

## Concept note

### Second practitioners' workshop on Non-Legally Binding Instruments in International Law

Vienna, Parkhotel Schönbrunn, 18 September 2024

## I. Background

On 26 March 2021, an Expert Workshop on “Non-legally binding agreements in international law” was organised by the CAHDI in which many delegations participated. The event brought about the idea to discuss the possible follow-up to this topic by the CAHDI during its 61<sup>st</sup> meeting (23-24 September 2021 in Strasbourg, France) during which the CAHDI agreed to pursue its work on this issue on the basis of a questionnaire (*document CAHDI (2022) 2 Confidential*). A draft questionnaire was prepared by the German delegation and approved by the CAHDI at the 62<sup>nd</sup> meeting (*document CAHDI (2022) 2 Confidential*, dated 24 March 2022).

On the basis of the 22 responses received to the questionnaire up to the end of 2022, Professor Andreas Zimmerman (University of Potsdam/Germany) prepared an analytical report and presented it to delegations at the 64<sup>th</sup> meeting of the CAHDI (23-24 March 2023 in Strasbourg, France). At the same meeting, the CAHDI agreed that the report should be updated on the basis of the clarifications provided by the delegations and supplemented by the new responses. The CAHDI also instructed the Secretariat to prepare a working document on this subject with a view to developing best practices and, where appropriate, guidelines.

To date, 33 delegations (Albania, Austria, Belgium, Bosnia-Herzegovina, Canada, Cyprus, Estonia, Finland, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, the Republic of Korea, Lithuania, Luxembourg, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, the United States of America, the Council of Europe and the European Union) have sent their responses to the questionnaire, which are set out in the revised analytical report, prepared by the Secretariat, and contained in document *CAHDI (2024) 12 prov Restricted*, dated 31 March 2024. The report deals with the practice of the above-mentioned states and organisations regarding non-legally binding instruments<sup>1</sup> and includes the main trends emerging from the replies to the questionnaire.

At its 65<sup>th</sup> meeting (28-29 September 2023 in Strasbourg, France), the CAHDI held an exchange of views on the revised report and on the best options for a follow-up (*document CAHDI (2023) 18 Confidential* dated 11 September 2023) and decided to organise a follow-up workshop on non-legally binding instruments with a practical orientation and hence with a focus on some of the open issues identified in the answers to the CAHDI questionnaire on the topic as well as the subsequent analysis reflected in the mentioned report. In order to identify the issues that CAHDI delegations would be interested to further explore in the course of the workshop, the CAHDI Secretariat prepared an inquiry (*document CAHDI (2024) 4 prov Confidential Bilingual*) and asked delegations for comments by 15 March 2024. By 26 March 2024 twelve delegations (Andorra, Armenia, Austria, Bosnia and Herzegovina, Cyprus, Ireland, Germany, Greece, Finland, the Netherlands, Switzerland and Türkiye) had responded to the inquiry.

The following proposal is based on the analysis of the answers provided to this inquiry.

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<sup>1</sup> At its 64<sup>th</sup> meeting (23-24 March 2023 in Strasbourg, France), the CAHDI decided to change the term “agreement” to “instrument”.

## II. Central questions for discussion

The expert workshop is intended to shed light on the most pressing questions surrounding non-legally binding instruments. The inquiry (CAHDI (2024) 4 prov *Confidential Bilingual*) identified following topics as being of most interest to CAHDI delegations:

- Discussion on good practices to ensure that there are no misunderstandings as to the legal nature of an instrument titled “MoU” (Q2).
- Discussion on potential indirect legal effects of non-legally binding instruments (Q10).
- Discussion on the possible “circumvention” of treaty procedures by non-legally binding instruments (Q16).
- Potential follow-up for CAHDI to undertake in the area of non-legally binding instruments (Q18): *Discussion on the usefulness and appropriateness of a potential model text for non-legally binding instruments (Q4), discussion on whether CAHDI should continue to work on standard terminology for non-legally binding instruments to delimit them better from treaties (Q8).*

On this basis, the following four panels are suggested:

- In the first discussion panel, it is proposed to present and discuss different terminology – or blocks of text – used in daily practice of MFAs and other Ministries of states represented in the CAHDI that is commonly understood to be indicative of a non-legally binding instrument, highlighting “good” and “bad” practices.
- In the second discussion panel, it is proposed to showcase practical examples of potential indirect legal effects of non-legally binding instruments as experienced in some jurisdictions, e.g., where non-legally binding instruments were or were not used to interpret legally binding norms. Based on these practical examples, “good” or “bad” practices on the types of provisions that should not be object of non-legally binding instruments could also be identified.
- In the third discussion panel, it is proposed to have an exchange between states that have experienced examples of possible “circumvention” (internal and external) of treaty procedures by non-legally binding instruments and share their lessons learned and potential “good” practices to mitigate this risk.
- In the fourth panel, it is proposed to focus on the way forward and to discuss and try to reach an agreement on the usefulness and appropriateness of a potential model text for non-legally binding instruments, guidelines, compilation of good practices or a glossary.

Each panel will begin with a short introductory presentation by a legal practitioner either from a CAHDI delegation or from a legal practitioner outside the CAHDI (20 min). For every panel, some CAHDI delegations will then be asked to present their (contrasting) practice or experience (5 min each). The rest of the sessions will be reserved for discussions and exchanges of perspectives of CAHDI delegations to highlight their practical experience with these questions in the everyday practice of states.

The fourth panel will differ as it will start with the presentation of the examples for the different follow-up options concerning the work of the CAHDI concerning non-legally binding instruments, either using existing examples that have been shared by CAHDI delegations, other international organisations or those which are publicly available (10 min). The rest of the remaining time for this panel will be reserved for a discussion between CAHDI delegations on the way forward.