'The practice of States and

International Organisations regarding non-legally binding agreements'

Oral Presentation by

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Part I: Introduction and background

Dear Ambassador Tichy,

Excellencies,

dear colleagues,

many thanks for the invitation to present my report on 'The practice of States and International Organisations regarding non-legally binding agreements' to the CAHDI, and for having me invited to draft the report at the first place following up on our joint 2021 workshop on the same issue.

As you will recall my report is based on a questionnaire on the practice of member States and I am particularly grateful to those 22 member States that provided

information as to their practice in line with the said questionnaire, so that my report could have been as representative of relevant State practice as possible.

It goes without saying though, that obviously I was thus only in a position to, in my report, for one, only reflect their very practice, and that, second, I made an attempt to present the main trends arising from those replies.

Today's oral presentation will, by and large, follow the structure of my written report, which in turn had followed the set-up of the questionnaire.

I will thus start with substantive aspects of such non-legally binding agreements, and then move on to related procedural aspects. I will conclude with some more general aspects including possible ways forward.

But let me start with the issue of terminology. I recall that a significant number of States rejected the very use of the term "*agreement*" in relation to non-legally binding instruments, but I note at the same time that both, the OAS and the ILC have used the very same term in their respective guidelines and studies in the matter.

If member States do wish, however, to avoid the term of 'non-legally binding agreements' as such, it might be advisable to henceforth e.g. use the generic term of 'non-legally binding arrangements'. In any case one has to recall that unilateral non-legally binding instruments are not being covered by the study.

At the same time, the practice reported to me confirmed that a whole range of terms are in use for such non-legally binding instruments. There was a consensus however that the crucial element is to be seen in the fact that – in contrast to treaties – they are by their very nature meant *not* to, and do not, create legally binding

obligations under international law. Put otherwise, States work on the basis of a negative definition of such arrangements.

As far as the notion of so-called "Memoranda of Understanding" or 'MoU' is concerned, the State practice, as reported, confirmed that the said notion was rather used for non-legally binding instruments. At the same time, however, mention was made of the fact that other States sometimes also use the said term when referring to legally binding agreements.

Notwithstanding Article 2 (1) lit. a VCLT, which as we all know confirms that it is the content and language of an instrument that is decisive for determining its respective legal character and its legal effects, at least some States stated that they preferred not to use the term at the first place in order to avoid misunderstandings. States may thus consider the issues arising from the continued use of the notion of MoUs. In any case, most States do not distinguish between MoUs and other types on non-legally binding instruments.

As to the distinction to be drawn between treaties governed by international law on the one hand, and between different types and forms of 'non-legally binding agreements' on the other hand, States clearly distinguish between treaties, civil law contracts and non-legally binding instruments, while no distinction is made between MoUs (perceived as being not legally binding under international law) and other types and forms of non-legally binding instruments.

As to how to differentiate between legally binding agreements and non-legally binding instruments, there was also a consensus to the effect that this constitutes a matter of interpretation, where the intention of the parties, as expressed in the text, as well as the language and terminology used, is decisive.

Yet, there is not one single decisive element that typically qualifies an agreement as non-legally binding (or *vice versa*). Rather, every agreement ought to be assessed in its entirety, taking into account the content, form and terminology of the document, as well as the circumstances surrounding its conclusion.

Yet, a clause *explicitly* stating that an agreement was not legally binding was a very clear and strong indicator, if not even provides conclusive evidence that the parties did not intent to enter into legally binding obligations arising under international law.

There was some disagreement whether other States whether non-legally binding instruments should at least *normally* contain such a 'disclaimer' clause, and /or whether they should indicate that they are "not eligible for registration with the Secretary-General of the United Nations".

Many States listed typical terms and phrases that should be used in non-legally binding agreements instead of other terms that were typically used in treaties, in order to indicate that the instrument in question was not meant to be legally binding under international law.

As you will see in the written report, some States use standard language indicating the binding/binding-character of a given instrument such as e.g. *not* using

language as to the 'entry into force' or 'parties' in an instrument that is *not* meant to be legally binding.

As far as the competence to enter into non-legally binding instruments is concerned, not surprisingly, replies of the reporting States differed significantly on the basis of the different internal constitutional structures of the State concerned. Normally, however, it is the respective government or individual ministers, and even State agencies or similar institutions (as well as federal sub-entities, where they exist) are considered competent to sign 'non-legally binding agreements' with no need for parliamentary approval.

One of the most crucial questions is the one that relates to possible (indirect) legal effects of non-legally binding instruments, and whether such types of instruments, their non-binding character notwithstanding, might eventually be precursors of legally binding agreements related to the same subject matter.

The majority of States participating in the survey held that non-legally binding agreements may under certain circumstances produce indirect legal effects by providing interpretative guidance and may also facilitate the later conclusion of a binding agreement, sometimes referring to the work of the ILC which has stated that such non-legally binding instruments may, their lack of binding force notwithstanding, nevertheless "provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development".

At least some States also noted that non-legally binding instruments may serve as subsequent agreements within the meaning of Art. 31(2)(a), (3)(a) VCLT provided

the parties to the respective treaty participated in the non-binding instrument with the intent to clarify the underlying treaty in question, or could constitute subsequent State practice in accordance with Arts. 31(3)(b), 32 VCLT, provided such practice takes place "in the application of the [original] treaty", as required by Art. 31(3)(b), 32 VCLT.

In cases where a non-legally binding arrangement formed part of prior treaty negotiations it may also form part of the *travaux préparatoires* of the later treaty as a supplementary means of its interpretation pursuant to Art. 32 VCLT.

Finally, it was recognized that non-legally binding instruments may produce legal effects through concepts such as acquiescence and estoppel.

On the whole, it thus seems that States do not categorically exclude possible indirect legal effects under international law produced by instruments which themselves are, as such, not legally binding under international law. However, the extent to which, and under what conditions, such effects may take place, seem to still need further analysis taking into account both, general rules of treaty law, as well as other general principles of international law such as estoppel or acquiescence.

As to the reasons why non-legally binding instruments are preferred as compared to treaties, it has become obvious that the former are sometimes concluded to later facilitate the conclusion of a binding agreement, and sometimes because it is impossible to reach a legally binding agreement with all parties involved.

Besides, apart from the fundamental question whether States want to enter into binding obligations or not at the first place, many States held that it was the

subject matter that was decisive in order to opt for the conclusion of a treaty, or whether instead entering into a non-legally binding instrument. Notably, technical or administrative issues are preferably regulated by way of non-legally binding instruments which can more easily be amended or even terminated. In contrast, other topics such as e.g. tax or trade agreements, instruments regulating privileges and immunities, or providing for binding dispute resolution mechanisms were not infrequently held to be *per se* ineligible to be regulated by way of non-legally binding instruments.

Moreover the time factor as to their conclusion and the inherent flexibility of non-legally binding instruments were also considered to be important factors in deciding whether to conclude a treaty or to merely enter into a non-legally binding agreement.

On the whole, it thus seems that it is not least the very informality and flexibility inherent in non-legally binding instruments that make them the instrument of choice, as compared to (perceived) lengthy negotiation and entry into force procedures as far as treaties are concerned.

This flexibility also extends to the issue who, under domestic law, may make then decision to enter into non-legally binding agreements since in member States, typically, the constitutional rules regulating the formal conclusion of treaties do *not* apply to the conclusion of non-legally binding agreements, and most of the States that replied to the questionnaire, stated that there are no other rules below constitutional rank in place either. Thus, national parliaments only seem to become

involved in 'concluding' non-legally binding agreements through its general right to be informed and to eventually petition the respective government, but are not asked to formally agree.

As far as the issue of some form of a mandatory centralised formal assessment of non-legally binding agreements to be eventually concluded the replies were mixed and showed a significant lack of uniformity among the States that engaged with the questionnaire: in some States there exists a mandatory formal assessment, while in other States such formal assessments are not mandatory but are nevertheless often being conducted as a matter of routine, while in a third group no formal assessment is conducted at all.

In those States where a formal assessment as to possible legal issues arising from the conclusion of non-legally binding instruments is (to be) conducted, it is mostly the legal department of the Ministry of Foreign Affairs which performs the assessment, or which shall be consulted.

What is more is that it is also its timing of such review – to the extent it takes place at all - which varies significantly among States contributing to the survey of State practice.

Mutatis mutandis, no uniform practice may be discerned either as to whether non-legally binding agreements entered into by sub-national territorial units/bodies or specialized agencies are also subject or not to the same formal assessment *e.g.* by the respective Ministry of Foreign Affairs.

The majority of States reporting, and indeed even some which do not have a mandatory formal assessment in place, have some kind of internal guidelines or written guidance for concluding and assessing non-legally binding agreements, which guidelines or handbooks are then made available to the various governmental departments potentially involved in the 'conclusion' of non-legally binding instruments.

As to the signature, there seems to be a consensus, that no document containing 'full powers' as referred to in Article 7 (1) lit a) VCLT is required for signing a non-legally binding agreement and, in contrast to the signing and ratification of international treaties, many States seem to not provide for *any* formal procedure whatsoever when it comes to the signing of non-legally binding agreements. In some States, however, an approval of the President, the Council of Ministers, or of the Minister of Foreign Affairs is required.

Finally, there does not exist a uniform practice among Council of Europe member States as to the issue whether the signatures of non-legally binding agreement necessarily have to be on the same document, while there is not yet a broader practice on mere 'electronic signatures'.

In most States that participated in the survey non-legally binding agreements do not have to be concluded in the respective national language, but may also be 'concluded' in a neutral language, typically in English or possibly in French, unless said language was the official language of the other partner

Generally, there are neither strict formal rules applying to non-legally binding agreements as they do when it comes to treaties such as the choice of paper et al., but States are generally keen to make sure that non-legally binding agreements do not, by their outer appearance, give the impression to constitute treaties binding under international law.

In most States there is no specific domestic data base or register for non-legally binding agreements, but they are somewhere registered or archived, e.g. by the respective lead department and/or by the respective Ministry of Foreign Affairs.

Moreover, and in contrast to treaties, non-legally binding agreements are in almost all States reporting *not* published in an official treaty series or legal gazette.

Let me now move on to the pros and cons of such non-binding instruments, as perceived by States, and possible ways forward.

Most States saw the main benefit of non-legally binding agreements in their greater flexibility, with more expeditious and less formal processes needed given the increased speediness of political developments and growing international cooperation.

Furthermore, non-legally binding agreements are seen as useful in order to specify the terms and obligations of previous treaties, or by providing an alternative if the conclusion of a binding treaty is politically not possible.

Concerns were however also uttered about the frequent use of non-legally binding agreements, their potential misuse to avoid binding commitments, which could lead to less reliability in international relations.

Overall, as shown, the replies to the questionnaire provided by 20 States and two International Organisations show that there exists a significant level of agreement on the main characteristics of non-legally binding agreements, and on the main differences between their conclusion and effects as compared to treaties.

What are then possible smaller or bigger steps to be eventually taken, if at all.

For one, I propose that the results of the survey, including this report, could be made available to the International Law Commission for its consideration, given the fact that the ILC has included the topic of "Non-legally binding international agreements"/ "Accords Internationaux Juridiquement Non-Contraignants" in its long-term programme of work.

Besides, a publication, either on the CAHDI's website and/or in form of a printed publication, of both, the survey of State practice, as well as of this report, might be helpful to further disseminate the respective practice of CAHDI member States.

As to possible additional future steps it is obviously for member States whether efforts could be made, or should be made, to establish specific substantive or procedural requirements or uniform practices regarding non-binding exchanges and instruments, following up on the "Guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements" developed within the framework of the OAS.

I thank you for your kind attention, apologize again that I could not make it to Strasbourg (which I would have loved I might say) due to prior academic

engagements here in Poznan – and obviously stand ready for any further questions you might have.