## Outline

Introduction	1
Part 1: Nonbinding instruments in international	_
practice1	
A. The variety of nonbinding instruments: an overview	
analysis	7
Part 2: The functions and limits of nonbinding	
instruments	3
A. The international level	3
B. The state level: compliance with and implementation of	
nonbinding instruments by states	
C. Private level: direct impact on private actors	4
Part 3: The legitimacy of nonbinding instruments	'3
A. Introduction	'3
B. Legitimacy challenges	
C. Addressing the challenges	)7
D. Conclusion and outlook	19
Part 4: Concluding summary	13
Bibliography45	57
Index 49	) (

## Table of Contents

Int	rodu	ction	1
		Nonbinding instruments in international	_
-			
A.	The v	variety of nonbinding instruments: an overview	
	I.	Memoranda of Understanding 10	6
	II.	International programmes 1	8
	III.	Declarations of principles and action plans adopted at	
		international conferences	9
	IV.	International recommendations adopted by	
		international institutions	
		1. International Organisations2	
		a) United Nations General Assembly2	3
		b) United Nations Environment Programme 2	
		c) Food and Agriculture Organization2	
		d) World Health Organization 2	
		e) International Maritime Organization 3	
		f) International Civil Aviation Organization 3	
		g) International Atomic Energy Agency 3	7
		h) Organisation for Economic Co-operation and	
		Development4	0
		(1) Environmental recommendations addressed	
		to states4	-0
		(2) OECD Recommendation on Common	
		Approaches on the Environment and	
		Officially Supported Export Credits4	-3
		(3) OECD Guidelines addressed to private	
		actors4	
		2. Multilateral Environmental Agreements 4	
		a) Vienna Convention and Montreal Protocol on	
		Substances that Deplete the Ozone Layer 4	17
		b) Convention on Biological Diversity4	
	V.	Operational Procedures and Safeguard Policies	
		1. World Bank	
		2. Global Environment Facility	
	VI.	Technical standards	57

Table of Contents

		1. Codex Alimentarius Commission	
		2. International Organization for Standardization	59
В.	Illust	rative case studies	60
	I.	Fisheries Regulation: the FAO Code of Conduct for	
		Responsible Fisheries	61
		1. The institutional framework	61
		2. The regulatory challenge	63
		3. The nonbinding response: the Code of Conduct for	
		Responsible Fisheries	67
		a) The CCRF	
		b) International Plans of Action	
		c) FAO Technical Guidelines for Responsible	
		Fisheries	71
		4. Norm development	72
		a) Development of the CCRF and International	
		Plans of Action	72
		b) Development of Technical Guidelines	
		5. Norm adaptation	
		6. Norm implementation and follow-up	76
		7. Preliminary assessment and outlook	
	II.	Regulating international trade in chemicals and	
		pesticides: the introduction of Prior Informed	
		Consent through nonbinding instruments	81
		1. The institutional framework	81
		2. The regulatory challenge	82
		3. The nonbinding response: the voluntary PIC	
		procedure	84
		4. Norm development process	87
		a) Mandate	87
		b) Norm elaboration and adoption	88
		5. Norm adaptation	91
		6. Norm implementation and follow-up	92
		a) Overview	92
		b) International administration by the FAO/UNEP	
		Joint Group of Experts	92
		7. Preliminary assessment and outlook	98
	III.	Establishing norms of corporate social responsibility:	
		the case of the OECD Guidelines for Multinational	
		Enterprises	
		1. The institutional framework	
		2. The regulatory challenge	103

		3. The nonbinding response: the OECD Guidelines for
		Multinational Enterprises
		a) General scope109
		b) Nonbinding character 110
		c) Substantive norms 111
		4. Norm development process
		5. Norm adaptation
		6. Norm implementation and follow-up 120
		7. Preliminary assessment and outlook
C.	Chara	acteristics of nonbinding instruments and parameters for
	analy	sis
	I.	Nonbinding status
	II.	Norm characteristics
	III.	Origin and norm development
	IV.	Non-state actor involvement
	V.	Addressees
	VI.	Adaptability
	VII.	Follow-up and compliance mechanisms 140
ъ	. 2 7	a
_		he functions and limits of nonbinding
		ents 143
A.	The i	nternational level
	I.	The interplay of nonbinding instruments with
		international law
		1. The precursory function of nonbinding instruments 143
		a) Role in the development of customary
		international law144
		(1) Nonbinding instruments and customary law 144
		(2) Distinguishing between nonbinding
		instruments 152
		b) Role in the development of general principles 155
		c) Role in the development of treaty law
		(1) Examples from practice
		(2) Case study: from the voluntary PIC
		procedure to the PIC Convention
		(i) The shift to binding treaty law
		(ii) Comparing the voluntary and binding
		PIC systems
		2. The supplementary function of nonbinding
		instruments 171

XIV Table of Contents

	a)	Interpre	etation and concretisation of treaty law	
		through	n nonbinding instruments	171
	b)	Exampl	le: interpretation of Article XX GATT	175
	c)		menting treaty law through references in	
	ŕ	treaty l	aw	182
		(1) Wc	orld Trade Organization	184
		(i)	References in the SPS and TBT	
			Agreements	184
		(ii)		
			framework of discussions for reform	
			of the WTO Agreement on Subsidies	
			and Countervailing Measures	189
		(2) Un	nited Nations Convention on the Law of	
		the	Sea	194
		(i)	Applicability of nonbinding	
			instruments	195
		(ii)	Application of FAO and IMO	
			instruments	202
		(3) Ur	nited Nations Fish Stocks Agreement	205
	d)	Reinfo	rcement through international dispute	
		settlem	ent	206
		` '	TO	207
		(2) Ur	nited Nations Convention on the Law of	
		the	e Sea	210
				214
II.	Inter	-institut	ional cooperation through nonbinding	
	1. Es	stablishn	nent of cross-cutting standards	218
	2. Tl	ne role o	f nonbinding instruments in inter-	
	in	stitution	al cooperation	222
	a)		nce on norm development in other	
			tions (FAO-WTO)	223
	b)		nce on norm implementation activities of	
			nstitutions	
			kample: World Bank	227
			sample: the use of OECD Guidelines by	
			e United Nations Security Council	
	c)		ticular: impact on regional organisations	231
			kample: regional fisheries management	
			ganisations	
			xample: European Union	
	3. Sı	ımmary		239

В.	The state level: compliance with and implementation of				
			g instruments by states2	244	
	I.		binding instruments and compliance by states 2		
			Nonbinding status as a compliance-enhancing factor 2		
			Norm characteristics and compliance		
			Norm development processes and compliance		
			nternational means of enhancing compliance by		
			tates	258	
		a)	Economic incentives and disincentives	258	
		,	(1) Restriction of market access to compliant		
			states	260	
			(2) Loan policies of financial institutions		
			(3) Export credit guarantees		
		c c	Compliance management		
		•	(1) Reporting		
			(2) Monitoring and verification		
			(3) Compliance Assistance		
			(4) Norm concretizations and interpretations		
		5. A	Actors		
		а	) The central role of international institutions	279	
			The role of non-governmental organisations		
			ummary		
	II.		olementation in national legal systems		
			egislative implementation		
			) The need for legislative implementation		
			b) Specific legislative implementation		
			Different techniques: programmed legislation or		
			dynamic references	298	
		2. I	mplementation in the absence of specific		
			mplementing legislation	301	
			1) Policy making		
			Administrative legal rules, directives and internal		
			guidelines	305	
		C	c) Administrative decision-making	308	
			(1) Interventionist administration		
			(Eingriffsverwaltung)	308	
			(2) Distributive administration		
			(Leistungsverwaltung)	311	
		C	d) Non-regulatory informal administration		
			(1) Adoption of national voluntary instruments		
			(2) Promotional activities, information and	_ ~	
			warnings	317	

		(3) Labelling
		3. Judiciary
		4. Summary
	III.	Limits of the regulatory capacity of nonbinding
		instruments regarding states
		1. Limited utility to provide legal certainty and
		predictability
		2. Implications of the lack of dispute settlement and
		enforcement
		3. Lack of inspections and verifications
		4. Limited utility for long-term incentive structures 337
		5. Limitations due to non-individualized reporting and
		compliance review
		6. Limited compliance assistance
C.	Priva	te level: direct impact on private actors
	I.	Means of enhancing compliance by private actors 345
		1. International complaint mechanisms
		2. Membership systems and institutionalised discourse
		between private actors353
		3. Listings
		4. Naming and shaming by NGOs
		5. Marketing and labelling
	II.	"Implementation" efforts by private actors
	III.	The potential and limits of the regulatory capacity
		regarding private actors
		1. Potential
		2. Limits
	_	
Pa	rt 3:	The legitimacy of nonbinding instruments 373
A.	Intro	oduction373
	I.	Notion of legitimacy
	II.	The legitimacy question in the context of nonbinding
		norms
В.	Legi	timacy challenges381
	I.	Traditional bases of legitimacy: consent and domestic
		implementation process
	II.	International level challenges
		1. The gradual attenuation of original consent 386
		2. Flexible decision making procedures
		3. Informalisation and the growing influence of the
		executive and experts

		a) Broad mandates and lack of institutional law 39	<del>)</del> 2
		b) Weak oversight and control	<del>)</del> 3
		c) Delegation to subsidiary decision-making bodies 39	<del>)</del> 3
		d) Delegation to secretariats	
		e) Delegation to experts	
	III.	National level challenges	
		1. Deparliamentarisation	
		a) Implementation without a specific legislative act 40	
		b) Implementation by means of a specific legislative	
		act40	<b>D</b> 1
		(1) References in legislative acts to nonbinding	
		instruments (dynamic references)	Э2
		(2) "Programmed" legislation	
		2. Internationalisation and public discourse 40	
		3. Sectoralisation40	
		4. Challenges arising from addressing private actors 46	06
C.	Addı	ressing the challenges40	
	I.	General approach40	
		1. Domestic and international approaches 40	09
		2. Input and output oriented approaches 4	10
		3. Formalisation through procedural law 4	12
	II.	National level improvements 4	
		1. Procedures for improved parliamentary participation 4	13
		2. Avoidance of dynamic references4	19
		3. Improved intra-governmental consultation and	
		approval4	
	III.	International level improvements 4	
		1. Strengthening the principle of legality4	21
		2. Improved procedural law to define intra-institutional	
		delegation 4	22
		3. Procedures of access to information and public	
		participation4	-24
		a) Stakeholder and NGO participation as a general	
		remedy?4	24
		b) Public participation, access to information and	
		legitimacy4	26
		c) Procedural institutional law4	
_	_	4. Independent (judicial) review4	
$\Box$	Con	clusion and outlook	120

Part 4: Concluding summary	443
Bibliography	457
Index	499