Panel 1: Exchange On 'Good' Or 'Bad' Practices Between Practitioners

'Good' or 'bad' practices on the types of provisions, terminology or blocks of text of non-legally binding instruments

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Introduction

My introduction to this session falls into two parts.

First, I will make some general points - on some issues of concept or issues of principle.

And second, and the main part of the presentation, will be some illustrations of non-binding provisions, terminology and blocks of text.

This will only be an introduction to the subject rather than a full analysis.

When referring to 'non-binding instruments' or 'non-legally binding instruments', I will use an acronym – NBI.

General points

First, I will quickly mention some general points (Slide 2).

Bilateral and multilateral instruments

My primary focus – and I expect the primary focus of others – will be on bilateral instruments. My illustrations today are all from NBIs which are bilateral in nature.

But a large number of non-binding instruments – and very important ones – are multilateral, in the form of guidelines, recommendations, declarations or implementing measures. There is a wide variety of multilateral NBIs, which we must not forget.

The same broad rules, or features of state practice, apply to both bilateral and multilateral instruments. We should, in my view, be just as strict in drafting whichever type of instrument it is.

Intent test and objective test

In determining whether an instrument is binding or non-binding, often people refer to an intent test – what is the intention of the participants, those signing the instrument? – or to an objective test, looking closely at the terminology and context. What do we see on the face of the document?

I would argue that the two tests are really applied together. In practice, the drafting of the instrument, the wording used, is normally a significant indication of the intent.

I am not saying terminology is conclusive. There are a range of factors you have to take into account. But terminology is significant.

Terminology

In my view, examining terminology is not a sign that we have lost the plot, or that we are arguing for a distinction without a difference. It is exactly how lawyers everywhere, in every legal context, define their or their client's intentions. Precision is the feature of every formal document. So I do not apologise for being worried about such things as the use of 'will' or 'shall'. Just as with any legal drafting, the wording of an NBI should be precise.

'Good' and 'bad' practice

I will proceed cautiously in using the terms 'good' and 'bad' practice, as such, just because it is difficult for one state to criticise another state in this field. But I think we can say that there is some practice which is better than others, or which even may be 'best' practice: and some practice which is less advisable or not advisable. But I acknowledge that the state practice varies, and views even in this room, will vary.

Texts in English and other languages

I will be talking today about texts in the English language. But I am not doing that in a presumptuous way. States mostly conclude instruments in their national language. so NBIs are concluded in many languages, where different terminology – and even different principles – will apply.

Not being too prescriptive

Finally, in my list of general points, I accept that to some degree I am being prescriptive. But I think it important not to be over-prescriptive on issues of terminology, or indeed on NBIs as a whole. I want to avoid saying that, unless you use certain words, you have created a treaty. Something special should be required if you want to create a treaty. Not the other way round.

But it is acceptable – indeed healthy – for there to be some variation within an overall broadly common framework. Or otherwise, political discourse will become unmanageable, and you will have unintended treaties everywhere.

Terminology, texts, and blocks of text

So, I now turn to specific terminology and texts

First, I would refer to the table of terminology (Slides 3-5) that is on the UK government treaties website, which has been mentioned in previous documents, and with which you may all be familiar.

The first column is language suitable for treaties, the second column is language suitable for NBIs.

DO NOT USE FOR NBI	DO USE FOR NBI
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
done	signed
enter into force	come into operation/come into effect
mutually agreed	jointly decided
obligations	commitments
parties	participants
preamble	introduction
rights	benefits
have the right	be permitted to
shall	will
undertake /agree/undertake to	carry out/decide/will

I will now examine specific aspects of a typical NBI.

Title

First, for an NBI, you need a **non-binding title, purpose and definition of participants**.

The document should not be titled or referred to as an 'Agreement'. (Slide 6)

I appreciate that the ILC agenda item on this subject still refers to 'non-legally binding agreements'. But it is better, in my view, in the title to avoid 'Agreement'.

'Agreement' is one of the usual titles for a treaty. What we are trying to do is say 'this is not a treaty'. So it is a way of helping ourselves.

Similarly, the word 'agree' and its derivatives should be avoided. It is better to say instead, the 'Participants enter into arrangements' or 'have reached the following understandings'.

UK practice is to restrict use of the title 'Memorandum of Understanding' to NBIs. Other states have a different practice. Particularly, in Asia and Africa, 'Memorandum of Understanding' or 'MOU' is often used for a binding instrument as much as for an NBI. And for that reason, some states, some European states, avoid using 'MOU' for the title of an NBI, because of its potential ambiguity.

The following is the introduction to a UK-Singapore MOU (Slide 7):

'*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*.'[1]

Participants, not 'Parties'

In UK practice, we refer to 'participants', not 'parties'. Some states refer to 'sides'.

An example is the United States of America-Zambia MOU on an integrated value chain in electric vehicle battery sector (Slide 8):

'*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:***

Another illustration is from the UK-Singapore MOU referred to above:

'***0.2 Participants***

This MOU is made 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. (**referred to individually as a "Participant" and collectively as the "Participants"**).*'

[1] Memorandum of Understanding between the Government of the Republic of Singapore and the Government of the United Kingdom on Digital Trade Facilitation, signed on 22 December 2021.

Loose definition of purpose and objectives

The purpose of an NBI is often set out in broad terms (Slide 9) – in terms of cooperation, collaboration, framework, objective, 'seek to', and similar. The provisions should be cast as expressions of intent rather than as obligations. That is why, in English, we use 'will' instead of 'shall'. In other words, we say 'the participants will do…' rather than 'the participants shall do…'

It is better to draft the instrument as paragraphs or numbered provisions rather than as Articles. Articles are a feature of treaties.

But provisions can still have subject headings, so long as they do not imply obligation.

Here is another illustration from the UK-Singapore MOU (Slide 10):

'***0.3 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.*

The purpose of this MOU is to:

establish a collaborative working relationship between the Participants regarding their respective functions; develop and strengthen practical cooperation on cross-border trade facilitation matters between the Participants; and…'

Another example is the United States of America-Zambia MOU on an integrated value chain in electric vehicle battery sector previously cited (Slide 11):

Section I: Objective and Scope

1. ***The purpose*** *of this Memorandum of Understanding* ***is to strengthen cooperation*** *among the* ***Participants in furtherance of the development*** *of a cross-border integrated value chain…*

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…*'

The following is another example from the Memorandum of Understanding on mutual recognition of academic qualifications between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland, signed on 21 July 2022 (Slide 12):

'***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*.'

And another example from the MOU on the Principles of an India - Middle East - Europe Economic Corridor:

'*Along the railway route,* ***Participants intend to enable*** *the laying of cable for electricity and digital connectivity, as well as pipe for clean hydrogen export.* ***This corridor will secure*** *regional supply chains, increase trade accessibility, improve trade facilitation, and support an increased emphasis on environmental social, and government impacts.*

Participants ***intend that*** *the corridor* ***will*** *increase efficiencies, reduce costs, enhance economic unity, generate jobs, and lower greenhouse gas emissions - -* ***resulting in*** *a transformative integration of Asia, Europe and the Middle East.*

In support of this initiative, Participants ***commit to work*** *collectively and expeditiously* ***to arrange and implement*** *all elements of these new transit 2 routes, and to establish coordinating entities to address the full range of technical, design, financing, legal and relevant regulatory standards*.'

Dispute resolution

Binding dispute settlement mechanisms such as arbitration should be avoided (Slide 13). If there is a provision on disputes, it should be something along the lines that disputes should be settled through diplomatic channels, or through consultations or negotiation.

Here is an example from the UK-India MOU cited above (Slide 14):

'*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***.'

'…come into effect', '…come into operation' (not entry into force)

An NBI should not 'enter into force' but 'come into effect' or 'come into operation' (Slide 15).

Here are a couple of examples:

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."*

Or (Slide 16):

"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."*

An NBI can have a 'two-stage' procedure for it to come into operation – in other words, it can come into operation following a further step such as an exchange of notifications. But the notifications should be drafted consistently in non-binding terms, and there should be no reference to 'ratification'.

Signature block, not testimonium

There should be a simple signature block, and not a formal treaty testimonium (Slide 17).

The following are possible provisions, the first from the same UK-India MOU (Slide 18):

'*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

Or without the specific references:

*'The **foregoing record represents the understandings reached** between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of…….. upon the matters referred to therein.*

Signed in duplicate at …….. on …….... in the English and

*…… languages, both texts **having equal validity**.*

[NB "authoritative" or "authentic" should not be used]

For the Government of the United Kingdom of Great Britain and Northern Ireland:'

For the Government of [State title]:

Express statement of non-legally binding effect

By this is meant a provision such as the following (Slide 19):

*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.***[2]

Some states, as a matter of their national practice, require such a provision – that the instrument is not legally binding either under domestic law or under international law.

UK practice is not always to insist on an express 'non-legally binding statement' – that the instrument is not legally binding. But I acknowledge that where an NBI is high-profile, or signed at a high-level, or covers a particularly important subject, such an express statement will often be included.

Personally, I consider that, if we are too prescriptive on this point, we get into the position where, unless an MOU includes such a provision, it is considered a treaty. Or people will be more careless in drafting the rest of the instrument, because they think that the express non-legally binding statement excludes the risk of it being legally binding.

Here are some other examples of such provisions (Slide 20):

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

[2] Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People's Republic of China and the Government of the Republic of the Philippines, signed 27 November 2018.

under international law. *The Participants intend to meet within the next sixty days to develop and commit to an action plan with relevant timetables*.[3]

Or:

This Memorandum of Understanding is not intended to be legally binding and is not an obligation of funds. *All activities pursued under this Memorandum of Understanding are subject to the availability of funds.*[4]

Or (Slide 21):

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*****.**[5]

Conclusion

So that is a brief introduction to the topic. I look forward to hearing from the other panel members, and to our discussion.

[3] Memorandum of Understanding on the Principles of an India - Middle East - Europe Economic Corridor, signed 9 September 2023.
[4] Memorandum of Understanding between the United States of America, the Democratic Republic of the Congo, and the Republic of Zambia concerning support for the development of a value chain in the electric vehicle battery sector, signed 13 December 2022
[5] Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement, signed 13 April 2022.