

CAHDI Expert Workshop on „Non-legally binding agreements in international law “

Welcome and opening remarks (9:00 a.m. – 9:15 a.m.)

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Introduction

Dear colleagues, distinguished guests,

I would like to welcome you all to today’s expert workshop on “Non-legally Binding Agreements in International Law”, which the German Foreign Office has jointly organized together with Professor Andreas Zimmermann from the University of Potsdam and the CAHDI Secretariat/Legal Office.

When we started planning this event, we were still hoping that it could take place in person. However, we finally had to adjust to the ongoing pandemic and had to move the workshop online. We are confident this virtual format will still offer us the opportunity to have a fruitful exchange. This will in no small measure be due to our distinguished panelists and experts on the topic, who will provide us with their insights on the status and effects of non-legally binding agreements.

Reference to Swiss Roundtable of Regulation

Today’s workshop will be the second event under the auspices of the German Chairmanship of the Council of Europe concerning non-legally binding instruments. Last month, the Permanent Representation of Switzerland to the Council of Europe and the Delegation of the European Union held an excellent “Roundtable on Regulation in the 21st century”, in which they closely examined the potential and challenges of Soft Law. We are very glad to pick up this thread today on a related topic. However, our discussion will primarily focus on the relationship between international treaties and non-legally binding agreements.

Idea and purpose of the workshop

The idea for initiating this workshop arose primarily from the seemingly ever-increasing relevance of non-binding agreements in today’s international practice. Every month, Germany signs about 15 non-legally binding agreements with partners around the world. These agreements cover a wide range of topics, will diverge in the degree of detail and are signed with a multitude of different partners such as States, subordinated State entities or International Organizations. This almost universal usage inevitably leads to questions regarding their delineation from binding international treaties as well as their possible indirect legal effects.

As these instruments are in use all around the globe, we perceived a demand for a more detailed discussion on the status, potential and challenges of these instruments and - possibly - towards a more systematic standardization.

Structure of the Workshop

In the face of these manifold aspects related to non-legally binding instruments, our first panel today, chaired by our CAHDI Chair Ms Alina Orosan, will focus on the distinction between legally binding agreements and their non-legally binding counterparts as well as on the question whether non-legally binding agreements can indeed produce indirect effects under international law. I am looking forward to the presentations by Professor Philippe Gautier as well as by Professor Andreas Zimmermann.

Our second panel, chaired by CAHDI-Vice-Chair Dr. Helmut Tichy, will focus on the practice of international organizations, not only regarding their own practice of concluding non-legally binding agreements but also regarding their efforts to standardize the practice of their Member States in that field. I am grateful to our experts on Panel 2, Professor Duncan Hollis and Dr. Jörg Polakiewicz for speaking here today.

Each panel will be followed by a brief commentary to shine spotlights on how state practice relates to the issues raised. These commentaries will be provided by our esteemed colleagues Petr Válek, in the first panel and Kaija Suvanto, in the second panel.

German practice in the area of non-legally binding agreements

Allow me now to say a few words on the practice of the German Foreign Office in the area of non-legally binding agreements. As seemingly everywhere else, the significance of non-legally binding agreements has consistently been rising in our practice. Issues that would have formerly been the subject of a binding treaty under international law are nowadays addressed through Joint Declarations of Intent. How and why is this?

Non-legally binding agreements vary in the degree of detail and can cover a wide range of topics. To illustrate this, let me provide you with an example of recent German practice: we have recently signed declarations for the implementation of a handball project; we have signed declarations on energy or general economic cooperation; and we have even signed detailed declarations spelling out the benchmarks of cooperation in the field of development aid or migration. Apart from the range of topics and the degree of detail, it is also the actors concluding such declarations, which can widely differ. Non-legally binding agreements can be signed for example by the German Federal Government, by single ministries, subordinate authorities or the German "Länder".

Diverging state practice on non-legally binding agreements

It is fair to say that there is no uniform state practice on how to call non-legally binding instruments. Take, for example, the term "Memorandum of Understanding". While this term for some states clearly indicates a non-legally binding instrument, other states conclude

“MoUs” containing binding obligations under international law. Since this denomination is ambiguous, our practice has aimed to avoid the usage of this term, preferring to call non-legally binding instruments “Joint Declaration of Intent”. The *“Richtlinien für die Behandlung völkerrechtlicher Verträge”*, the German Federal Government’s internal guidelines for dealing with international treaties as well as non-legally binding agreements, specify that the term “MoU” should be avoided lest it is absolutely clear from the remainder of the document that it is non-binding. However, in practice this frequently causes a point of contention as many states prefer the term “MoU” and discount mere “Declarations of Intent” as something of lesser significance.

Another example of diverging state practice refers to what features states treat as decisive when determining whether a given document is legally binding or not. Some states let the title of the document or a single clause on its non-legally binding effect suffice to establish the legal character of an entire agreement. Other states, Germany among them, require a more comprehensive scrutiny. In our practice, the wording of the entire document as well as its structure is carefully checked to ensure that it contains not a single sentence suggesting a legally binding instrument.

German practice on how to distinguish non-legally binding from legally binding instruments

In German practice on non-binding instruments, we will look for trigger words usually only used in international treaties, and “soften” them down to a non-legally binding alternative. For example, the term “agreement” is commonly associated with legally binding documents, even though by definition “to agree” simply indicates a concurrence of wills of two sides.

Despite the fact that in accordance with the literal meaning of the term there could be legally binding as well as non-legally binding agreements (hence the title of this workshop), in German practice we usually avoid the term “agreement” when concluding declarations of intent.

Another example concerns the use of the future tense instead of the present tense, since the latter is usually reserved for binding treaties. Furthermore, words like “shall” or terms like “enter into force” are turned into their non-binding counterparts “will” and “come into effect”.

These examples of German practice illustrate that in fact there is a lack of any comprehensive framework specifying the rules of these instruments. While international treaties have found their firm footing in the Vienna Convention on the Law of Treaties, there do not exist common rules or principles when it comes to non-legally binding agreements.

Therefore, as of now, states are mostly deciding at their own discretion how to categorize them.

Conclusion

Against this backdrop, today's workshop will provide us with the opportunity to take stock of the Council of Europe Member States' practice regarding non-legally binding agreements.

Allow me now to thank you all for your attention. Before I hand over to the Chair of our first panel, Ms Alina Orosan, we have the privilege to listen to a video message of Undersecretary-General, Mr. Serpa Soares, the legal adviser of the UN.

I wish us all a productive and fruitful workshop and discussion. Thank you.