Committee of Legal Advisers on Public International Law (CAHDI)
Expert Workshop on
„Non-Legally Binding Agreements in International Law“

Online Conference via KUDO, 26 March 2021, 9.15 a.m. - 13.15 p.m.

Chair's Summary

Introduction

The German Federal Foreign Office, the University of Potsdam and the CAHDI Secretariat jointly organized this workshop. Invitees were the Council of Europe (CoE) Member States, as well as its Observer States. It was the second event on non-legally binding instruments taking place under the auspices of the German 2021 Chairmanship of the CoE's Committee of Ministers, the first being an event on 'International Soft Law' jointly organized by the EU Delegation and Permanent Representation of Switzerland to the CoE in February. Whereas the first workshop analysed the conditions for the creation of soft law, this Expert Workshop focused on the key elements of non-binding agreements between States and/or international organizations and their indirect legal effects.

In his Opening Remarks, German Legal Adviser Christophe Eick illustrated the rising importance of non-legally binding agreements in international law by providing an account of the German practice in this area. The German Government signs non-legally binding agreements on a wide range of topics and with different international actors. To ensure a clear delineation from binding treaties, it makes use of internal guidelines, clarifying permissible language, form and structure of non-legally binding agreements. This includes, for example, avoiding the term "Memorandum of Understanding (MoU)" because it could be misunderstood as indicating a binding treaty.

These remarks were followed by a video message from UN Under-Secretary-General for Legal Affairs Miguel de Serpa Soares. Given the increasingly diverse instruments concluded by States and international organisations, he identified a demand for conceptual clarification among practitioners. He pointed out that non-legally binding agreements are often defined only negatively by distinguishing them from binding treaties. The UN face the question of drawing a distinction between treaties and non-legally binding instruments on a daily basis in fulfilling their mandate as the organ with which registration of treaties under Article 102 UN Charter is to be effected. While the UN's decision of registering an agreement as a treaty does not confer legal effect in itself, it creates an important presumption in practice that an instrument is indeed a treaty. Concluding, USG Miguel de Serpa Soares cautioned against the legal risks still associated with the use of non-legally binding instruments.

First Panel: Treaties versus non-legally binding agreements

Chair: Alina Orosan, Director General for Legal Affairs, Ministry of Foreign Affairs of Romania, CAHDI Chair

Panelists:

Philippe Gautier, Registrar of the International Court of Justice; Professor at the Catholic University of Louvain (Louvain-la-Neuve)

Andreas Zimmermann, Professor at the University of Potsdam, former Member of the Human Rights Committee and member of the Permanent Court of Arbitration

Petr Válek, Director, International Law Department, Ministry of Foreign Affairs of the Czech Republic

The first panel "Treaties versus non-legally binding agreements" focused on the distinction between treaties and non-legally binding agreements and on the latter's possible indirect effects in international law. Philippe Gautier, in the first presentation, examined the relevant jurisprudence of international courts and tribunals, in particular that of the ICJ. He argued that international courts, although not frequently faced with the distinction, had developed a coherent set of criteria in determining whether an agreement is legally binding or not. The central criterion should be the intention of the parties, which would need to be interpreted by relying on certain objective factors such as the content and language of the instrument, the context in which it was signed or even subsequent practice of the sides. The form, modalities of conclusion and title of a document seemed to be only of secondary significance to international courts when assessing the legal quality of an agreement.

Andreas Zimmermann in turn focused on the potential indirect legal effects of MoUs. He argued that MoUs could serve as precursors to what later might become the content of a legally binding treaty. Non-legally binding agreements could also be incorporated by binding instruments, this way producing indirect legal effects. As an example, he cited the JCPOA ('Iran Nuclear Deal'), which was endorsed by a binding Security Council resolution making some of its originally non-legally binding provisions mandatory under Chapter VII authorities. While non-legally binding agreements have no potential to incur State responsibility or trigger the principle of good faith, there could be cases in which the legal doctrine of estoppel applied. This could notably be the case where uncertainty remained regarding a document's legal character. Andreas Zimmermann argued that MoUs could also be indicative of an evolving rule of customary law, while acknowledging that States' lack of *opinio juris* in the framework of MoUs mostly prevented a direct link. He concluded by advising States to pay close attention to the language used in non-legally binding agreements in order to avoid possible indirect legal effects.

In his ensuing comment from the perspective of a legal adviser, Petr Válek identified a trend towards an "overuse of MoUs". As reasons for this phenomenon he pointed towards their swift conclusion and their higher popularity among governments due to their merely political, but not legally binding character. Problems with MoUs could arise from the fact that they would often be drafted by political officers in the Foreign Ministries without the involvement of legal experts and advisers, potentially resulting in texts with ambiguous legal terms. As possible solutions, Petr Válek suggested a register of signed MoUs, strengthening the role of legal advisers within Ministries of Foreign Affairs, as well as preparing an internal manual on non-binding instruments, containing best practices with regards to their usage.

The discussion in Panel 1 revealed that several CoE Member States have already developed internal guidelines on how to draft non-legally binding agreements. However, it also surfaced that States are facing the same problems regarding the assumed lack of transparency of such instruments or the absence of common "MoU terminology". It was remarked that the practice of the UN added towards

the confusion concerning the unclear term of "MoU", as the UN would conclude both treaties and non-legally binding agreements termed "MoU". It was mentioned that it would be helpful if the UN made a clearer distinction when concluding binding or non-binding instruments. Furthermore, the panel discussed that the distinction would not always be between treaties and non-legally binding agreements, but also in relation to private law contracts.

Second Panel: Towards uniform State practice concerning non-legally binding agreements – Relevant and desirable?

Chair: Helmut Tichy, Legal Adviser, Federal Ministry for European and International Affairs, Austria, CAHDI Vice-Chair

Panelists:

Duncan Hollis, Laura H. Carnell Professor of Law at the Temple University School of Law, Non-Resident Scholar at the Carnegie Endowment for International Peace

Jörg Polakiewicz, Director of Legal Advice and Public International Law, Council of Europe

Kaija Suvanto, Director General for Legal Affairs, Legal Service, Ministry for Foreign Affairs of Finland

Duncan Hollis presented his work as special rapporteur on the OAS *Guidelines on Binding and Non-Binding Agreements* of August 2020, a set of best practices and definitions derived from the collection of State practice of member States of the OAS on the conclusion of such instruments. The Guidelines distinguish between binding and non-binding agreements, the former taking the form of a treaty or a private law contract and the latter merely constituting a political commitment. The Guidelines focus on six main points regarding agreements: the definition of different types of agreements, the capacity to conclude them, the question how one identifies the different types of agreements, the internal procedures used by States to conclude such agreements, their (legal) effects and lastly the training/education of State personnel. The Guidelines identify two different tests to determine whether an agreement is legally binding: the "intent" test, focusing on the subjective will of the parties, allowing to consider also external factors such as statements by political officials; and the "objective test", relying on the objective impression from the text of an agreement. Duncan Hollis concluded by underlining that the Guidelines are not to be understood as final but rather as an opener for a more open and transparent discussion on the role of non-legally binding agreements.

Jörg Polakiewicz, in the second presentation of the panel, focused on the CoE practice regarding MoUs and other agreements. He presented a wide variety of such instruments, subdivided in six different categories. These were MoUs concluded by the CoE with international and intergovernmental organisations on strengthening cooperation, MoUs concluded with other international bodies in a field of common expertise, MoUs concluded with States for a particular purpose, MoUs concluded with States for the purpose of establishing Information Offices of the Council of Europe (IOCEs), agreements which extend the jurisdiction of the Administrative Tribunal of the CoE (ATCE), and MoUS in the framework of the execution of judgments of the European Court of Human Rights. He concluded that the CoE's practice of MoUs was diverse and shaped by practice and reasons of expediency rather than by a strict legal framework. The agreements would not always have the same form and content. The main purpose of the use of MoUs in the CoE would be their capacity to establish cooperative partnerships with different international entities, which is why Jörg Polakiewicz characterized them as "a pragmatic and effective tool".

Kaija Suvanto commented that the topic of non-legally binding agreements was important and merited further discussion, potentially also within CAHDI. The OAS Guidelines could serve as a good example in this regard. She saw many advantages in having guidelines establishing a uniform practice on non-legally binding agreements. Such guidelines could assist in distinguishing between binding and non-binding agreements. She referred to the challenge of not having a settled domestic procedure for the adoption of non-legally binding agreements. She also pointed towards the challenge of democratic legitimacy, as parliaments would frequently not be involved in the negotiation and conclusion of these instruments. Kaija Suvanto finally expressed support for the recommendation, contained in the OAS Guidelines, of creating a national registry for political commitments.

In the ensuing discussion, it was pointed out that certain forms of treaties could also be concluded with low level procedural requirements. Remarkably, this had not prevented the increasing popularity of non-legally binding agreements, suggesting that it was not just the low procedural requirements but also the increase in legal and political flexibility which has led to their popularity among States. Sometimes States would be unwilling or unable to assume international responsibility under a binding agreement. The question was raised whether the difference between binding and non-binding agreements in terms of impact and effect was even significant. It was mentioned that harmonising the understanding and usage of non-legally binding agreements would be beneficial for all States. Non-legally binding agreements would usually not affect individuals or third parties. However, these instruments could lead to subsequent domestic legislation and thus produce indirect legal effects. CAHDI was considered as the proper forum for continuing the discussion on a prospective harmonisation of non-legally binding agreements within the CoE.

Closing Remarks

In his Closing Remarks, Christophe Eick thanked the Chairs and panellists and concluded that a significant number of CoE Member States had expressed their support to assemble a more detailed account of their practice on non-legally binding agreements. This could constitute a first step towards an initiative similar to the one that led to the OAS Guidelines. However, it would remain to be seen if a higher degree of standardization would not come at the cost of a certain loss in flexibility.