

Panel 1

“ ‘Good’ or ‘bad’ practices on the types of provisions, terminology or blocks of text of non-legally binding instruments”

SECOND WORKSHOP ON NON-LEGALLY BINDING INSTRUMENTS
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General Points

Non-legally binding instruments = 'NBIs'

Both bilateral and multilateral instruments

'Intent' and 'objective' test

Importance of terminology

'Good' and 'bad' practice

Texts in English and other languages

Important to allow some variety

Table of terminology

First column: Treaty language
Second column: NBI language

article	paragraph
agree	accept/approve/decide
agreement/ undertaking	arrangement/understanding
authoritative/authentic	equally valid
clause	paragraph
conditions	provisions
continue in force	continue to have effect/continue in effect or operation/continue to apply

Table of terminology

First column: Treaty language

Second column: NBI language

done	signed
enter into force	come into operation/come into effect
mutually agreed	jointly decided
obligations	commitments
parties	participants
preamble	introduction

Table of terminology

First column: Treaty language

Second column: NBI language

rights	benefits
have the right	be permitted to
shall	will
undertake /agree/undertake to	carry out/decide/will

Title

'Agreement' to be avoided

UK practice is to use 'Memorandum of Understanding', 'Arrangements', or similar

'MOU' is, however, avoided by some states

'MOU' is used by some states also for legally binding instruments

The sides are described as 'Participants', not Parties'

Title

‘This is a **Memorandum of Understanding between the Government of the Republic of Singapore**, as represented by the Ministry of Communications and Information, **and the Government of the United Kingdom**, as represented by the Department of Digital, Culture, Media and Sport.’

Participants

‘The United States of America (the “United States”), the Democratic Republic of the Congo (the “DRC”), and the Republic of Zambia (“Zambia”) (hereinafter collectively referred to individually as a **“Participant”** and jointly as the **“the Participants”**);

NOW, THEREFORE, have **reached the following understanding:** ’

Broad framing of objective, purpose and commitments

The purpose of an NBI is often **set out in broad terms** – in terms of cooperation, collaboration, framework, objective, ‘seek to’, ‘intend to’, and similar.

The provisions should be cast as **expressions of intent** rather than as obligations.

In English, **use of ‘will’ instead of ‘shall’** e.g. ‘the Participants will do...’ rather than ‘the Participants shall do...’

Objective and Purpose

This MOU is a principles-based document that sets out the overall framework within which the Participants will collaborate on matters of mutual interest and responsibility on cross-border trade facilitation.

Objective and Purpose

‘Section II: Areas of Cooperation

1. The Participants intend to cooperate in feasibility studies, consultancies, and technical assistance **opportunities to facilitate...**

Section III: Intentions

1. The United States intends to support DRC and Zambia in their development of a value chain for EV batteries in the DRC and Zambia in a manner consistent with applicable domestic laws and international best practices...’

Objective and Purpose

‘PARAGRAPH 1: PURPOSE

1.1 With this MoU, **the participants accept to mutually recognise** educational qualifications and periods of study undertaken by students within duly approved and recognised higher education institutions in the two countries, as per the terms of this MoU.’

Dispute Resolution

Binding dispute settlement mechanisms such as arbitration should be avoided.

If there is a provision on disputes, it should be along the lines that disputes should be '**resolved through diplomatic channels**'.

Or e.g., **by consultations or negotiation.**

Dispute Resolution

‘Any dispute relating to the interpretation or implementation of this MoU will be settled **amicably by consultation or negotiation between the participants directly, acting in good faith.**’

Coming into effect, Coming into operation

Should not refer to 'entry into force' but to..
'coming into effect', or 'coming into operation'

'This Memorandum **will come into operation** on signature and will **continue in operation** until terminated by either Participant giving six months' written notice to the other.'

Coming into effect, Coming into operation

'This Memorandum of Understanding **will come into effect** on the date of the later of the two Governments' notifications and **will continue in effect** until terminated by either Government on six months' written notice.'

Simple Signature block, not Testimonium

Avoid formal treaty phrases such as 'IN WITNESS WHEREOF' and 'DONE' at; and words such 'authoritative' and 'authentic'

Simple Signature block, not Testimonium

‘The foregoing record represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India upon the matters referred to therein.

Signed in duplicate at on in English and Hindi languages, both texts having equal validity.

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND

FOR GOVERNMENT OF THE REPUBLIC OF INDIA’

Express Statement that Instrument is not legally binding

‘IV. Relevant Position.

This Memorandum of Understanding, and all discussions, negotiations and activities of the two governments or their authorized enterprises under or pursuant to this Memorandum of Understanding, will be without prejudice to the respective legal positions of both governments. **This Memorandum of Understanding does not create rights or obligations under international or domestic law.’**

Express Statement that Instrument is not legally binding

‘Today’s Memorandum of Understanding is the result of initial consultations. It sets forth political commitments of the Participants and **does not create rights or obligations under international law.** The Participants intend to meet within the next sixty days to develop and commit to an action plan with relevant timetables.’

Express Statement that Instrument is not legally binding

‘1.6 This Arrangement **will not be binding in International law.**

2.2 For the avoidance of doubt, the commitments set out in this Memorandum are made by the United Kingdom to Rwanda and vice versa and **do not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third-parties or individuals.’**