Expert Workshop on Non-Legally Binding Agreements in International Law
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Towards uniform state practice concerning non-legally binding instruments - relevant and desirable?

Dear CAHDI members, dear colleagues,

When I got the invitation to this Panel, it reminded me of the Treaty Conference, which was organized in the sunny and warm Jerusalem by the Ministry for Foreign Affairs of Israel in March 2018. Sir Michael Wood, a member of the ILC, was one of the guest speakers in the seminar. I remember that one of the ideas Michael presented was that CAHDI could work to collect information on non-legally binding instruments and to formulate common criteria to be applied to these instruments. The idea was then and is still welcome.

Therefore, I am more than happy to see that the Inter-American Juridical Committee of the Organization of American States has already taken this challenge to collect practice of American States and ended up publishing Guidelines for Binding and Non-binding Agreements. The valuable work already carried out by our American colleagues could serve as an inspiration for a similar effort that could be takenup in the framework of CAHDI. These studies, American and European, together could perhaps then further feed the work of the ILC so that the topic might one day be discussed in the 6th committee as well. This could be something for all of us to take back home and think about.

The question for the Panel today is whether **uniform state practice concerning non-legally binding instruments is relevant and desirable.** As Duncan and örg pointed out, the practice of using MoUs is quite diversified. Therefore, greater coordination and cooperation at the international stage could improve knowledge and reduce the risk of difficulties in implementing and interpreting these instruments.

As an everyday treaty practitioner, I see a lot of advantages of having guidelines pursuing uniform practice on non-legally binding agreements. Definitely more pros than cons. However, in order to develop uniform state practice there has to be a common will to agree and follow meaningful guidelines.

When dealing with legal instruments, the **first challenge** to tackle is, of course, to assess whether the instrument in question is **legally binding or not** – what is the intention of the Parties? How can we assess this intention? What are the indicators? And, as we have already understood from the previous speakers, the title of the instrument is not decisive.

As Duncan just told, in the OAS guidelines, different methods for identifying the status of an instrument are presented. The guidelines also include examples of clauses that could be inserted in instruments in order to distinguish non-binding instruments from binding instruments and to avoid confusion.

In our National Treaty Handbook we have a special chapter for MoUs and other non-binding instruments. In this chapter, it is pointed out, what should be taken into account when drafting or identifying an MoU: its title, language, intention, previous practice and clauses which identify the instrument as non-binding. The Handbook also contains a list of vocabulary and a model for an MoU. (I am sure these are familiar to anyone who has studied Anthony Aust's book Modern Treaty Law and Practice).

In my opinion, it is certainly a benefit to have a **commonly agreed "MoU language**", which makes it easier for lawyers to assess the will of the Parties in a purely technical sense. However, regardless of the language, the intentions of the Parties could still differ from each other. If I take an example from Finland, some peacekeeping MoU:s between Finland and the UN have been treated as legally binding agreements in Finland and approved by Parliament due to the language used in those instruments (they include such wordings as "shall" and "agree", even if the MoUs also contain non-binding expressions such as "enter into effect" and no "enter into force"). As the language is not always coherent or decisive, the specific clauses are important when assessing the intention of the Parties and the status of the instrument. One example from our own practice is the Memorandum

of Understanding between Finland and NATO regarding Host Nation Support. In this MoU, two specific safeguard clauses were inserted, namely that the MoU is not intended to supersede national law or international obligations and that it is not eligible for registration under Article 102 of the UN Charter. These clauses were decisive when we determined the national approval procedure of this MoU.

In inserting such specific clauses to non-legally binding instruments, a question may arise however; how to assess an instrument, which is silent regarding its binding nature. The question is, whether we should make an *e contrario* conclusion that the instrument is binding unless there is a specific clause to the opposite effect. This question is particularly relevant as regards instruments that have been concluded before common guidelines for that purpose have been approved.

This brings me to **the second challenge,** which is the **domestic approval procedure** for non-legally binding instruments. In the OAS guidelines there is a recommendation that States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. This recommendation includes notification to and coordination with relevant State institutions, including the State's Foreign Ministry.

In Finland, as in many other countries, the domestic approval procedure for legally binding instruments, such as treaties, is prescribed in our Constitution. The legislation is, however, silent as regards the procedure for accepting non-legally binding instruments, e.g. MoUs. The procedure has developed in practice, based on the competence of the Ministries, and is now recorded in our Treaty Handbook in more detail. Briefly said, it is the task of each Ministry to decide on the negotiation and signing of an MoU belonging to its competence. However, a problem arises when the MoU is signed on behalf of the Government or when it belongs to the competence of several Ministries but only one Ministry is a Participant of the MoU. In such cases, we have instructed that the responsible Ministry should consult the other relevant Ministries and get their written approval for signing. It is also possible to approve an MoU via an inter-Ministerial committee. Consequently, no formal decision of the Government is made and Parliament has no role in the approval process except that in certain cases Parliament is informed.

I warmly support the recommendation of the OAS to establish a domestic approval procedure also for non-legally binding instruments for several reasons. If there exists an agreed procedure including prior consultation with the Ministry for Foreign Affairs, this also serves the need to check whether the instrument in question is indeed non-binding. This check could also prevent the possibility to circumvent the treaty procedure if there is a need for that. Finally, a formal approval procedure could make these instruments more visible, at least on the level of the Government.

What is more problematic and worth discussion is the **role of Parliament, which I would point out as a third challenge**. The role of Parliament is especially interesting as regards politically or otherwise significant non-binding instruments. It is enough to say that even if it is clear that it is in the competence of each state to decide its national procedures, there could be merit to inform Parliament of the most significant non-legally binding instruments. This is, for example, what we did in Finland as regards the previously mentioned MoU on Host Nation Support.

Finally, I would like to take up the recommendation included in the Guidelines concerning **a national registry for political commitments** (or at least the most significant of them). The publicity which such a register would allow needs of course to be in conformity with the domestic regulations for public access to information of each State. It is clear that this kind of a registry comparable to a treaty register would make access to these political commitments easier and make them more visible. This is positive from the point of view of democracy, and transparency as well. Public access to non-legally binding instruments could also serve the goal of using political instruments only when they are an appropriate tool to reach the intended purpose and when there is no need for legally binding obligations. It could make the practice of using non-legally binding instruments more coherent in an individual state as well as between states. In the name of transparency, it would also be interesting to collect the practice of different countries of publishing these instruments, such as MoUs, e.g. in their treaty series. [In this context, I must confess that Finland is not a forerunner in this aspect. At least not yeat. We do not yet have a common registry for non-legally binding instruments. However, we are in the process of launching an electronic datasystem,

common to the whole Government. This system would allow drafting and registering as well as publishing all kinds of documents, including non-legally binding instruments.]

I think I'll stop here and conclude by saying that as a treaty practitioner, I regard uniform state practice in the field of non-legally binding instruments desirable and I do hope the OAS guidelines will pave the way for a similar process also in CAHDI. If such a process gets the green light, we will be happy to contribute. I thank you all for your attention and look forward to possible questions.