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Committee of Legal Advisers on
Public International Law
Comité des Conseillers Juridiques
sur le Droit International Public



Expert Workshop on Non-Legally Binding Agreements in International Law

(Strasbourg, 26th of March 2021)

Concept note

I. Background

Non-legally binding agreements, often generically referred to as “Memoranda of Understanding” (MoU), are of increasing prevalence in international relations. As a matter of principle, they do not create legal obligations for states but solely embody commitments of a political nature. Accordingly, they present a number of advantages for states as compared to treaties: they provide flexibility and even when being vague on purpose in order to gloss over political and/or legal disagreements they do not create legal difficulties; they offer the option of confidentiality as they do not need to be published; they are not subject to the formalities that surround treaty making and they are easily amended.

On the flipside, the usage of non-binding agreements is not without dangers. The most significant risk associated with such instruments is uncertainty surrounding their legal status, *i.e.* disagreement among the parties as to their qualification as treaty or MoU. Associated with this is the risk of inadvertently concluding a treaty due to a possible lack of care in drafting. Aside from the danger of creating legal obligations ‘by mistake’, the question arises if, and if indeed so, what kind of (indirect) legal consequences may arise out of deliberately non-binding agreements.

II. Central Questions for Discussion

This expert workshop is intended to shed light on the most pressing questions surrounding non-legally binding agreements. In the first discussion panel, this will include the question of how to clearly identify a non-legally binding agreement in order to minimize potentially negative and unintended consequences associated with the use of such instruments. The panel will further explore what, if any, legal consequences can arise out of non-legally binding agreements. A second panel will be centered on the practice of states with regard to MoUs. Central issues are whether states consider pursuing a uniform practice on non-legally binding agreements desirable and, if this were the case, how such an objective might be attainable

Panel 1: Treaties versus non-legally binding agreements

Criteria for Distinguishing between Treaties and Non-legally Binding Agreements

For practitioners and states, the identification of MoUs and their distinction from treaties is crucial – a treaty is governed by international law and creates legal obligations, whereas a MoU is only capable of creating political obligations. This workshop will contribute to more clarification in identifying which features distinguish a MoU from a treaty. Such indicators may relate to:

- Treaty specific vs. MoU specific wording/terminology
- Formal indicators: structure, final clauses, participating actors (Foreign Ministry or other state institutions)
- Express clauses indicating non-bindingness
- Circumstances of conclusion
- Subsequent acts of states and international organizations (e.g. non-registration)

Potential (indirect) Legal Consequences arising out of Non-legally Binding Agreements

In principle, non-legally binding agreements do not entail legal obligations under international law. However, as *inter alia* the public debate surrounding the UN Global Compact on Migration has shown, the question may arise whether, and if so which, indirect legal consequences may arise out of such instruments and whether they might add to a growing body of “soft law”. This workshop will explore under which circumstances this may be the case, considering aspects such as:

- MoUs as preparatory acts preceding a treaty or elements of a later decision of an international organization (e.g. endorsement of the JCPOA in UNSC Res. 2231)
- MoUs as interpretative guidance of legal agreements (e.g. as subsequent agreements and subsequent practice pursuant to Art. 31 (3) lit. a) and b) VCLT)
- MoUs as contributing to standard setting
- MoUs as potential grounds for estoppel
- MoUs as potential precursors for a rule of customary international law

Panel 2: Towards uniform state practice concerning non-legally binding instruments - relevant and desirable?

In absence of a broad uniform framework such as the Vienna Convention on the Law of Treaties, a wide array of diverging state practice exists when it comes to non-legally binding agreements. In face of a growing number of these kinds of agreements, the second panel of the workshop will address the question whether achieving a uniform practice regarding non-legally binding agreements is relevant and desirable for the Member States of the Council of Europe.

Paving the way for an ensuing discussion, experiences of the Organization of American States (OAS) and the Council of Europe will showcase how international organizations can provide a forum for member states to account for their diverging practices regarding non-legally binding agreements and how international organizations themselves conclude such agreements. The OAS experience encompasses notably an extensive initiative launched by OAS Member States since 2016 to identify both common, as well as diverging practices regarding non-legally binding agreements, culminating in the “Guidelines of the Inter-American Juridical Committee for Binding and Non-binding Agreements”. In contrast, the experience of the Council of Europe will illustrate its internal understanding of non-legally binding agreements and provide an example of how, and in what instances, an international organization decides to avail itself of non-legally binding instead of binding agreements.

Both panels will be complemented by the perspectives of legal advisers of Member States of the Council of Europe who will enrich the discussion by providing their practical experience on the role of non-legally binding agreements in the everyday practice of states and on the factors they identify as main advantages or concerns regarding the usage of such instruments.