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Panel 2: Practical examples of potential indirect legal effects of non-legally binding instruments

Potential indirect legal effects of non-legally binding instruments

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Thank you to the Council of Europe and the Federal Ministry of European and International Affairs for the invitation. I will provide an overview of the indirect legal effects of non-binding instruments, which I will refer to as NBIs.

To begin, I will discuss the effect of non-binding instruments on state behaviour. Conceptually, there is a clear distinction between binding agreements, which can give rise to state responsibility, and non-binding agreements, which do not. However, a key question arises: does state behaviour differ significantly based on whether the agreement is binding or non-binding? From my observations, I believe that, on average, state behaviour, including compliance, is not markedly different. Paraphrasing Louis Henkin, it appears that most states comply with most provisions in their NBIs most of the time, much like they do with binding treaties.

Ambassador Perez asked this morning: what provision has more legal effects, a non-binding provision in a binding agreement, or a binding provision in a non-binding agreement? I think as a factual matter, a binding provision in a non-binding agreement is likely to have on average, more effect on state behaviour than a purely auxiliary provision in a binding agreement. Moreover, I would argue that a binding provision in a non-binding agreement may exert more influence on state behaviour than a non-binding provision in a binding agreement. This highlights the importance of recognising that both types of agreements can facilitate international co-operation, even if there is an important conceptual distinction between them.

How do NBIs achieve compliance and influence state behaviour? There are four key pathways. First, they create political expectations for co-operation, imposing a moral and political burden of justification if a state fails to comply. While this is not a legal obligation, the distinction may not be that clear in practice.

Second, some NBIs include mechanisms for implementation, monitoring, and even dispute resolution, similar to binding agreements. These mechanisms can create changes in state behaviour and can therefore lead to compliance.

Third, NBIs can create to domestic legal obligations when states voluntarily choose to incorporate these non-binding agreements into their domestic law. Then the domestic law is the source of bindingness. However, this can still be an important effect of NBIs – it demonstrates the potential for NBIs to create legally binding effects at the national level.

Fourth, there are international standards that, while not formally binding, directly affect state behaviour without any implementation, e.g. rules and standards in international financial law. For instance, the Basel Capital Accords set capital requirements for global banks, which domestic bank regulators apply routinely in their day-to-day work, irrespective or at least without domestic implementation being a precondition.

These are just some pathways that show the potential effect of such standards. This can become more complex, in particular when agreements are mixed, i.e. that have both binding and non-binding provisions, or when there is a disagreement between parties or participants regarding whether a particular agreement is a binding or not.

Let me now turn to lawmaking. This covers at least part of the broad spectrum of the effects of non-binding agreements. An NBI can be a precursor to a binding agreement, i.e. having a pre-law function. How often that has been the case in the past is an empirical question which has not, to my knowledge, been answered. Similarly, a NBI, just like a binding agreement, can set the agenda for later binding or non-binding agreements. The mere use of a certain wording or certain text blocks might make it more likely that similar wording or blocks of text will also be used in future. Additionally, it is important to recognise that NBIs and binding agreements do not operate in isolation; they are often part of a broader network that influences future agreements. What happened in the past may affect what happens in the future at a factual level.

There is an intriguing argument, albeit one that may be challenging to substantiate, regarding the potential emergence of a tacit agreement over time from what initially began as a non-binding agreement between states. This seems to be suggested by the International Court of Justice's decision in the case between Peru and Chile, based on a shared understanding reached between the two states concerning their maritime boundary.

This leads us to an important point, already emphasised in our discussions this morning: the potential effects of non-binding agreements suggest that states should exercise caution when drafting them. Using looser terms can be risky, even if everyone acknowledges that no international legal obligations are created. The language even in non-binding agreements matters.

Turning to the topic of customary international law, it seems widely accepted that non-binding agreements can constitute a form of state practice. The key question, however, is whether we can consider these, often bilateral, agreements as constituting generalised practice. As outlined in Professor Zimmermann's earlier report, the critical aspect lies in the presence of almost identical content across agreements, which will be essential for determining whether we have generalised practice.

This raises further complex questions. What does it truly mean for the language to be "almost identical"? We must also consider which variations in language are irrelevant for assessing generalised practice. At first sight, the second requirement—opinio juris—may seem paradoxical, given the expressly non-binding nature of NBIs.

However, if we are close to establishing a customary international law rule, the lack of a sense of legal obligation in an NBI may be less significant. The consistent repetition of similar language by states in non-binding agreements could still lead to the emergence of custom.

I would also like to address the role of non-binding agreements in treaty interpretation. In my view, there is no principle that prevents treaty interpreters from using related NBIs in treaty interpretation to determine the ordinary meaning of binding agreements. For instance, WTO dispute settlement bodies routinely refer to dictionaries for interpretation of WTO agreements, even if these dictionaries are not produced by states, but by publishers like Oxford University Press.

Additionally, the actions of states in relation to non-binding agreements could qualify as subsequent practice. However, caution is warranted, given that states did not intend to create legally binding obligations to begin with, and one needs to carefully assess whether the acts done in relation to the NBI are in fact in the application of a treaty. As a practical matter, there is also the question of whether NBIs can be dealt with as precursor to a binding agreement, in particular if they are used as *travaux préparatoires* in treaty interpretation and the language used is very similar. Despite the limitations outlined in Article 32 of the VCLT, recourse to preparatory materials is a common practice among treaty interpreters, in particular tribunals, and we have an extensive notion of preparatory materials – a term that is not further defined in Article 32. The question is whether NBIs can be counted as preparatory materials for the interpretation of a future treaty.

Turning to my final slide, I would like to highlight some literature examining how domestic courts have engaged with non-binding agreements in environmental contexts. This literature suggests that domestic courts have not consistently applied NBIs in a principled manner. Instead, they have tended to use non-binding agreements when it aligns with the interests of domestic agencies, rather than to benefit private actors. There are several pertinent questions surrounding the use of NBIs by domestic courts, including whether they should be utilised at all given their non-binding nature and the intentions of the states involved.

Nevertheless, there are opportunities for courts to leverage NBIs, particularly when dealing with vague and open-ended provisions. This raises critical questions about the balance of power, especially in situations where a domestic court perceives that the executive branch may have used an NBI to circumvent oversight, transparency, or parliamentary approval. In such cases, a domestic court might be more inclined to consider the NBI in its interpretation.

Thank you very much for your attention.

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