

Indirect legal effects of non-binding instruments

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Overview

1. The effect of non-binding instruments (NBIs) on state behaviour
2. NBIs & law-making: treaties and customary international law
3. NBIs & interpretation: Articles 31 & 32 VCLT; NBIs in domestic courts
4. Protecting reliance on NBIs: Estoppel

State behaviour in relation to NBIs

- How do states behave following the conclusion of an NBI; does their behaviour differ compared to a binding agreement?
- Difference: state responsibility attaches to legal obligations only
- Otherwise state behaviour similar for binding and for NBIs
- Most states comply with most of the provisions in their NBIs most of the time



Four compliance pathways for NBIs

- 1st pathway: Political expectations of cooperation and political burden of justification for non-compliance
- 2nd pathway: Implementation, monitoring and dispute-resolution processes resemble those in binding agreements
- 3rd pathway: NBIs as launching pad for domestic legal bindingness
- 4th pathway: International standards affect state behaviour directly

Compliance complexities

- Agreement is part binding / part not binding
 - e.g. Paris Agreement

- Reasonable disagreement between parties about whether an agreement and whether particular provisions are binding
 - e.g. JCPOA



Law-making processes – normative pull

1. Pre-law function, NBIs as the precursor to binding agreements
 2. Setting the agenda for later binding agreements
- Limited existing empirical evidence
 - Normative pull may extend to third parties (no privity)

3. Tacit agreement? (*Peru v. Chile*)
4. NBIs concretising binding agreements (e.g. air services agreements)

States to consider:

- Care needed in drafting NBI, especially re breadth of language
- Good faith legal obligations to consider the NBI (*South West Africa*)?

- NBIs as state practice
 - When is this practice sufficiently “general”?
 - “Almost identical”: when is text boilerplate
- NBIs as *opinio juris*?
 - Paradoxical question
 - The closer we get to the existence of CIL, the more gravitational pull NBIs have

NBIs in interpretation: Article 31

- Art 31 VCLT – nothing precludes interpreters from using NBIs to determine the ordinary meaning of a term in a binding agreement, cf. dictionaries
- Caution re whether NBIs subsequent practice “in the application of the treaty” – art 31(3)(b)
- ILC: COP decisions “other subsequent practice” notwithstanding non-unanimity

NBIs in interpretation: Article 32

- Art 32 VCLT – NBIs as a supplementary means of interpretation
 - Strongest when binding agreements repeat concepts or blocks of text from NBIs
- Do negotiators recognise that NBIs have a pre-law function and are *travaux*? Can negotiators carve out or exclude this function?

NBIs providing guidance to domestic courts

- Existing domestic courts' decisions on NBIs are unprincipled. They depend on whether the domestic agency has acted in accordance with the NBI to the detriment of a private actor.
- Should domestic courts take consistent account of NBIs for some rule of law reason in a democracy, given the use of NBIs for flexibility and for lack of oversight?
- Should domestic courts apply NBIs at all, given they are intended to be non-binding?

Protecting reliance on NBIs: Estoppel

- No state responsibility, given the lack of legal obligations
- Promising state may be estopped from reversing its position
- The key question is whether and when NBIs give rise to detrimental reliance