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PRESENTATION FOR CAHDI WORKSHOP ON NON-LEGALLY BINDING INSTRUMENTS

Presentation of the ongoing work by the ILC on "non-legally binding international agreements"

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I would like to start by congratulating the Ministry of European and International Affairs of Austria and the CAHDI for organising this important event. It is truly an honour to be here today to discuss the ongoing work of the International Law Commission (ILC) on non-legally binding international agreements.

When I proposed to the ILC a few years ago that we begin work on non-binding agreements, there was a mix of enthusiasm and skepticism among members. Some were supportive, recognising its relevance, while some others viewed it as perhaps too theoretical. However, as we delved deeper into the subject, it became evident that this is indeed a very practical issue, particularly for legal practitioners in the legal services of the Ministry of Foreign Affairs who are increasingly encountering complex legal challenges related to these agreements.

The ongoing interest in this topic, exemplified also by the fact that this is already the second Practitioner's Workshop of CAHDI members, confirms the pressing need to explore the legal implications of non-binding agreements or instruments under international law.

In 2022, the ILC formally included the topic of non-legally binding international agreements (in French, which is to some extent clearer: "Les accords internationaux juridiquement non contraignants") in its long-term work program. It was then put at the programme of work in 2023 and I was the same year appointed as the Special Rapporteur for this topic. My first report (UN doc. A/CN.4/772) was released in June 2024, although it was submitted in January due to the time required for translations at the UN. The ILC had its first debate on this topic in July and early August this year. In Chapter 8 of this year's ILC report, released in all six official UN languages last week, you will find a summary of our activities on the topic.

Member states of the UN, including those from CAHDI, had the opportunity to share their initial perspectives on this topic during the discussions in the Sixth Committee in 2022 and 2023. The inclusion of this topic in the ILC's agenda has been largely supported by those who voiced their opinions in discussions last year and in 2022.

In my first report, I summarised the views expressed by various countries. Many stressed the practical relevance of the topic.

My first report was mainly of a preliminary nature. My objective was twofold: to initiate a general debate among commission members, and to establish the parameters for our future

work. I chose not to propose any draft provisions in this report, as I believe we will be more effective in drafting conclusions and guidelines once we have achieved a clearer consensus on the direction of our work.

In my report, I highlighted seven main elements: a summary of the Sixth Committee debates; a review of previous ILC work on non-binding agreements (in the course of its works on other topics); an initial overview of relevant practice, jurisprudence, and academic work; proposals regarding the scope of the topic and (and I think the two elements are linked), the terminology to be used to identify it; the identification of legal questions to be addressed (criteria for distinguishing treaties from non-legally binding international agreements; regime of non-legally binding international agreements; and (potential) legal effects of non-legally binding international agreements); recommendations on the format of our outcomes; and a proposed schedule for future work through to the end of the quinquennium in 2027.

I plan for my next report to focus on draft conclusions regarding the scope of our topic and the critical distinction between non-binding agreements and treaties. Following my first report, we engaged in a productive plenary debate with 28 Commission members contributing their views. This dialogue generated a wealth of ideas, and all discussions will be documented in the public verbatim records of the Commission.

A consensus has emerged around the practical significance of this topic and the need to focus our efforts on its practical aspects rather than engaging in theoretical debates, such as the distinction between law and non-law or the discussion on soft law. There was also a consensus on the need not to be prescriptive, with the objective of the work of the Commission being to provide clarification as far as possible in order to ensure more legal security in that field.

The ILC should, on the other hand, avoid indirectly converting non-binding agreements into binding ones. It was felt necessary not to undermine the possibility for states to conclude in their day-to-day practice non-binding agreements, which are very important to foster international cooperation and to address contemporary challenges, in particular when there is no appetite to conclude binding agreements.

We also agreed on the importance of basing our work on existing state practice, jurisprudence, and doctrine, ensuring that our materials reflect diverse legal systems and regions. The core issues we will focus on include distinguishing between treaties and non-binding agreements, as well as understanding the possible legal effects of such agreements.

Several substantive questions were raised during this year discussions, including the doctrine of estoppel and whether it can give legal effect to non-binding agreements, as well as the potential for courts to recategorise non-binding agreements as treaties under certain circumstances. We also had discussions on the question of the possible existence of a presumption. Is there a presumption that an agreement is binding or is there the opposite presumption that an agreement is not binding, or maybe there is no presumption at all and we have to decide on a case-by-case basis whether an agreement is binding or not binding?

The main issues that were discussed this year and on which we did not take any definitive decision – but at least stated our position – concern three core elements: the terminology to be used, the scope of the topic, and the nature of the final outcome of the work.

First, on terminology, the main debate was (I think you had the same debate in the CAHDI) on whether or not we should use the term “agreement” in the title of the topic to define its scope, or whether we should use another term like instrument, arrangement, or even “acte concerté non conventionnel”, which is very French and which would be difficult to translate into other languages. I ultimately recommended retaining the term "agreement" for practical legal reasons. First, the Vienna Convention on the Law of Treaties is based on the premise that all treaties are agreements, but not all agreements are treaties. The ILC confirmed this interpretation in its work on subsequent agreements in relation to treaty interpretation, where it adopted a draft conclusion which explicitly used the expression non-binding agreement; at that time, it did not prompt any debate. Furthermore, the phrase non-binding agreements is now currently used, and there is little room for ambiguity if both terms are used together *(“non-binding”* and “*agreements”*). But the main reason is that we thought the term “agreement” is a good term to show that the work will not concern all instruments, but only agreements, ie commitments taken by mutual will. We will not envisage other kinds of documents or instruments which are not agreements. The word agreement is very useful in that respect to define the scope of the topic.

The last argument that was made is that the term agreement is preferable to terms like “arrangement”, which are technical and administrative, and not very easy to translate in many languages. So far, there seems to be a general consensus that emerges in the commission to this effect. In my view it is better to keep the term “agreement” for the time being. Of course, the commentaries will indicate that the use of the term “agreement” is without prejudice to the nature and effects of these agreements and without prejudice to the terminological choices made by states in their practice.

In terms of terminology, we also had some discussions on the word “regime” of non-binding agreements and the word “effects” of non-binding agreements, because some members considered that they were too strong, in fact, and they were connotated as already having a legal component. The suggestion was made to possibly use words like “implications” or “consequences” of non-binding agreements which are softer or more neutral than the term “legal effects”, which may be misleading.

The second point which was mainly discussed this year was the scope of the topic. The general view was that we need to keep some flexibility and not to be categorical in the framing of the scope of the topic. So far, there is an emerging general consensus that we should work only on agreements in writing, that we should exclude unilateral acts as well as resolutions of international organisations acting as independent subjects of international law, and that we should exclude non-binding provisions that you can find in some treaties. We will only work on non-binding agreements themselves, not on non-binding provision that are contained in some treaties. We should also exclude documents or agreements that merely state a fact or a position, but do not contain any normative component or commitment. In a nutshell, the scope of the topic should be on agreements that are very similar to treaties but which are not binding.

The main discussions on the scope of the topic evolved around three categories of agreements or documents.The first are acts of international conferences, which are adopted not by an international organisation but by an international conference. There seems to be consensus to include them in the topic, even though they are adopted under very specific institutional frameworks. We decided to include them in the topic because it constitutes the most obvious examples of non-binding agreements at the multilateral level. Second, we also had discussions on interinstitutional agreements or agreements between substate entities. My preference was initially not to include them in the topic because they are perhaps very different from interstate agreements. But after the debate that we had in the commission, my position today is to, at this stage, include them in the topic, at least some examples, and to see later to what extent we need to deal specifically with inter-institutional agreements. Finally, some members recommended to include agreements concluded with private persons or entities, like peace agreements between the state and an armed group. But some members were quite reluctant to include these agreements in the topic because they constitute a very specific form of agreement with their own legal issues. It may be better not to have too many different kinds of agreements under this topic and to focus on agreements or agreements concluded by states and/or international organisations, and to put aside agreements concluded with private parties.

The last point was on the outcome of the work of the ILC. The main debate was whether we should produce a set of draft conclusions or a set of draft guidelines on the topic. There is so far a slight majority which is in favor of draft conclusions because they are considered as being more neutral and less prescriptive than draft guidelines.

However, it is only a slight majority, and nothing has been decided definitively. The feedback of the Sixth Committee will be very helpful in that regard for the Commission to decide what to do next year when we start the drafting exercise as such. Some members also proposed to prepare model clauses, recommendations or best practices, but it was only a minority of members who made that proposal. Here again, we need to think about it further to decide what we can do in that in that regard.

In conclusion, Chapter 3 of this year's report includes a request for information directed at states, seeking insights into their practices concerning non-binding agreements. I encourage CAHDI to provide any relevant information that could inform my next report. While we considered a specific request to CAHDI, we opted to wait next year and to see whether we should broaden our request to include all other relevant international organisations to ensure balanced representation.

I look forward to fostering close co-operation between CAHDI and the ILC on this important topic. Thank you for your attention.

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