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Panel 3: Discussion on practical experiences that states have encountered regarding the possible "circumvention" of treaty procedures and good practices of risk mitigation

Possible "circumvention" of treaty procedures on the national level or on the international level

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Thank you so much. It is a pleasure to be here, and I feel fortunate to have the chance to speak with you all today. Unfortunately, I could not join you in Austria this time, but I am grateful for the opportunity to contribute to this important discussion remotely.

I was asked to address the topic of the circumvention of treaty procedures and best practices for risk mitigation. I will do my best to explore the question of how such circumvention might occur. As Professor Forteau mentioned earlier, this is one of the critical questions in the realm of non-binding agreements. I also took note of the discussion just now about the terminology—whether we call them "non-binding international agreements" or "instruments." This is an issue I have been grappling with as well, not only as an academic but also in my role as the reporter for the American Law Institute's Restatement of Foreign Relations Law, where we are adding a section specifically on non-binding agreements.

We are currently engaged in the same debate—what exactly are we referring to when we use terms like "agreement" versus "instrument"? Do these terms carry different legal meanings? This is a significant point of discussion in our work, and I am glad to hear that it is a shared concern here.

To give some context, most of my research in this area has focused on the United States (US), though as part of an article on the rise of non-binding international agreements, we conducted a comparative study. In that study, we surveyed a variety of practices from around the world. What we consistently found was that non-binding agreements are becoming an increasingly prominent part of international law practice across many jurisdictions. This trend is by no means unique to the US, and I suspect it is something many of you have encountered in your own work.

The chart I am showing here focuses specifically on US data. The red line represents binding international agreements, including treaties formed with the advice and consent of the Senate, as well as executive agreements that are binding based on the President's authority or Congressional delegation. The reporting process for these agreements is fairly rigorous. I personally undertook a significant effort to document these agreements by suing the US Department of State to obtain 5,000 cover letters detailing binding agreements between 1989 and 2016.

What is striking is that the number of binding agreements peaked in the 1990s but has since leveled off and even declined. At the same time, the number of non-binding agreements has been on the rise. This is significant, as it suggests a shift in how international obligations are being framed—particularly in the US, but also globally. Importantly, the figure I am presenting for non-binding agreements is likely an undercount, as there is no formal reporting requirement for them. I had to file Freedom of Information Act requests with 24 US government agencies to gather this data, and in some cases, I even had to sue for it.

The main point I want to underscore is that, even with these limitations, we can see a clear trend: non-binding agreements are becoming more prevalent than binding agreements, at least in the US. From the conversations I have had with legal advisers from various countries, this trend seems to be mirrored elsewhere.

Now, turning to the issue of circumvention, I want to start by considering why states might choose to use non-binding agreements over binding ones. In some cases, circumvention may be a factor, but I do not believe it is the primary motivation. There are many reasons states might opt for non-binding agreements, including flexibility, speed, and the ability to avoid onerous domestic approval processes, particularly in countries where legislative approval is required for binding agreements.

That said, there are instances where non-binding agreements may be used to bypass internal or external checks, and that is where concerns about circumvention arise. In my research, I have found that within the US government, for example, different agencies sometimes prefer non-binding agreements precisely because they allow them to avoid oversight from the State Department. This is troubling because it means that certain agreements, even those with significant implications, may be negotiated and concluded without the proper diplomatic checks and balances.

The lack of transparency around non-binding agreements is also problematic when it comes to avoiding democratic scrutiny. In the US, non-binding agreements have historically not been subject to the same reporting requirements as binding ones, which means they can be used to avoid public or congressional oversight. This has led to concerns, particularly in politically sensitive areas like immigration, where agreements were negotiated without proper disclosure.

I want to be clear, though—this is not to suggest that non-binding agreements are inherently problematic. In many cases, they serve legitimate purposes, such as facilitating fast-moving negotiations or fostering relationships between states in situations where a binding agreement might not be necessary. However, the potential for abuse exists, and that's why transparency is so crucial.

I believe that addressing these issues does not require a blanket prohibition on non-binding agreements. Instead, what is needed is a stronger framework for transparency and oversight, both internally within governments and externally to the public and international community. Ensuring that all parties are clear about the nature of these agreements—whether binding or non-binding—and increasing the visibility of their content will go a long way toward mitigating the risks associated with their use.

Internally, we need greater transparency from US agencies to the State Department, ensuring that the department has visibility into all non-binding instruments being concluded. This would provide a clear view of the full range of commitments made to our partners. Externally, transparency is also crucial—by which I mean transparency to the political branches and to the public.

One of the major challenges, however, is the concern that transparency may embarrass negotiating partners. This is a significant argument that the Department of Homeland Security

has raised in the litigation I currently have ongoing with them. The department has argued that it cannot disclose certain agreements, not because it does not want to, but because its partners fear embarrassment if the agreements are made public.

This is why the work you are doing to reach international consensus on best practices is incredibly important. We need to ensure that transparency around these agreements is aligned globally, without letting one state's reluctance to disclose information hinder the political obligations of another. Achieving coherence and agreement on what transparency looks like in these cases is essential.

I would also like to highlight a difficulty we face—defining the scope of what we are talking about. There was just a discussion in the previous session about this very issue: are we talking about non-binding international agreements? Or non-binding instruments? Are these terms interchangeable, or do they represent different concepts? I ran into this problem when submitting a Freedom of Information Act request. I had to be very specific about what I was asking for, and many agencies initially responded by saying they did not understand the request. Through discussions, we eventually clarified it, but it underscored how difficult it is to define these terms. A shared definition would greatly improve transparency efforts across the board.

Let me briefly touch on US practices. As many of you likely know, the US made a significant change in 2023 with the National Defense Authorisation Act, which introduced, for the first time, requirements for both the disclosure and publication of what it called "qualifying non-binding agreements." These agreements are defined somewhat vaguely as those that could reasonably be expected to have a significant impact on US foreign policy, or those subject to a request from key foreign relations committees in Congress.

Rather than trying to define non-binding agreements in a highly specific manner, this was the solution. The State Department has since issued regulations providing more detail, and the statute includes various reporting and publication requirements. If anyone would like more information on this, I am happy to share it, but in the interest of time, I will not go into much detail here.

The key point is that, for the first time, the US now requires that certain non-binding agreements—referred to as "qualifying non-binding instruments"—must be disclosed to both the public and Congress. This is a significant step forward. It also requires better coordination within the executive branch. Agencies are now required to report agreements to the State Department within 15 days, designate a compliance officer within each agency, and undergo audits by the Comptroller General. These measures establish accountability for compliance with these transparency obligations.

The State Department has also started publishing these qualifying non-binding agreements on public websites. You can access them directly, and if you download the files, you will find a zip folder containing the agreements. Additionally, there are links to information about the agreements, though the level of detail is not as thorough as I had hoped. Still, it is progress.

When you look at these agreements, you will notice that they include a statement of their legal basis. While I had hoped for more specificity, the State Department has opted for a blanket statement covering all non-binding instruments. Even so, this represents an important step forward in making significant non-binding instruments more transparent, though there is still room for improvement.

I will stop here because I am eager to hear from the other panelists. Thank you very much.

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