Expert Workshop
Non-Legally Binding Agreements in International Law

Statement by Mr. Miguel de Serpa Soares
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Distinguished Legal Advisers,

Ladies and gentlemen,

I would like to thank the Federal Foreign Office of Germany, the CAHDI Secretariat and the University of Potsdam for their invitation to participate in today's Expert Workshop on Non-Legally Binding Agreements in International Law.

We are all used to meeting in virtual format by now. That being said, I regret not being able to be among this distinguished audience of colleagues and friends, even virtually, due to the time difference between Strasbourg and New York.

Given the importance of this topic for the international legal community, the organization of this expert workshop is timely. As we can all see in our respective fields of work, States and international organizations are concluding increasingly diverse instruments. This reflects the expanding landscape of international relations; it also poses legal challenges that would benefit from conceptual clarification through exchanges among practitioners.

The category of non-legally binding agreements in international law is relatively unclear, and such agreements are often defined negatively by reference to what they are not, namely a treaty or a contract.

The Charter of the United Nations refers to legally binding agreements in Article 102, setting forth the obligation of Member States to register with the Secretariat "every treaty and every international agreement". Yet the Charter does not define the term, and Article 1 of the General Assembly Regulations to give effect to Article 102 only adds to this term: "whatever its form and descriptive name".

To paraphrase James Brierly in his first report on the law of treaties, a treaty is an agreement, but not every agreement, even between entities possessing treaty-making capacity, is a treaty. Non-legally binding agreements are thus characterized by falling outside the realm of international law,

which governs treaties as per the customary definition in the Vienna Conventions on the Law of Treaties, and outside the realm of domestic laws governing contractual relations.

It is also unsatisfactory to categorize non-legally binding instruments as soft law, since political or moral commitments are not necessarily soft in nature, and are by definition unregulated by any regime of law.

An examination of the treaties registered with the Secretariat shows that States from all regions have concluded hundreds of treaties entitled "Memorandum of Understanding", a designation more regularly used for binding agreements since the 1990s. International practice with regard to binding and non-binding MOUs is diverse and at times inconsistent. The United Nations itself is facing the same phenomenon since the Organization commonly concludes both non-legally binding and legally binding agreements labelled as "memorandum of understanding".

Distinguishing between legally binding and non-legally binding instruments is key, and is an issue that the United Nations Office of Legal Affairs faces on a daily basis.

First, my Office – as the centralized legal service of the Organization – regularly reviews legally binding and non-legally binding draft agreements submitted by the various United Nations Secretariat Departments, Offices, and Regional Commissions, including to avoid misunderstandings and legal uncertainties. Second, to fulfil the Secretariat's mandate under Article 102 of the Charter with respect to the registration and publication of treaties, my Office examines each instrument submitted by States and international organizations for registration to determine *prima facie* whether it is a treaty

In the fulfilment of both functions, my Office undertakes a legal analysis to ascertain the mutual intention of the participants to conclude a legally binding or a non-legally binding document. Such an intention may be apparent from the inclusion in these instruments, for example, of an express reference to their non-legally binding character, or to their lack of eligibility for registration. In that regard, the intention of the parties to conclude a non-legally binding instrument, or a treaty, may need to be clarified and at times formally confirmed.

Further, my Office pays close attention to all mandatory language that would imply rights and obligations as well as some terms which are usually employed in legally binding agreements. Due attention is paid, among others, to the language included in provisions on entry into force or effect and on dispute settlement. The latter is of utmost importance, since one of the main consequences of the conclusion of a legally binding agreement is the possible resort to legal proceedings to settle disputes regarding their interpretation or application. On the contrary, dispute settlement provisions in non-legally binding agreements are usually limited to negotiations and consultations, to actually ensure that they do not include resort to legal proceedings.

I should add that registration under Article 102 of the Charter is not conclusive of the legally binding nature of an instrument, in that the Secretariat's action does not confer any status on an instrument or a party which it would not otherwise have. It is worth recalling that the obligation of registration under Article 102 has its origin in the objective of eliminating secret diplomacy and

giving publicity to treaties. Nonetheless, in view of the significance accorded to registration by States, it is clear that registration remains important in practice since it may lead to a presumption that the registered instrument is indeed a treaty.

In sum, it is my hope that the practice of the Office of Legal Affairs usefully contributes to the clarification between binding and non-binding agreements in international law. In this respect, my Office is preparing internal templates and guidelines which may ease the drafting of non-legally binding agreements. This would promote a more consistent practice within the UN system, while acknowledging that the main advantage of these instruments is precisely their level of flexibility.

Allow me to conclude with a friendly word of caution. The legal risks associated with the use of non-binding instruments are not to be underestimated. The role of Legal Advisers of States and international organizations alike is to ensure that no legally binding instrument is concluded inadvertently. In view of the wide-ranging international practice in this regard, I am certain that today's discussion will greatly benefit all of us in this endeavour.

I wish you a thorough and fruitful discussion and I look forward to our next meeting, hopefully in-person and in a healthier environment.

I thank you for your attention.