

Information Provided by the United States of America on its Practice Relating to Non-Legally Binding Exchanges and Instruments

In accordance with the request of the International Law Commission in paragraph 54 of its report on its 75th session (A/79/10), the United States is pleased to provide the following information on its practice related to non-legally binding exchanges and instruments.

General

Non-binding exchanges and instruments are an important and routinely used tool in the diplomacy of the United States. The United States and other governments carry out a broad range of exchanges and communications designed to provide bases for cooperation and mutual understanding that do not give rise to legal rights or obligations.

A principal benefit of non-binding exchanges and instruments is the flexibility they afford states to memorialize shared understandings, make political commitments, or advance cooperation with minimal procedural or other requirements in circumstances where establishing legal rights and obligations is not necessary.

Consistent with this flexible approach, non-binding exchanges and instruments in U.S. practice can take a range of forms and include varying degrees of formality and specificity. Aside from the important consideration that non-binding exchanges and instruments must be drafted in a manner that allows them to be distinguished from legally binding agreements, there are not other essential requirements in U.S. practice associated with non-binding exchanges and instruments. Moreover, the United States does not view any subsets of non-legally binding exchanges and instruments as having an essentially different character than others, and in this regard we do not view some non-binding exchanges and instruments as constituting “agreements” and others not. In general, the fact that an exchange or instrument is non-binding establishes only what it is not – *i.e.*, that it is not a legally binding international agreement – and does not establish anything meaningful about what the exchange or instrument is.

In U.S. practice, some areas of cooperation do not lend themselves to being addressed through non-binding exchanges or instruments. This is principally the case where the objective of the cooperation requires the creation of legally binding rights or obligations. Such examples include cooperation that requires the allocation of rights – such as to intellectual property created through the cooperation – or of obligations to pay costs associated with the cooperation. Similarly, arrangements for personnel to enjoy privileges and immunities in the territory of another state generally must be legally binding in character for such privileges and immunities to have legal force. Many cooperative activities, however, do not require legally binding arrangements, and may be based on non-binding exchanges or instruments.

Distinguishing non-binding instruments from international agreements

As noted above, a fundamental element of the practice of the United States with respect to non-legally binding exchanges and instruments is to aim to draft such exchanges and instruments so that their non-legally binding character is clearly reflected in their texts and that they may be distinguished from legally binding international agreements. An essential part of this practice is to reserve certain terms specifically for use when the parties intend an instrument's provisions to establish legally binding rights or obligations. Principal among these are the terms "shall," and "agree" or "agreement," and provisions that address an instrument's "entry into force," which imply that the instrument has legal force, though other drafting conventions may also be used to help distinguish non-binding exchanges and instruments from legally binding agreements.¹

The fact that the terms "agree" and "agreement" are among the few drafting tools available to states for distinguishing between legally binding agreements and non-binding exchanges and instruments makes it problematic to use them in connection with non-binding exchanges and instruments. Doing so would undermine the ability of states to use these terms as presumptively establishing the legally binding character of their instruments and would make it harder for the United States and our partners to use clear drafting practices to distinguish between legally binding agreements and non-legally binding exchanges and instruments.

In light of these considerations, the United States specifically refrains from referring to non-binding exchanges and instruments as "agreements." This practice is also widely followed by other states.² In U.S. practice, other terms – such as "instrument" or "arrangement"—are

¹ This practice is also widely followed by other states. See Jeremy Hill, *AUST'S MODERN TREATY LAW AND PRACTICE* (4th ed, 2023), 46 ("Most states now follow a practice of manifesting their intention to conclude a treaty by consciously employing a fairly standard form, and by using mandatory language such as (in English) 'shall', 'agree', 'undertake', 'rights', 'obligations,' and 'enter into force'. In contrast, when they do *not* intend to conclude a treaty, but rather a non-binding instrument, instead of 'shall' they use a less mandatory term such as 'will'; such terms as 'agree' or 'undertake' are avoided...") (emphasis in original). Hill further notes that, although non-binding instruments are sometimes loosely referred to as "agreements," such usage "is not advised," *id.* at 41, and lists "agreement" as a term that states use to distinguish treaties from non-binding instruments, *id.* at 47.

² A 2022 survey conducted by the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) found that "a wide majority of States and international organisations ... rejected the use of the term 'agreement' in relation to non-legally binding instruments as this term was reserved for legally binding instruments." On the basis of this state input, the CAHDI abandoned use of the phrase "non-legally binding agreements," both in the title of its project on this topic and in its work more generally and has adopted the phrase "non-legally binding instruments" as the subject of its ongoing work.

The Special Rapporteur's first report on this topic (A/CN.4/772) notes that the term "Non-binding international agreements" was used in the work of the Inter-American Juridical Committee (IAJC), which in 2021 adopted "Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements." However, neither the IAJC Guidelines nor their commentaries cite evidence that OAS member states, or states more generally, have a practice of referring to non-binding instruments or exchanges as "agreements," and accordingly they do not provide support for the usage by states of the term "non-binding agreement." Notably, the IAJC adopted its guidelines under a process that did not allow a meaningful opportunity for OAS member states or other OAS bodies to review or comment on them prior to their adoption, and the guidelines themselves were not endorsed or adopted by the OAS General Assembly or any other OAS Member State organ. The United States specifically noted its concern about the Guidelines' use of the term "non-binding agreements" when states were invited by the OAS General Assembly to comment on the Guidelines following their adoption by the IAJC. See *Views from the United*

commonly used to refer to non-binding exchanges and instruments, as these terms are not presumed to refer only to items that are legally binding in character.

U.S. Legal Framework governing non-binding instruments

Under U.S. law, the President has authority to enter into non-binding exchanges and instruments with foreign states and other foreign actors as a part of his authority under the U.S. Constitution for the conduct of foreign relations. This authority is exercised on a day-to-day basis by the agencies and departments of the U.S. executive branch under the President's general supervision, and in consultation with the Secretary of State. No approval of the U.S. Congress is required for the United States to enter into a non-binding exchange or instrument, however statutes passed by Congress may play a role in allowing the United States to carry out commitments contained in a non-binding exchange or instrument.

U.S. law does establish certain minimal post-conclusion procedural requirements applicable to a category of documents designated as “qualifying non-binding instruments,” that arise following the conclusion of such instruments. (The use of the term “non-binding instruments” rather than “non-binding agreements” is consistent with U.S. practice, as discussed above, to reserve the use of the term “agreement” for legally binding instruments.)

Under U.S. law, “qualifying non-binding instruments” are those non-binding instruments that “could reasonably be expected to have a significant impact on the foreign policy of the United States.”³ Separately, an instrument may become a qualifying non-binding instrument if it is the subject of an inquiry to the Secretary of State from designated members of the foreign affairs committees of the U.S. House of Representatives or Senate.⁴

For non-binding instruments that meet these criteria, two requirements apply: (1) the texts of the instruments must be transmitted to Congress following their conclusion⁵ and, (2) subject to certain exceptions, the texts of the instruments must be published.⁶

Two points are notable about this treatment of non-binding instruments in U.S. law.

First, the applicable requirements arise after the instrument has been concluded, and do not impact the practical or legal ability of the U.S. executive branch to conclude non-binding instruments with foreign partners. This promotes the ability of the United States to use non-

States on the “Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements”
https://www.oas.org/en/sla/iajc/docs/themes_recently_concluded_Binding_and_Non-Binding_Agreements_United_States.pdf (“[T]he incorporation of the word ‘agreement’ into the term used to refer to instruments that do not have legal effect unnecessarily gives rise to potential confusion on this important point, thereby undermining a key objective of the Guidelines. It is not the practice of the United States to use the term ‘political agreement’ to refer to instruments that do not give rise to legal rights or obligations, and the United States urges other states similarly to avoid its use.”).

³ See 1 USC 112b (k)(5)(A)(ii)(I).

⁴ See 1 USC 112b (k)(5)(A)(ii)(II).

⁵ See 1 USC 112b (a)(1).

⁶ See 1 USC 112b (b)(2) and (3).

binding instruments and exchanges flexibly and efficiently to advance cooperative initiatives with foreign partners.

Second, the regulation of non-binding instruments under U.S. law is based on the significance of the instrument's content or on the extent of its interest to the U.S. Congress, and not on its status as a non-binding instrument as such or on any assessment that the instrument constitutes an "agreement." This is reflective of a view that there is nothing inherent about non-binding instruments as a category that merits systematic attention or regulation in U.S. law.

Implications for the ILC's work

The features of U.S. practice discussed above have two main implications for the future work of the ILC on this topic.

First, they reinforce the intention expressed by the Special Rapporteur that the outcome of the ILC's work should not be prescriptive in nature. Because flexibility is among the principal benefits of non-binding exchanges and instruments in the practice of states, it is critical that any outcome of the ILC's work not undermine or constrain such flexibility. Analysis that describes the practice of states and identifies ways in which states have made effective use of non-binding exchanges and instruments may be particularly helpful to states. In the same vein, the ILC's work should not seek to prescribe rules or practices regarding the use of non-binding exchanges and instruments, or to suggest guidelines or other forms of regulation.

Second, the ILC should discontinue its use of the term "non-legally binding international agreements" in the title of the project and in its further work on this issue. As discussed above, most states reserve the term "agreement" for legally binding instruments and refrain from referring to non-binding instruments as "agreements." They do so specifically so that the term "agreement" may be used to distinguish legally binding instruments from non-binding instruments. Use of the term "agreement" by the ILC to refer to non-binding instruments would create serious confusion and disruption to the practice of states in this area, the significance of which should not be underestimated. Indeed, in our view, the positive impact the ILC's study of this topic has the potential to create by illuminating aspects of state practice would be entirely negated by the damage that would be caused if the ILC's work created confusion on this fundamental point. Doing so would be inconsistent with the goal the Special Rapporteur has articulated that the ILC's work should seek "to reduce, as far as possible, the areas of legal uncertainty that have appeared in the field."

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The United States appreciates the opportunity to provide information on this topic and hopes that it will be helpful to the Commission. The United States will follow the Commission's work on this topic with interest and looks forward to continued engagement with the Commission on it.