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LEGISLATIVE GUIDES, MODEL LAWS, RECOMMENDATIONS, PRINCIPLES: A "*SOFT MULTILATERAL LAW-MAKING*" FOR INTERNATIONAL GOVERNANCE?

ONLINE SEMINAR ON THE MARGINS OF THE 62ND CAHDI MEETING, 22 MARCH 2022

CHAIR'S SUMMARY

1. Introduction

Under the aegis of the Italian Presidency of the CoE's Committee of Ministers and in collaboration with the CAHDI Secretariat, the Service of legal Affairs, Diplomatic disputes and international Agreements of the Italian Ministry of Foreign Affairs and International Cooperation organized a panel discussion focused on the increasing role of the soft multilateral law-making and its implications for international governance.
In his introductory remarks, the Head of the Service highlighted the growing relevance of international soft law instruments in several key areas. Starting with private and commercial international law, where tools such as model laws, legislative guides, principles and recommendations are developed to harmonize national legal systems though preserving a certain degree of both autonomy and flexibility. A flexibility that appears to be very precious for States, in particular, in regulating areas subject to rapid changes, due, for example, to fast technological progress.
The ensuing discussions centered around three main thematic areas concerning, respectively: a) the interactions between hard and soft-law instruments in the codification and progressive development of international law; b) the functional approach in unification of law by standards setting bodies and, finally, c) the effectiveness of soft law regulating market transactions.

A) Prof. Attila Tanzi, from the University of Bologna, introduced the **first theme**. He addressed the relationship between hard and soft-law instruments within the framework of the role of the United Nations in the international law-making process. In particular, he emphasized the twofold function of GA Resolutions in preparing the ground for the adoption of international conventions, on the one hand, and in the formation and evolution of international customs, on the other, in combination with other authoritative statements – including by the ILC, the ICJ and other UN Bodies, together with the MS' attitude. Prof. Tanzi offered multiple examples of how both legally and non-legally

binding instruments have exercised a custom-evidentiary, crystallizing, or generating function. He has illustrated how the fields of international environmental and human rights are especially exemplary of such dynamic. In a historical perspective, the United Nations multilateral diplomatic has been shown as an “exemplary laboratory” in which - since its inception, through the decolonization, the Cold War and its aftermath - the pendulum has been swinging in the international law process between preference for the adoption of legally binding and for non-legally binding, instruments and of the often waning dividing line between the two. Prof. Tanzi has argued how, even though often starting from such opposite approaches over the years, the UN diplomatic process has “flown into a common terminus in the wider course of the international law making”. He stressed how, after the codification of the most important areas of international law, it is nowadays detectable a mix of *conventional fatigue* with a sense of reluctance to assume new international obligations in combination with the revival of legal nationalism. Prof. Tanzi concluded with a brief cost/benefit analysis from a legal perspective of the choice between adopting internationally legally binding and non-legally binding instruments, which was later articulated by Prof. Van Aaken.

B) On the **second theme**, Prof. Maria Chiara Malaguti, from the Università Cattolica del Sacro Cuore of Rome / Milan, focused her intervention on the so-called "functional approach" through which Conventions for the unification of law, in particular, make use of a neutral language and other drafting techniques to establish rules through a result-based approach. This leaves States with a certain autonomy as to the adoption of specific standards and recommendations subsequently implemented according to the legal context of a country. In parallel, multilateral organizations for the unification of law and other international bodies, adopt soft law instruments such as Model Laws and Legislative Guides, as well as international standards and recommendations. In some fields in particular, independent national authorities might then implement such international standards, with no direct involvement of the legislative bodies. She argued that although not necessarily transposed in general norms under the form of a law or equivalent legislative act, the more and more widespread use of such “measures and forms of cooperation” in various sectors, in particular in the international economic area and commercial cooperation, may nevertheless lead to the formation of uniform law and generally accepted principles. She pointed out how such an approach has becoming more and more evident and common for instance to the so-called “three sisters Organizations” UNIDROIT, UNCITRAL and HCCH, operating in the field of private and commercial international law. To the point that they have recently adopted a Tripartite Legal Guide providing a roadmap to the existing uniform law texts in the area of international commercial contracts (with a focus on sales) aimed at facilitating the appropriate use, uniform interpretation, and adoption of international instruments covering neighboring areas of law and permitting a systematic approach to such instruments to enhance their enforceability and certainty of application. This is one of the results of the ongoing joint works of these Organizations to help systematizing such instruments and permit their understanding and role within the formation of international law. From a more general point of view, she argued that the assessment of the non-binding nature of soft-law instruments does not affect their ability to produce some “legal effects” on national legal systems, as reflected, in particular, by recent case law of the European Court of Justice, affirming the duty of EU Member states to take into consideration Guidelines of EU authorities (coming in turn from international standards) when legislating in a specific field. What appears, from a doctrinal angle, as a not yet sufficiently discussed topic, concerns the “intrinsic” legal nature of such instruments and

therefore their role within the general architecture of instruments of international law, in the light of their ability to effectively integrate and complement the today less frequent use of International Conventions.

C) Finally Prof. van Aaken, from the University of Hamburg, developed the **third theme**, focusing on the effectiveness of regulation of and by markets via soft law. She made analytical reference to the "game theory" to highlight the benefits of the use of soft-law applied to some specific problem constellations. Under the "coordination game" angle, for instance (illustrated by the rule of driving right or left on the streets), she argued that the function of soft-law appears as a merely informational one: all actors see a natural incentive to comply and thus no special mechanism for compliance is needed via soft law. The creation of a mere "focal point" for information purposes would be sufficient to attain the goal. In contrast, in "cooperation game" constellations - and the so called "prisoner's dilemma" - incentives towards noncompliance are strong. In this case, soft law may be used by designing strong "compliance devices" through changing the pay-offs for non-compliant behavior, for example by using outcasting. Prof. van Aaken took The Financial Action Task Force as an example of such a soft-law constellation and of its modus operandi under this assumption. Finally, the "stag hunt game" (where all "hunters" are best off killing the stag and then all eat but may go it alone to hunt a hare as a small gain, leaving everyone else worse off), makes the behaviors of all actor's dependent on one another for the achievement of a common goal. Because of the necessity of reciprocal trust, cooperative behavior can be put at risk. In this case, soft law may provide for monitoring and trust enhancing devices, such as peer monitoring, as it is the case when States work together to improve good corporate governance. A last reference was made by Prof. van Aaken to the "expressive function" of soft law, playing on the intrinsic motivation of different actors to understand what is the correct conduct. Furthermore, this expressive law function also serves for other actors, such as NGO's, by creating of a sort of indirect, reputational, decentralized (though not less effective) enforcement mechanism, e.g. via the market. This is the case, for example, for the OECD Guidelines for Multinational Enterprises where apart from the National Contact Points no other implementation mechanism is foreseen.

2. Conclusions and possible way forward.

The Panel discussion provided a useful opportunity to consider tools for further deepening the undergoing general debate in CAHDI about the nature and effectiveness of international soft-law and its modus operandi in areas of increasing relevance.

Some useful comparative considerations were made in relation to the legally binding instruments, focusing on the advantages and disadvantages between the two approaches as well as on their respective effectiveness, impacts and consequences on the ways in which international law making, governance and diplomacy behave in either case. The fact is that over the years multilateral negotiations have significantly changed their working methods and the instruments they adopt, from traditional Convention and Treaties to soft law such as Legislative Guides, model laws, recommendations and principles. Both multilateralism and international cooperation have adapted to such changes. Identifying the main trends should remain a shared objective within the international community, including in CAHDI, and may help in better addressing challenges and ways forward.

In this regard, a first step could be to constantly keep soft law under review within CAHDI by making it a permanent issue on its agenda. This would make it possible to monitor its evolution, both internationally and nationally, and to deepen the analysis of its comparative advantages and disadvantages with conventional law. Another option could be to assess how national legislation transposes and adapts to soft law and to its evolution, in particular with regard to its "expressive function". This could also lead to assessing whether an inventory of the practices of state and non-state actors could help further promote the use of soft law. Finally, this could also help develop, where appropriate, comprehensive and commented guidelines and / or collections aimed at promoting the use of soft law and making it more effective.