

Treaties and MOUs: Current Trend and Practice

Objectives

- Understand what is a "Memorandum of Understanding"
- Provisions commonly found in an MOU
- How to draft an MOU
- Good Practice for Ministries to undertake before submitting an MOU to AGC

What is a Memorandum of Understanding?

 In a form and wording which expresses an intention that it is not to be legally binding

Records international commitments

"MOU" is most common name for non-legally binding instruments

but confusingly some legally-binding instruments have been titled as "MOU"

Nevertheless it should be no less carefully drafted given that it is always the intention to perform all of the Brunei Government's commitments in good faith, whether legally binding or not

Not legally binding

Parties' intentions and MOU content

Not form / title of instrument

Rules governing conclusion of MOU?

- Vienna Convention on the Law of Treaties (VLCT) govern treaties that create rights and obligations under international law
- MOUs are non-legally binding, thus VCLT does not apply
- No domestic law, rules or guidelines to regulate how MOUs must be concluded – flexibility, but adherence to VCLT for good practice
- No rigid formula or "right" version

Title of MOU

- Both versions have been used in the past
- Bilateral "Government of His Majesty and Yang Di-Pertuan of Brunei Darussalam"
- Multilateral "Government of Brunei Darussalam"
- Which name will come first? Each country will keep the copy in which its name appears first



MEMORANDUM OF UNDERSTANDING

BETWEEN

THE GOVERNMENT OF BRUNEI DARUSSALAM

AND

THE GOVERNMENT OF THE STATE OF

IN THE FIELD OF HIGHER EDUCATION AND SCIENTIFIC RESEARCH



RESTRICTED

MEMORANDUM OF UNDERSTANDING

Between the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam and the Government of the Federation on Military Cooperation

Title of MOU: "Governments" vs "Ministries"

- AGC preference is to use "Governments"
- Changes to Government structures e.g. renaming or reconfiguring of Ministries
- Flexible due to possibility of constitutional limitations of other country
- Different from domestic contracts here dealing with another sovereign State



MEMORANDUM OF UNDERSTANDING ON ECONOMIC AND TRADE COOPERATION BETWEEN

THE MINISTRY OF FOREIGN AFFAIRS AND TRADE
OF BRUNEI DARUSSALAM

AND

THE MINISTRY OF INDUSTRY AND TRADE

OF

Preamble

- Background, object and purpose of MOU
- Political statements
- Eventhough not substantive obligations, Preamble still relevant in interpretation of MOU and is accorded some weight
- Implementing Ministries representing the Governments
- "Recalling", "Recognising", "Noting"
- Customary to CAPITALISE and be in **bold** font (purely a matter of style)
- End with ""HAVE REACHED the following understanding:"



MEMORANDUM OF UNDERSTANDING

Between the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam and the Government of the on Military-Technical Cooperation

The Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam and the Government of the hereinafter referred to as the "Participants",

GUIDED BY the mutual desire to strengthen friendly relations between the States,

STRIVING FOR mutually beneficial long-term cooperation based on mutual respect, trust and consideration of the interests of each State,

HAVE REACHED the following understanding:

Objective

- Explains purpose of the MOU
- "... subject to their respective national laws, rules, regulations and national policies in force in each country ..."

OBJECTIVE

The Participants will, subject to the terms of this Memorandum of Understanding and their respective national laws, rules and regulations and policies, set up a framework for the enhancement of economic and trade cooperation to:

- Strengthen cooperation towards trade liberalisation and facilitation between the Participants in accordance with the respective international commitments of each country.
- 2. Facilitate and promote private sector participation in trade cooperation.
- Utilise regional and multilateral cooperation to strengthen bilateral economic and trade cooperation.



Scope / Areas of Cooperation

- Examples of areas of cooperation:
 - Sharing of information and materials
 - Exchange of visits by respective experts
 - Interaction through workshops and conferences
- Flexibility: ".. Other areas of cooperation as may be jointly decided by the Participants."

AREAS OF COOPERATION

The Participants will, subject to their respective national laws and regulations, and on a reciprocal basis, encourage and facilitate cooperation in the following areas:

- Exchange visits by respective officials and experts in the fields of culture and the arts and related matters, especially those in the field of tangible and intangible cultural heritage;
- Exchange of materials and information, translations, books, periodicals and other publications and wherever possible, art specimens;

c. Promotion of culture and the arts;

- d. Participation in cultural dialogues, conferences, seminars and exhibitions;
- e. Exchange of information on cultural activities and related matters;
- f. Any other areas of cooperation as mutually decided upon by the Participants.

Implementation

- Establishment of Working Group / Joint Committee
- Responsible for monitoring the implementation of MOU
- Common elements:
 - Level of representation Minister / Senior Official?
 - Frequency of meetings Annually / As when necessary?
 - Terms of Reference
 - Who will bear expenses of organising and attending the meetings Host Country / Visiting Country?

IMPLEMENTATION

- A Joint Working Group will be established to implement this Memorandum of Understanding. The Joint Working Group will comprise of the Co-Chairpersons and not more than 8 members as jointly determined by the Participants.
- The Joint Working Group meeting is to be chaired alternately by the Permanent Secretary of the Ministry of Industry and Primary Resources of Brunei Darussalam and the Secretary General of the Ministry of Domestic Trade, Cooperatives and Consumerism of ______ or their nominated representatives respectively.
- The venue of the Joint Working Group meeting will alternate between Brunei Darussalam and Malaysia. The Joint Working Group will meet at least once a year or as may be jointly decided upon by the Participants.
- The Joint Working Group may undertake the following functions:
 - (a) preparing programmes for the implementation of this Memorandum of Understanding;
 - (b) liaising with the relevant bodies in their own countries to facilitate the implementation of projects under this Memorandum of Understanding;
 - considering and adopting new method and areas of co-operation between the Participants in the co-operative sector; and
 - (d) reporting to their respective governments on the progress of the activities and programmes implemented pursuant to this Memorandum of Understanding.

Financial Arrangement

- Who will bear expenses of cooperative activities under MOU?
- Common elements:
 - MOU will not give rise to financial obligations by one Participant to the other
 - Bear own expenses
 - Expenses will be jointly decided by Parties on a case-by-case basis
 - Expenses will be subject to availability of funds and resources

FINANCIAL ARRANGEMENTS

- This Memorandum of Understanding will not give rise to any financial obligation by one Participant to the other.
- Each Participant will bear its own expenses arising from the implementation of this Memorandum of Understanding, subject to the availability of funds and resources.
- Expenses incurred as a result of any cooperative activities undertaken within the framework of this Memorandum of Understanding will be borne in a manner to be jointly decided upon by the Participants on a case-by-case basis.

Confidentiality

Common elements:

- Obligation to ensure that any information that may be exchanged be kept confidential and not disclose to Third Party, unless consent given
- Confidentiality obligation continue to be binding despite expiration / termination of MOU

CONFIDENTIALITY OF INFORMATION

- Each Participant undertakes to observe the confidentiality and secrecy of documents, information and other data received or supplied to the other Participant arising from any cooperation under during the period of the implementation of this Memorandum of Understanding. Neither Participant shall disclose such confidential information to a third party by any means except with the prior approval of the Participant that furnished the information.
- This Paragraph shall continue to be binding between the Participants notwithstanding the expiration or termination of this Memorandum of Understanding.

Protection of Intellectual Property Rights (IPR)

- Inclusion depends on nature of cooperation
- E.g. area of cooperation includes joint research, which may give rise to creation of intellectual property such as copyright or patent
- Common elements:
 - The obligation to <u>enforce protection of IPR</u>, in conformity with national laws and international agreements to which both Participants are party
 - Need <u>prior written consent</u> before using other Participant's logo/emblem
 - IPR for works carried out jointly shall be owned jointly, in accordance with terms to be mutually agreed upon
 - IPR for works carried out <u>solely</u> shall be solely owned by respective Participant

PARAGRAPH 6 PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

- The protection of intellectual property rights shall be enforced in conformity with the respective national laws, rules and regulations of the Participants and with other international agreements to which both Participants are parties.
- The use of the names, logos and/or official emblems of either Participant on any publication, document and/or paper is prohibited without prior written approval of that Participant concerned.
- 3. Notwithstanding anything in sub-paragraph 1 above, the intellectual property rights in respect of any technological development, and any product and services development, carried out:
 - (i) jointly by the Participants or research results obtained through the joint activity effort of the Participants, shall be jointly owned by the Participants in accordance with the terms to be mutually agreed upon; and
 - (ii)solely and separately by the Participant or the research results obtained through the sole and separate effort of the Participant shall be solely owned by the Participant concerned.

Effect of the MOU

- To expressly state that the MOU is intended to be non-legally binding between the Participants
- Ensures no ambiguity



PARAGRAPH 8 NATURE OF THIS MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is an expression of intent by the Participants to cooperate in their mutual interests and this Memorandum of Understanding does not create any legally binding obligations between the Participants under domestic or international law, and will not give rise to any legal process, unless otherwise stated in any subsequent written agreement.





This Memorandum is not an international treaty and does not create for the Participants any rights or obligations governed by the international law.



Amendment

- Provides for how the MOU can be amended and when such amendment will come into effect
- Common elements:
 - Can be amended at any time
 - Mutual written consent
 - Amendments reduced in writing
 - Integral part of the MOU
 - Come into effect on jointly determined date / in accordance with Effective Date provision of MOU

PARAGRAPH 11 REVISION, MODIFICATION AND AMENDMENT

- Any of the Participants may request in writing a revision, modification or amendment of all or part of this Memorandum of Understanding.
 Amendments will be made in accordance with the procedures in Paragraph 10.
- Any revision, modification or amendment agreed to by the Participants will form an integral part of this Memorandum of Understanding.
- Such revision, modification or amendment will be made in writing and come into effect on such date as may be determined by the Participants.

Settlement of Disputes

- Common elements:
 - Differences or disputes arising out of the application, interpretation or implementation of MOU
 - Settled amicably by consultation or negotiations, through diplomatic channels
- Reflects the non legally-binding nature of MOUs
- Ensures non-adherence to MOU commitments will not lead to tribunal proceedings



PARAGRAPH 9 SETTLEMENT OF DISPUTES

Any disputes or disagreements in the interpretation or implementation of this Memorandum of Understanding will be settled amicably through mutual consultations or negotiations between the Participants through diplomatic channels in the spirit of cordiality and mutual respect, without reference to any third party or international tribunal.

Effective Date

- Various ways that an MOU may come into effect:
 - On date of signature
 - On date of later written notification by the Participants, through diplomatic channels, indicating that the domestic requirements for its coming into effect have been completed
 - This will require both Participants to send a diplomatic note to each other, on completion of domestic requirements
 - Domestic requirements e.g. amendment of laws, Parliamentary Approval
 - Thus, MOU will not come into effect until diplomatic notes are exchanged



PARAGRAPH 12 EFFECTIVE DATE, DURATION AND TERMINATION

 This Memorandum of Understanding will come into effect on the date of signature by both Participants and will remain in effect for a period of five (5) years. Thereafter, it will be extended automatically for a further period of five (5) years or as determined by both Participants.



Paragraph 14

 This Memorandum of Understanding will come into effect on the date of the receipt of the last written notification through diplomatic channels by which the Participants notify each other of the completion of their internal constitutional procedures required for its coming into effect.



Duration

- Provides for duration and renewal/extension of MOU
- Various ways MOU may be extended:
 - Automatically extended this means that the Participants do not need to sign a new MOU or exchange any letters or diplomatic notes
 - Extended if Participants agree to do so not automatic renewal, and require exchange any letters or diplomatic notes
 - **Silent on extension** still possible to extend the same MOU, subject to the mutual agreement of the Participants



3. This Memorandum of Understanding will remain in effect for a period of five (5) years and will be automatically extended for successive periods of five (5) years, unless either Participant notifies the other in writing, through diplomatic channels of its intention to terminate this Memorandum of Understanding at least six (6) months prior to the expiry of this Memorandum of Understanding.





6. The present Memorandum will be applied for a period of 3 years. After this period, the application of this Memorandum may be continued by mutual consent of the Participants. Either Participant may terminate this Memorandum by giving at least 6 (six) months prior notice in a writing form to the other Participant.



This MOU will remain effective for a period of five (5) years, unless either Participant terminates it.

Duration: Automatic Extensions

- For automatic extensions, it may be for various time periods:
 - <u>A</u> further period of x years this is only a <u>single</u> period of x years, after which it will expire
 - <u>Further/Successive</u> periods of x years this is <u>multiple</u> periods of x years, thus is akin to an indefinite time-period, until it is terminated
 - <u>Time period to be determined by the Participants</u> when the MOU expires, the Participants have to mutually agree on how long it will be extended for, normally via exchange of letters or notes
- Extension for specified periods to allow Participants to review the implementation of MOU. But is this practised?

This MOU will enter into effect on the date of signing and will continue in effect for a period of five (5) years. Thereafter, it will be automatically extended for a further period of five (5) years.



3. This Memorandum of Understanding will remain in effect for a period of five (5) years and will be automatically extended for successive periods of five (5) years, unless either Participant notifies the other in writing, through diplomatic channels of its intention to terminate this Memorandum of Understanding at least six (6) months prior to the expiry of this Memorandum of Understanding.



ARTICLE 10 ENTRY INTO FORCE, DURATION AND TERMINATION

- This Memorandum of Understanding will come into effect on the date of signing and will remain in operation for a period of five (5) years.
- Thereafter, it will be automatically extended for a further period to be determined by both Parties.

Termination

- How to terminate an MOU
- Advanced written notice
- Termination will not affect implementation of ongoing activities which have been agreed upon by the Participants prior to date of termination, unless Participants decide otherwise



PARAGRAPH 12 EFFECTIVE DATE, DURATION AND TERMINATION

- This Memorandum of Understanding will come into effect on the date of signature by both Participants and will remain in effect for a period of five (5) years. Thereafter, it will be extended automatically for a further period of five (5) years or as determined by both Participants.
- Either Participant may terminate this Memorandum of Understanding by notifying the other Participant of its intention to terminate this Memorandum of Understanding by a notice in writing through diplomatic channels, at least six (6) months prior to its intended termination date.
- 3. The termination of this Memorandum of Understanding will not affect the implementation of ongoing activities or programmes, which have been agreed upon by the Participants prior to the date of the termination of this Memorandum of Understanding, unless the Participants agree otherwise.

Testimonium



SIGNED at *Bandar Seri Begawan* on 27th August 2016 in two (2) original copies each in the Malay, Vietnamese and English language. All texts are equally authentic. In case of divergence of interpretation, the text in English will prevail.



Testimonium

- "2 original copies" or "duplicate"
- In bilateral MOUs, there will always be 2 "original copies" despite there being more than 2 languages
- Each "original copy" consists of all texts in different languages
- Each country will sign both "original copies"
- Each country will keep 1 "original copy" (which has the texts in all languages)

Testimonium

- Where in more than 1 language, usually provides that English text will prevail
- The reason is one of practical reason since text was negotiated in the English language and is common language between countries
- Malay translation responsibility of <u>instructing Ministry</u> to provide a Malay translation, which AGC will vet

Signature Block

- For treaties, Vienna Convention on Law of Treaties provides that only the Head of State, Head of Government or Foreign Minister has the power to sign without the need for an instrument of full powers
- MOUs are not governed by the rule, since MOU is not a "treaty" under international law
- Thus, MOU can be signed by any person who has been given authorisation to sign on behalf of the Government of Brunei Darussalam



For the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam

H.E.

Ambassador Extraordinary and Plenipotentiary to the For the Government of the

Director of FSMTC

Drafting Style: format

- Headings
- Numbering Arabic numbers (1, 2, 3 ..) or Roman numerals (I, II ..)
- Paragraph numbering
- Consistent use of terms

PARAGRAPH 4 IMPLEMENTATION

- The Participants will pursue any further subsidiary arrangements necessary for the furthering of the objectives of this Memorandum of Understanding.
- 2. For the purposes of consultation and implementation of this Memorandum of Understanding, the Participants designate the following as the national focal agencies for this Memorandum of Understanding:
 - a. The Ministry of Foreign Affairs and Trade of Brunei Darussalam;
 and
 - b. The Asia-Pacific Market Department (the Ministry of Industry and Trade of the
 i).



Drafting style: terminology

- To make clear the intention to enter into an MOU, the established practice is to use well understood terms which convey the intention that it will be a non-legally binding instrument, rather than a treaty
- Avoid "treaty language" to ensure that MOUs are not worded in such a way as to amount to legally binding treaties
- Treaties and MOUs: Guidance on Practice and Procedures (produced by the Treaty Section, Foreign & Commonwealth Office)

Drafting style: terminology

Treaties (Legally Binding)	MOUs (Non Legally Binding)
Agreement	Memorandum of Understanding
Party	Participant
shall	will
Article	Paragraph
agree	accept
enter into force	come into effect
mutually agree	Jointly decide
obligations	commitments

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Good Practices		
Comments on draft MOU e.g. consistency with laws or policies, proposals to limit or expand scope of cooperation		
Background information behind intention to conclude the MOU		
Any relevant documents e.g. minutes of meeting with other Party		
Intention of other Party – legally binding or not?		
Who prepared the initial draft? If Brunei, is it based on a similar previous MOU?		
Name and contact details of officer-in-charge (including e-mail address)		
Providing AGC with signed copy of MOU		

Understand commitments being entered into

Understand terms being used

Commitments are consistent with Ministry's policy

Role and responsibility of instructing Ministry



QUESTION AND ANSWER SESSION

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THANK YOU

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