INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO)

A. SUBSTANTIVE ASPECTS

I. Definitions

1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it?

No. The International Development Law Organization (IDLO) reserves the term “agreement” to indicate a document that contains binding legal obligations. Thus, we would view the term “non-legally binding agreement” as a contradiction in terms or category error.

2. If not, what term do you use instead (e.g. arrangements) and how do you define it?

IDLO would typically use the terms “instruments” or “arrangements” to refer to documents that are not legal binding.

3. Do you consider "Memoranda of Understanding" to be legally binding or non-legally binding instruments? Or can they be both?

In IDLO’s practice, MoUs may be legally binding, non-legally binding, or contain both binding and non-binding provisions. The designation of “MoU” does not, in itself, determine the legal nature of an instrument. Legal nature must be assessed in light of the intention of the MOU participants, as expressed through the terminology and provisions.

IDLO has developed MOU templates to facilitate preparation and approval of MOUs and ensure consistency in its practice. For example, two MoU templates are entirely non-binding and are intended to express a general willingness to cooperate. A third template creates binding obligations concerning specific aspects of cooperation, such as confidentiality or intellectual property, while leaving the implementation of cooperative activities non-binding.

II. Distinction

4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?

In IDLO’s practice, these categories are distinguished primarily by the nature of the instrument and the entities involved.

Treaties are certain agreements between subjects of international law governed by international law. Examples include IDLO’s Establishment Agreement (its founding treaty), and Host Country Agreements between IDLO and a Host State providing for privileges, immunities and facilities.

The term international agreement is used more broadly to encompass binding instruments concluded with States, government entities or international organizations, such as donor agreements. Donor agreements are generally governed by their own terms and conditions and the general principles of international law, to the exclusion of any single national legal system. Disputes would be settled amicably through negotiations; sometimes the agreement may contain a provision for international arbitration.

An international contract would be a binding instrument concluded with private parties or personnel. In IDLO's practice, such contracts are similarly governed by their terms and conditions and the general principles of international law, rather than a particular national legal system, and the dispute resolution mechanism would be international arbitration.

Non-legally binding instruments are concluded with States, international organizations or public institutions, such as universities or government agencies, to express intentions or political commitments, such as a general willingness to cooperate, while eschewing any legally binding obligations.

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)?

The essential element is the intention of the parties not to create legally binding obligations, as reflected in the language and substance of the instrument. At times, an instrument may contain an express provision stating that the instrument is not legally binding. Other relevant indicators include the terminology used, the scope and purpose of the instrument, and the drafting of its provisions.

IDLO seeks to reflect non-binding intentions through language expressing willingness or an intention to cooperate, rather than language that expresses binding commitments (e.g. "should" or "intends to" rather than "shall" or "agrees"). Other terms used to signal an intention not to be binding are "participants" rather than "parties," and "become effective" rather than "enter into force".

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?

As noted above, at IDLO an MoU may be legally binding, non-legally binding or contain a mix of binding and non-binding provisions. Terms such as "arrangement" or "letter of intent" may be used for instruments that are intended to be non-legally binding.

7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?

IDLO takes a flexible and pragmatic approach in its use of non-legally binding instruments and does not distinguish between different types of non-binding instruments or apply different internal rules. IDLO values non-legally binding instruments in large part because of their flexibility.

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?

No.

III. Competence

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

Under Article VI(4)(B)(f) of the IDLO Establishment Agreement, the Director-General has the authority to negotiate and conclude "grants, leases, contracts, and other agreements and transactions" related to IDLO's mandate on behalf of the Organization. This includes non-legally binding instruments. The Director-General may delegate signing authority to other IDLO officials in accordance with standing or ad hoc delegations of authority. IDLO occasionally applies different

internal approval procedures, for example, depending on their nature, some letters of intent may be approved at a different level.

10. 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)?

IDLO's Establishment Agreement does not confer agreement-making authority on specialized bodies or offices. Under Article VI(4)(B)(f), the Director-General has the authority to negotiate and conclude agreements on behalf of the Organization (see answer to question 9). This authority may be delegated to other IDLO officials.

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?

In IDLO's experience, instruments intended to be non-legally binding may on occasion have certain practical or interpretative implications in the relationship between the two sides. For example, a non-binding MoU may, by establishing a general framework for cooperation, pave the way for a subsequent binding agreement governing particular activities.

IDLO has not identified any instances in its practice where a non-legally binding instrument was a prerequisite for the conclusion of a binding instrument under 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?

IDLO's choice between a legally binding and a non-legally binding instrument depends primarily on the purpose and nature of the proposed cooperation, the intention of the parties or participants, and whether funding is involved.

Non-legally binding instruments would be appropriate where the participants wish to establish a general framework for cooperation or express a shared intention to collaborate without undertaking specific legal obligations or committing any funds. On the other hand, where the intention is to provide legally enforceable obligations or confer privileges and immunities, or where funding is involved, a binding agreement would be appropriate.

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

The decision is driven in the first instance by the purpose and intent of the cooperation, rather than by any individual.

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

The procedures are similar, with a legal review being necessary for any instrument.

VI. Formal Assessment[1] of Non-legally Binding Agreements

For States:

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?

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)?

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

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.

Such instruments are assessed through the Organization's internal review and approval processes. The Office of the General Counsel is consulted in the preparation of a non-legally binding instrument, and, prior to approval and signature, will conduct a legal review.

VII. Democratic Review/Parliamentary Participation

For States:

[1] 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.

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?

IDLO has no such internal directive or guideline. IDLO's Office of the General Counsel provides internal guidance to other departments and offices on the conclusion of non-legally binding instruments.

VIII. Signature and Format

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

IDLO has an internal approval process for the signature of non-legally binding instruments. The instrument is reviewed and cleared by relevant departments, including the Office of General Counsel, before it is submitted to the Director-General. The instrument would be signed by the Director-General or by an official duly authorized to do so under internal delegations of authority.

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

This would largely depend on the type or form of the instrument. MoUs are generally signed by both parties or participants on the same document. By contrast, an exchange of letters is concluded through separate letters exchanged between the parties or participants, and thus signatures would not appear on a single 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?

The use of electronic signatures is accepted by IDLO, and we accept electronic transmission of non-legally binding instruments as well as most international agreements, such as donor agreements. For treaties, we would require an 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?

IDLO requires non-legally binding instruments to be drafted in English, the working language of the Organization. A copy in another language may sometimes be signed if requested by the other participant, but the English version remain authoritative in case of discrepancies.

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)

No.

IX. Registration and Publication

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

IDLO maintains an internal database of non-legally binding instruments such as MOUs.

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

The Office of the General Counsel maintains records of both legally binding and non-legally binding instruments. The department that requested the instrument also retains an electronic copy.

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

IDLO does not publish its non-legally binding instruments.

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?

It is difficult to imagine a situation when a non-legally binding instrument would be withheld from the repository.

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?

IDLO uses standard templates approved by the Office of the General Counsel as drafting aids for its agreements and non-legally binding instruments. In addition, the Office of the General Counsel provides internal guidance and training to relevant departments and offices on the preparation and conclusion of agreements, including the distinction between legally binding and non-legally binding terminology.

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

For States:

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?

At IDLO, resolutions are internal acts adopted by the Assembly of Parties, which represents all IDLO member parties. Resolutions reflect decisions taken by the Assembly pursuant to the Establishment Agreement, such as the adoption of the budget or Strategic Plan, or the election of a Member Party to a governance body.

In contrast, agreements and non-legally binding instruments are not concluded by a governing body of the Organization but on behalf of the Organization by the Director-General, who has been elected by Member Parties to administer the Organization. These instruments are concluded with another party, such as a State or an international organization.

Practically, resolutions direct IDLO's institutional governance, whereas agreements or non-legally binding instruments facilitate cooperation with external partners in IDLO's pursuit of its mandate.

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?

IDLO does not attribute a law-making effect to non-legally binding instruments.

Non-legally binding instruments are flexible vehicles that are useful to IDLO in advancing its mandate.