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# COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

## (CAHDI)

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### CAHDI Questionnaire on the practice of States and international organisations regarding non-legally binding agreements

**62<sup>nd</sup> meeting**  
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Public International Law Division  
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**CAHDI Questionnaire on the Practice of States and International Organisations  
regarding Non-legally Binding Agreements**

The CAHDI Workshop on Non-legally Binding Agreements held in the framework of the 60<sup>th</sup> CAHDI meeting (26 March 2021) revealed a growing demand among CAHDI member and observer States for developing a better understanding of the phenomenon of non-legally binding agreements between subjects of international law.<sup>1</sup> During the 61<sup>st</sup> CAHDI meeting in September 2021, the CAHDI discussed different options on how to follow-up to the Workshop. As a first step, the members decided to assemble their relevant state practice on non-legally binding agreements.

We therefore kindly ask States as well as international organisations to fill out the following questionnaire.

<b>A. SUBSTANTIVE ASPECTS</b>
<b>I. Definitions</b>
1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it?
2. If not, what term do you use instead (e.g. arrangements) and how do you define it?
3. Do you consider "Memoranda of Understanding" to be legally binding or non-legally binding instruments? Or can they be both?
<b>II. Distinction</b>
4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?
5. In your view, is there one (or multiple) essential element(s) typically qualifying an agreement as non-legally binding? If so, which one(s)?
6. Do you distinguish between “MoUs” and other types of non-legally binding agreements, such as “joint declarations of intent” or “arrangements”? If so, how?
7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?

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<sup>1</sup> For the purpose of this questionnaire, we use the term “non-legally binding agreement” to describe the phenomenon of an agreement between two subjects of international law intending to remain below the threshold of binding treaty under international law. This is done for reasons of uniformity and without prejudice to the discussion, whether “non-legally binding agreement” is an appropriate term for these types of understandings.

8. Do you distinguish between the type of non-legally binding agreement concluded with international organisations or States? Do you have different rules applying to non-legally binding agreements depending on whether the other side is a State or an international organisation?

### III. Competence

9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?

10. For States: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements?

For International Organisations: Are bodies/specialized agencies competent to conclude their own non-legally binding agreements (or can they sign non-legally binding agreements on behalf of the entire organisation)?

### IV. (Indirect) Legal Effects

11. Do you consider non-legally binding agreements capable of producing (indirect) legal effects, for example as preparatory acts for/in connection with a legally binding instrument or as interpretative guidance for such binding instruments? Would you consider non-legally binding agreements under certain circumstances as a prerequisite of a binding instrument of international law?

## B. PROCEDURAL ASPECTS

### V. Choice of Instrument

12. What factors influence or determine your decision whether to opt for a legally binding or non-binding agreement? For instance, do you sign non-legally binding agreements to facilitate the conclusion of a legally binding agreement in the future or do you conclude non-legally binding agreements in situations in which a legally binding agreement cannot be reached with the involved sides?

13. Who, within your State/international organisation, ultimately decides whether to conclude a treaty or a non-legally binding agreement?

14. What are the main differences in your internal procedure when concluding a non-legally binding agreement or a binding treaty?

### VI. Formal Assessment<sup>2</sup> of Non-legally Binding Agreements

For States:

<sup>2</sup> In this section, “formal assessment” refers to the internal procedure for checking the formal criteria of a draft agreement to ensure it is clearly identifiable as non-legally binding.

15. In your State, is there a mandatory centralised formal assessment of non-legally binding agreements concluded by any government ministry?

16. If so, what Ministry/body performs this formal assessment?

17. At what time in the process of concluding a non-legally binding agreement is the formal assessment carried out?

18. If sub-national territorial units/bodies or specialized agencies are competent to conclude non-legally binding agreements (cf. question 9), are such agreements subject to the same formal assessment applicable for agreements of the (federal) government/international organisation?

19. Do you have an internal standard/written guidance for formally assessing non-legally binding agreements, i.e. a law, a directive or internal guidelines?

20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?

21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?

22. Does the responsible ministry/body provide guidance to other (government) departments and agencies on best practices with respect to non-legally binding agreements (e.g. workshops, information materials on how to properly draft and conclude non-legally binding agreements)?

For International Organisations:

23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.

**VII. Democratic Review/Parliamentary Participation**

For States:

24. Is your legislature notified or consulted about the conclusion of non-legally binding agreements? If so, does parliament need to be involved for any non-legally binding agreement or are there limitations (eg only for politically significant agreements)? Who determines whether such requirements are fulfilled?

25. If so, at what stage of the process is the legislature usually involved?

26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?

27. If legislative participation is provided for, does the legislature have a (legal) remedy if it perceives a violation of its right to be consulted/to participate?

For International Organisations:

28. In case you have an internal directive/guideline on how to conclude non-legally binding agreements, has this document been approved by the member States/a statutory organ of the organisation?

### **VIII. Signature and Format**

29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?

30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?

31. Do you allow for electronic signature of your non-legally binding agreements? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of non-binding agreements instead of the exchange of physical copies?

32. For States:

Do you always require non-legally binding agreements to be set in your own language or do you also accept them exclusively in the partner's language / in English (or any other "neutral" language)?

For International Organisations:

What language do you usually require for the text of your non-legally binding agreements?

33. Do you have any formal requirements exclusively for concluding non-legally binding agreements? (e.g. using a special kind of paper only for non-legally binding agreements)

### **IX. Registration and Publication**

34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?

35. If so, what entity keeps the non-legally binding agreement after signature?

36. Do you publish your non-legally binding agreements and are they openly accessible?

37. Are there certain reasons (confidentiality, security, etc.) why non-legally binding agreements can be withheld from central registration/storage or (if applicable) publication? If so, which ones?

#### **X. Education/Training**

38. How do you disseminate information internally regarding the differences between binding and non-legally binding agreements? For example, are there regular workshops or training sessions with the units drafting non-legally binding agreements? Are there certain standard forms ("Model MoU"), which units can use as a drafting aid?

#### **C. GENERAL OBSERVATIONS ON STATE PRACTICE (AND WAY FORWARD)**

39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?

40. In recent years, have you been concluding an increased number of non-binding international agreements? If so, why do you think this is the case?

For International Organisations:

41. How would you describe the main differences between resolutions/declarations adopted by IOs and non-legally binding agreements concluded by IOs from a legal and practical perspective?

42. Do you attribute any law-making effect to non-legally binding agreements? Or do you see them as mere status and administrative arrangements for the purposes of international organisations?