to be bound by an international engagement. International practice supports such a contention because it offers us several cases of refusal of ratification. But the most famous is the one that comes from the United States of America where the Senate had refused to assent to the ratification of the Treaty of Versailles which the first part included the Covenant of the League of Nations. Despite President Wilson's efforts, the treaty of Versailles hadn't been ratified for fear that the Covenant of the League of Nation could diminish the power of Congress to declare war.

Finally, it is very important to notice that the MoU does not provide for clauses governing surveillance, security, search and rescue, air traffic, surveys, research, marine environment and other matters in the CIZ. Moreover, contrary to a good number of joint development zones which include some form of institutional machinery, Angola- DRC's MoU neither provide for a mixed Technical Commission like the Austria-Czechoslovakia Agreement did, nor does it provide for a Consultative Commission like it is the case with Frigg Field between Norway-United Kingdom. Although article 9(2) of the MoU states that 'the parties agree to seek amicable solutions to resolve any disputes that come from its application', it failed to establish a forum by which amicable solutions could be sought. In default of a Permanent Commission like in the case of the Kuwait-Saudi Arabia Agreement, the MoU could have provided for a Conciliation Commission like in the case of the Iceland-Norway Agreement; a Joint Commission like the cases in the Saudi Arabia-Sudan Red Sea Agreement and also the Japan-

⁴² Gerard Mantese, *Still keeping the faith: the duty of good faith revisited*, 76 Mich. B.J. 1190, 1190 (1997).

⁴³ Richard Hooley, *Controlling contractual discretion*, 2013 C.L.J. 65, 74.

⁴⁴ Mantese, *supra* note 39.

⁴⁵ Michel Godreau, *Lealtad y Buena fe contractual*, 58 Rev. Jur. U.P.R. 299, 373 (1989).

⁴⁶ 'The parties agree to ratify, according to the specific procedures to each of the countries, the present protocol agreement within six (6) months following its signature'.

Korea Agreement rather than referring immediately to Arbitration. Perhaps, these issues have been postponed to the practical phases of the intended JDA.

CONCLUSION

Summarizing, it can be firmly said that the 1884 treaty respond to all the requirements of a treaty in international law although the ways of its conclusion may be questionable. The inviolability principle of African borders inherited from colonial powers has responded in affirmative to the problem concerning the scope of 1884 treaty's binding force. The jurisprudence from judicial courts gives preference to the principle of inviolability rather than the clean slate theory. Therefore the intention of the Angola and DRC to cooperate through a provisional arrangement under the provisions of UNCLOS seems to be a wise decision rather than an innovation. However, when we consider that UNCLOS Articles 74 (3) and 83(3) provisions may be interpreted as the obligation to cooperate include the duty to inform and consult and the duty to negotiate in good faith to reach an agreement which will not hamper the final delimitation, we can understand that cooperation could be hampered when a party or parties fail to fulfill these two duties, or even one of them. In our current case, analysis of the MoU underscored some behaviors from Angola which can be seen as a bad faith hampering the implementations of the provisional arrangement concluded with its neighbor DRC on the shared resources of their disputed Continental Shelf. Waiting in vain DRC to perform the MoU, Angola had submitted a claim to the Commission on the Limits of the Continental Shelf (CLCS) in May 2009. But, on 14 June 2010, the DRC had also submitted a counter claim to the CLCS deploring that Angola was looking forward to delimiting its Continental Shelf in violation of DRC's rights. Unfortunately, these two States have to bear in mind that the Commission on the Limits of the Continental Shelf issues recommendations rather than decisions. Article 76 (10) UNCLOS, states that the provisions on the Convention on the Commission's role are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. This means that the Commission should not get involved in boundary issues and should confine itself to undisputed areas. Therefore, one may wonder why Angola didn't seize the opportunity of arbitration and call DRC to cooperate although article 9 (2)⁴⁷ offered the parties this judicial forum? Once again, this case shows the upmost important role that the principle of good faith plays in international law for the lack of good faith turns the cooperation between Angola and DRC from reality to myth. As result, not only the boundary delimitation between these two countries is pending but the provisional arrangement concluded is also sent to the Greek calendar.

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⁴⁷ The parties agree to seek amicable solutions to resolve any disputes that come from its application. However, in case of continuing disagreement, they will resort to arbitration according to the rules of the United Nations Commission on International Trade Law.

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