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Chair's Summary of the Second Practitioners' Workshop on Non-Legally Binding Instruments in International Law (Vienna, 18 September 2024)

The workshop on non-legally binding instruments (NBIs) opened with remarks from the Austrian Foreign Ministry, highlighting the significance of this topic for legal practitioners and expressing pride in hosting the event in Vienna as part of Austria's CAHDI presidency. A representative from the Council of Europe then reviewed prior work on NBIs and emphasised the focus of this workshop being the practical orientation of discussions concerning the day-to-day work with non-legally binding instruments. He acknowledged the role played by the German government in initiating the work on this subject in the CAHDI and indicated that the workshop is sought to contribute to CAHDI's decision-making process regarding the development of guidelines and best practices for NBIs.

Professor Helmut Aust from the Free University of Berlin delivered the *keynote address on "The growing use of non-legally binding instruments and their potentially profound implications for the future of the international legal system"*, underscoring the growing use of non-legally binding instruments and their implications for the international legal system. He noted their flexibility and potential to complement formal legal frameworks. He explained that informality in this context does not mean that non-legally binding instruments are casual in form, but rather that informality would relate to the place that such non-legally binding instruments may or may not have in the international legal order. Drawing an analogy from a trend of informalisation of already informal formats of the UN Security Council's working methods (informal interactive dialogues), he suggested that increased formalisation of non-binding agreements might prompt states to pursue even more flexible arrangements. He highlighted the role of state cooperation in understanding national practices, particularly through the CAHDI's and the International Law Commission's work on non-binding instruments. Engaging with the ILC work could help make Council of Europe member states' practice more visible in a context which has been - so far - predominantly driven by developments from other regions. Council of Europe states might also find it useful to take this opportunity to identify, for instance, where and to what extent their preferences align with the work of the Inter-American Juridical Committee on this topic. Professor Aust then developed a case study of a series of bilateral security agreements between Ukraine and its partners that illustrated the utility of NBIs in reinforcing international law principles. These would not represent isolated, one-off and non-binding attempts at bolstering individual bilateral relationships. Rather, the instruments together would form a pattern and were also embedded into a more collective process organised in the context of NATO, the G7, the EU, and the Council of Europe. In closing, the speaker stressed that non-binding agreements could play a crucial role in the defence and development of international law and may eventually pave the way for binding norms. He called for further clarity on how non-binding instruments interact with legally binding

ones, especially in complex international contexts like the current situation in Ukraine, urging continued engagement with CAHDI and the ILC to better understand these dynamics.

In the subsequent discussion, questions were asked regarding the role of preambles in defining the binding nature of instruments. Professor Aust affirmed that while preambles matter, they must be interpreted within a broader context. The representative from the *US* delegation pointed out that the use of terms like "shall" and "agree" in the US-Ukraine Agreement made it binding under US practice. He emphasised that while some agreements need to be legally binding, non-binding instruments can sometimes be more impactful due to their aspirational nature. Discussions also touched on differences between regional practices, such as between the Inter-American and the European approaches.

The *first panel "Exchange on "good" or "bad" practices between practitioners"* focused on "good" and "bad" practices in drafting NBIs, with Mr. Jeremy Hill, former diplomat, and experienced treaty law specialist of the Foreign, Commonwealth and Development Office (FCDO), stressing the importance of precise language. Mr Hill gave examples of terms that signal non-binding intent and cautioned against over-reliance on disclaimers. He also warned against a trend to assume an international instrument being in principle legally binding in the absence of distinctive features of NBIs. Other panellists shared insights from their countries, discussing the need for clarity, transparency, and flexibility in NBI drafting. The *Swiss representative* highlighted the importance of including a disclaimer while the *Austrian representative* emphasised the importance of a legal review of NBIs to ensure clarity regarding their non-binding nature. The *Slovenian panellist* highlighted the need for a register to track these instruments, noting challenges stemming from differing interpretations. The *German representative* then presented how non-legally binding instruments in principle should look like (structure, terminology and model clauses) according to the German Foreign Ministry Guidelines.

Referring to the case law of the European Court of Human Rights, a representative from the *Office of the CoE Commissioner of Human Rights* stressed that NBIs should ensure that non-legally binding instrument respect human rights, be published, need democratic safeguards and be reviewed regularly, and should not cover certain substantive areas, including access to justice and the principle of legality of criminal offences and penalties.

Discussions concluded with reflections on the complexity of NBIs in international law. The *UK representative* highlighted the challenges in classifying NBIs, while the *Canadian representative* raised concerns about the structuring of clauses and financial obligations. The *Slovenian panellist* echoed the call for transparency and the usefulness of a register for non-binding agreements to improve visibility among ministries. Lastly, the linguistic challenges of translating legal terminology in different languages were underscored, emphasising the importance of precision in language to avoid unintended binding obligations.

In the *second panel on "Practical Examples of Potential Indirect Legal Effects of Non-Legally Binding Instruments",* the presentation by Professor Waibel of the University of Vienna focused on the influence of NBIs on state behaviour, their significance in lawmaking, and their interaction with customary international law and treaty interpretation. He argued that understanding the impact of NBIs on state behaviour was crucial. Evidence would suggest

that states often behave similarly in both contexts. This would indicate that both types of instruments significantly contribute to international cooperation. Professor Waibel outlined

several pathways through which NBIs could influence compliance and state behaviour. Firstly, they may create political expectations for cooperation, establishing a moral obligation that compels states to justify non-compliance. Secondly, some NBIs may contain mechanisms for implementation, monitoring, and dispute resolution, fostering compliance. Thirdly, states may choose to incorporate NBIs into their domestic legal frameworks, thereby creating legal obligations. Lastly, NBIs may inform domestic legal standards informally, as exemplified by international financial regulations like the Basel Capital Accords. These mechanisms illustrate the substantial effects that NBIs can have on state behaviour and legal obligations, even in the absence of binding agreements. In the realm of lawmaking, NBIs could act as precursors to binding agreements or might evolve into a tacit agreement. This would underline the need for careful drafting of NBIs, as ambiguous language can lead to unintended legal consequences. Regarding customary international law, the consistency of language across agreements could signal the development of customary norms, indicating that even non-binding instruments can play a role in establishing customary international law. They can also play a significant role in treaty interpretation. States' actions concerning NBIs could be seen as subsequent practice, although caution is warranted due to their non-binding nature. Furthermore, NBIs may serve as preparatory materials for future treaties, especially when their language closely aligns with that of binding agreements.

In the ensuing panel discussion, the *Irish panellist* highlighted why states often prefer NBIs over binding treaties. He asserted that states opt for NBIs due to their convenience, confidentiality, and sufficiency, rather than solely to evade legal effects. He illustrated this with examples from Irish practice, such as the 1973 Sunningdale Communiqué and the 1993 Downing Street Declaration, which laid the groundwork for later binding agreements like the 1998 British-Irish Agreement. He pointed out that the inclusion of the Good Friday Agreement as an annex to a binding treaty conferred to it legal significance.

The *Dutch panellist* discussed several national case law examples on NBIs, such as the application of the principle of good faith to a 2000 Memorandum of Understanding (MoU) between the Netherlands and Belgium concerning a railway line (Iron Rhine case). Although the MoU had no legal force, it influenced arbitral proceedings, demonstrating the enduring relevance of good faith principles in interpreting NBIs. She highlighted that CAHDI might explore the implications of applying the principle of good faith to non-legally binding instruments.

The *UNOV/UNODC representative* focused in his presentation on bilateral arrangements and non-binding MOUs that UNOV and UNODC have with various states. Although non-binding, he gave several examples where these agreements can create quasi-treaty effects, establishing actionable rights. The speaker noted for instance United Nations Sustainable Development Cooperation Frameworks (UNSTCFs) that contain sometimes host country arrangements, MoUs that include clauses on intellectual property rights and dispute resolution and end-user agreements for technology, highlighting the practical utility of NBIs in operational contexts.

In the ensuing discussion, panellists explored measures to mitigate indirect effects of NBIs and their relevance to potential CAHDI tools. Professor Waibel emphasised that the approach addressing these effects should be tailored according to specific legal impacts, acknowledging the inherent complexity of NBIs. Ultimately, the participants underscored the importance of distinguishing between bilateral and multilateral NBIs, their role in treaty interpretation, and the balance between flexibility and legal consequences. It illuminated the practical applications of NBIs in international law, reaffirming their significance as tools for cooperation and operational effectiveness, and the need for legal clarity.

Subsequently, Professor Forteau provided an overview of the International Law Commission's (ILC) ongoing work on non-legally binding international agreements, a topic which the ILC included in its long-term work programme in 2022. As Special Rapporteur, Professor Forteau informed the participants that he had submitted his first report in June. His report discussed the distinctions between non-binding agreements and treaties, outlined the scope of the topic, reviewed relevant practices, and proposed a work plan extending to 2027. In his presentation, he reflected on the contributions made by UN member states during the Sixth Committee debates in 2022 and 2023, many of which emphasised the practical implications of non-binding agreements. His report aimed at stimulating a general debate and establishing a framework for future work, deliberately refraining from proposing draft texts. He highlighted key discussions on terminology, the scope of the topic focusing on written agreements while excluding unilateral acts and certain non-binding provisions, and the nature of the ILC's final outcome, preferably draft conclusions, deemed more neutral. In closing, Professor Forteau sought input from CAHDI members regarding state practices related to non-binding agreements to inform his next report and expressed a desire for closer collaboration between CAHDI and the ILC as the project progresses.

The subsequent discussion raised concerns about the ILC's use of the term "agreement" instead of "instrument" for non-legally binding instruments. The CAHDI Chair noted that this might suggest a legally binding nature, particularly in the context of different languages, such as the French term "accord." The EU representative pointed out that within EU practice, non-legally binding instruments are distinctly separate from legally binding treaties, with "agreement" reserved for the latter under Article 218 of the Treaty on the Functioning of the European Union. They encouraged the ILC to acknowledge regional variations in terminology. Similarly, the US cautioned against using "agreement" for non-binding instruments, arguing that it could create confusion with treaties and urged the ILC to consider CAHDI members' objections. Ireland echoed these concerns, suggesting that "agreement" might imply legal obligations in domestic contexts, and advocated for more inclusive terminology. In response, Professor Forteau explained the use of "agreement" as the least problematic option. He acknowledged the complexity of translating the term across different legal systems and reiterated that the substantive nature of the ILC's work should take precedence over terminological debates.

Further discussions evolved around the ILC's scope of work on this topic, with Poland and Finland questioning whether it should include inter-institutional agreements, which might not fit neatly with interstate agreements. Professor Forteau agreed that there were significant differences between these categories and indicated that the ILC's majority favoured including inter-institutional agreements. He emphasised that the feedback from member states,

especially during the Sixth Committee discussions, would be vital in shaping the definition and scope of non-binding instruments moving forward.

In Panel 3 “Discussion on Practical Experiences in Circumventing Treaty Procedures and Risk Mitigation Practices”, Professor Hathaway of Yale Law School addressed the workshop participants on the topic of circumventing treaty procedures and the best practices for mitigating associated risks. She touched on the ongoing debate regarding terminology, specifically whether to refer to these instruments as "non-binding international agreements" or simply "instruments." She presented the results of her empirical study that focuses on US practices in the area of NBIs but that also included a section on global trends. Her findings revealed a marked increase in the use of non-binding agreements across various jurisdictions, not limited to the US. Hathaway presented data indicating a peak in binding international agreements in the 1990s, which has since declined, while non-binding agreements have surged. However, she cautioned that the reported figures for non-binding agreements might be underestimated due to inadequate formal reporting requirements. Addressing circumvention, Hathaway explained that states may favour non-binding agreements for reasons of flexibility and speed, as well as to bypass internal or external oversight. She cited U.S. government examples where agencies opted for non-binding agreements to avoid State Department scrutiny. The lack of transparency, she argued, restricts democratic oversight, particularly when sensitive issues like immigration are negotiated without public disclosure. Nonetheless, Hathaway did not criticise non-binding instruments as such, recognising their role in facilitating expedient negotiations. She called for stronger transparency and oversight frameworks to mitigate risks associated with these agreements. Hathaway concluded by highlighting recent US legislative changes, specifically the 2023 National Defence Authorisation Act, which mandates the disclosure of specific "qualifying non-binding agreements." She viewed these changes as a positive step towards greater transparency, while emphasising the need for ongoing efforts to establish international best practices for non-binding agreements.

The Greek panellist then described how the Greek constitution determines the subjects and procedures for treaties and non-legally binding instruments. Certain agreements, especially those with financial implications, required parliamentary approval based on their content rather than form. She discussed challenges arising from hybrid agreements containing both binding and non-binding provisions and shared her office's practice of reformulating texts to comply with constitutional requirements. The Cypriot panellist explained that, similar to Greece, treaties in Cyprus required parliamentary approval unless they were classified as provisional or temporary, allowing for certain exceptions. She described the legal analysis undertaken to assess whether intended agreements would respect constitutional procedures, and, if not, how to mitigate and revise them accordingly, illustrated by recent emergency evacuation agreements that were treated as provisional due to time constraints. Additionally, she discussed the government's guidance for drafting non-binding instruments as a helpful tool to mitigate the risk of circumvention. The Finnish panellist focused on risk mitigation practices, underscoring the need for clear guidelines and training in handling non-binding instruments. Finland's national treaty handbook provides detailed guidance on appropriate drafting and approval processes, complemented by regular training for officials. While parliamentary approval is not required for non-binding agreements, politically significant ones are shared with parliament for transparency. The panellist emphasised the importance of accessibility,

noting that significant non-binding agreements are often published in official series or on ministry websites.

The subsequent discussion addressed practical challenges and solutions regarding NBIs, with the Norwegian representative noting discrepancies in agency responsibilities across countries. This complexity would complicate the use of interagency agreements and necessitates transparency to avoid overreach. The Polish representative sought clarification on Hathaway's methodological approach to studying non-binding agreements. Professor Hathaway outlined her study's two primary categories: "formal" non-binding agreements involving federal actors and "joint statements" reflecting the views of both parties. She acknowledged the challenges of studying these instruments and the need for centralisation to prevent agencies from committing to obligations they cannot fulfil. The Finnish panellist proposed three approaches to address interagency challenges: allowing joint signatories, having the lead ministry consult others before signing, and streamlining representation through the government. The discussion concluded with a call for transparency, interagency coordination, and adherence to constitutional processes to mitigate risks associated with NBIs.

In the concluding session on “Model Texts and Best Practices for Non-Legally Binding Instruments”, the CAHDI Secretariat summarised prior discussions and findings from Professor Zimmerman's report. An emerging consensus regarding the definitions of legally binding versus non-legally binding instruments was noted, and arguments for developing tools to enhance consistency and clarity while facilitating international cooperation were presented. However, concerns about oversimplification and loss of flexibility due to varying constitutional contexts among states were also discussed. Specific tools presented included model text(s), guidelines, good practices, and glossaries. The presenter argued that a model text could improve consistency but cautioned against rigidity. Guidelines could provide a structured framework for clarifying best practices and promoting consistency, a Compendium of good practices could encourage the sharing of successful approaches and innovations across different jurisdictions, and a glossary might clarify terminology but could overlook nuances in a multilingual context.

The discussion included contributions from representatives of Greece, the UK, and the US, expressing a cautious yet evolving view towards harmonisation. Emphasis was placed on the need for non-prescriptive approaches and clarity in distinguishing NBIs from binding agreements. In conclusion, participants acknowledged the critical shift in international law and the ongoing need for continued dialogue as the legal landscape and practice evolves.

The Chair suggested that the CAHDI could decide at its 67th session on the follow-up measures to be taken and could discuss whether the CAHDI Secretariat should be asked to prepare a paper for the next meeting, aimed at collecting existing materials and identifying areas where guidelines could be developed.

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