GERMANY

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?

In German practice, we do not usually use the term "non-legally binding agreement". Indeed, according to the German Guidelines for International Treaties, which include also a chapter on non-legally binding instruments, "agreement" is a term, which should be avoided in non-binding declarations. Instead, the term "Joint Declaration of Intent" or "Arrangement" should be used. These are defined as non-legally binding declarations between subjects of international law, which only express political commitments.

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

See answer to question 1.

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

In German practice, the term "Memorandum of Understanding" usually refers to a non-legally binding declaration of intent. However, the German Guidelines (see Answer to question 1) prescribe that the title "Memorandum of Understanding (MoU)" should be avoided, if possible. This is due to the perceived ambiguity of the term in international relations, which by some States is used also for legally binding documents. However, if the term cannot be avoided, it is acceptable only if the rest of the document clearly reflects the document´s character as a non-legally binding instrument.

II. Distinction

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

In contrast to treaties as defined in Art. 2(1) lit. a) Vienna Convention on the Law of Treaties (VCLT), international civil law contracts are contracts between subjects of international law establishing obligations under the domestic civil law of a state. Treaties establish obligations under international law concluded exclusively by subjects of international law.

While the main distinguishing feature between treaties and international civil law contracts is the legal order in which the agreement is rooted, the distinction between the former and non-legally binding arrangements relates to the legally binding or merely political character of the document.

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)?

In German practice, we differentiate between legally binding agreements, including treaties and civil law contracts, and non-legally binding arrangements based on a comprehensive assessment of the structure and wording of the document (cf. also next question).

In our view, no one element qualifies an agreement/arrangement as binding or not. Instead, the document must be assessed in its entirety with a special focus on its structure and wording. Our practice has distilled certain approaches to ensure the non-binding character of a document.

We prefer to call non-legally binding arrangements "Declaration of Intent". Standard treaty denominations such as "treaty", "covenant", or "agreement" are not acceptable for non-binding arrangements. We also avoid the term "Memorandum of Understanding" because international practice is ambiguous on whether it refers to a binding or non-binding arrangement (cf. question 3).

We ensure that the structure of non-legally binding arrangements differs from binding agreements. The former have no preamble or articles. They can have an introduction and may be divided into

sections or paragraphs. They do not use the present, but rather the future tense. They do not "enter into force", but "come into effect". A formal termination clause also indicates a binding agreement, given that non-binding arrangements do not require formal termination. Still, out of comity, non-binding arrangements can stipulate that ending cooperation under its terms should be subject to prior notification. Non-legally binding arrangements do not end with "done at", but rather with "signed at".

As regards their wording, non-legally binding arrangements typically refer to the signatories as "sides", not "parties". They should not contain typical treaty terms such as "shall", "agree", "oblige", "conditions", "rights", or "undertake". Instead, we prefer to use "concur", "jointly decide", "accept", "approve", "aim at", "strive at", "intend to", and others.

As mentioned, not one of these elements alone determines whether a document is legally binding or not. Rather, a comprehensive assessment with a view to all the above mentioned elements is conducted.

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 mentioned in our answer to question 5, the title alone does not determine the legal nature of a given agreement/arrangement. In principle, we regard "MoUs" to be the same as "Joint Declarations of Intent": non-legally binding arrangements. However, we aim to avoid the ambiguous term "Memorandum of Understanding" in our practice (see above question 3).

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

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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, has the competence to sign a non-legally binding agreement?

In principle, the competence to sign non-legally binding arrangements (understood as in Fn 1) lies with the Federal Government as a whole as well as with each of the Federal Ministries. Furthermore, the German Länder may also sign non-legally binding arrangements with other States/International Organisations.

10. For States: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements?

The German Länder *have a limited competence to conclude treaties with other States/International Organisations (with the consent of the Federal Government, cf. Article 32 section 3 Basic Law for the Federal Republic of Germany). This competence also encompasses the signing of non-legally binding arrangements. Thus, the same issue of clearly distinguishing treaties from non-binding arrangements arises for the Länder. To ensure that arrangements signed by the Länder are not treaties (triggering the requirement of consent by the Federal Government), the Länder submit their arrangements for prior political and formal assessment to the Federal Foreign Office.*

Other subordinate authorities may also sign non-legally binding arrangements with foreign entities. However, as such non-legally binding arrangements usually do not raise doubts concerning their clear distinction from binding international treaties (subordinate authorities may not conclude treaties, as they are no subjects of international law nor do they usually represent them), they do

*not have to undergo the formal assessment procedure as instruments signed by the Federal Government/*Länder*.*

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?

Given States' clear intent to the contrary, non-legally binding arrangements cannot produce direct legal effects. For the same reason, possible indirect legal effects must be assumed with caution.

Practice shows that non-legally binding arrangements can act as precursor to binding agreements and acts. Several international conventions arose out of prior non-legally binding arrangements. The United Nations Security Council lent some provisions of non-legally binding arrangements binding force through its Chapter VII authorities. While non-legally binding arrangements are no legal prerequisite for such acts, they might be necessary de facto to achieve a subsequent binding agreement or other action.

Non-legally binding arrangements can produce legal effects as a means of interpretation. States regularly use them as (subsequent) agreements in accordance with Art. 31(2)(a), (3)(a) VCLT. For that, all parties to the respective treaty must participate in the arrangement with the intent to clarify the treaty in question. If a non-legally binding arrangement forms part of treaty negotiations it enters the travaux préparatoires as a means of interpretation pursuant to Art. 32 VCLT.

States' acts under a non-legally binding arrangement can constitute subsequent State practice in accordance with Art. 31(3)(b), 32 VCLT. However, due regard must be had to the States' intent not to create legally binding obligations through the arrangement. This warrants caution before assuming that any practice pursuant to such an arrangement is "in the application of the treaty" as required by Art. 31(3)(b), 32 VCLT.

Similar reasoning applies to qualifying state practice pursuant to a non-legally binding arrangement as an element of international customary law. In principle, practice under non-legally binding arrangements may have such effect. However, States will often lack opinio iuris when acting solely pursuant to an arrangement which they do not consider binding.

When a State can reasonably expect another State to comply with a non-legally binding arrangement, estoppel may bar deviation from that arrangement. However, similar to the above remarks, estoppel cannot introduce legal obligations where none were intended. Hence, only special circumstances can justify the legitimate expectation of compliance with a non-legally binding arrangement. This could be the case, for example, when a non-legally binding arrangement requires one side to make significant investments that are futile without the other side's cooperation.

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?

*According to Paragraph 72 Section 1 of the Common Rules of Procedure of the Federal Ministries ("*Gemeinsame Geschäftsordnung der Bundesministerien*", GGO). there needs to be an assessment whether the purpose of a planned treaty cannot be reached by other means. In this assessment, the responsible Federal Ministry needs to evaluate whether alternative means, such as non-legally binding arrangements, civil law contracts or cross-border inter-agency arrangements, could also*

fulfil the pursued objective. Thus, there is a certain margin of appreciation for deciding whether a legally binding treaty or a non-legally binding arrangement is the adequate instrument.

Factors which might influence this decision are the importance of the subject matter, time (usually, a non-legally binding arrangement will be negotiated and concluded faster) and the question whether the other Side refuses to conclude a binding treaty. Usually, non-legally binding arrangements will be more flexible in their conclusion and handling.

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

*The Federal Ministry/*Land*, which is politically responsible for the subject matter of the non-legally binding arrangement decides in coordination with other Ministries concerned. However, as mentioned in the answer to question 10, treaties by the Länder require the consent of the Federal Government and their non-legally binding arrangements have to be submitted to the Federal Foreign Office for prior political and formal assessment.*

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

The main difference is that there is usually only a formal assessment by the Federal Foreign Office, which ensures that the internal standards for non-binding arrangements are observed. Consequently, instruments, which are clearly non-legally binding arrangements, do not need to undergo an assessment by the Ministry of Justice/Ministry of the Interior for potential implications on constitutional law.

In contrast with binding treaties, the German Länder do not need to consent or even be involved in the conclusion of a non-legally binding arrangement by the Federal Ministries, because non-legally binding arrangements cannot affect the constitutional competences of the Länder.

Treaties involving Germany as a party need to be in German (or – for multilateral treaties – to be translated into German). Non-legally binding arrangements may also be concluded just in English.

Treaties may require the consent of parliament before they can enter into force. Non-legally binding arrangements do not enter into force but only come into effect (usually with signature); no parliamentary approval is required.

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?

Yes. According to § 41(3) of the Guidelines on International Treaties ("Richtlinien für die Behandlung völkerrechtlicher Verträge", RvV), the Federal Foreign Office assesses non-legally binding arrangements to ensure that no legal obligations are accidentally entered into and that the Federal Government is aware of all planned non-legally binding arrangements. The RvV bind all Federal Ministries pursuant to Art. 72(6) of the Common Rules of Procedure of the Federal Ministries (GGO).

16. If so, what Ministry/body performs this formal assessment?

The legal department of the Federal Foreign Office (International Treaty Law Division - 501).

17. At what time in the process of concluding a non-legally binding agreement is the formal assessment carried out?

In principle, the formal assessment takes place before Germany sends a first draft for negotiation to the other side. If the other side provides a first draft, the assessment takes place early on in the

[1] In this section, "formal assessment" refers to the internal procedure for checking the formal criteria of a draft non-legally binding agreement to ensure it is clearly identifiable as such.

negotiation process. If subsequent negotiations result in changes to the reviewed draft, the final text will be assessed again.

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?

Non-legally binding arrangements of the Länder are subject to the same formal assessment as those of the Federal Government.

Non-legally binding arrangements by subordinate authorities/public agencies are usually not formally assessed by the Federal Foreign Office, as they are unlikely to be confused with international treaties (lack of subjects of international law).

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?

The formal assessment of non-legally binding arrangements is guided by § 41(2) RvV together with annexed instructions and a glossary. These norms contain standards on the structure, wording, and other formalities regarding non-legally binding arrangements. Their content is partially reproduced above in Part II, Question 5.

20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?

The RvV are issued by the Federal Foreign Office. They are published and available online in German:

(https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm).

Art. 72(6) GGO makes them binding for all Federal Ministries, including the formal assessment contained in § 41(3) RVV.

The responsible division in the Federal Foreign Office conducts informative workshops from time to time to raise awareness among the Federal Ministries about the mandatory formal assessment procedure.

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

Germany's diplomatic missions/responsible units for the subject matter in question within the Federal Foreign Office inform the unit responsible for the formal assessment of any planned non-legally binding arrangement between Germany and the respective partner state in question.

When a Land negotiates a non-legally binding arrangement, the unit in the Federal Foreign Office responsible for parliamentary relations – whose tasks also relate to the Bundesrat, the organ representing the Länder in the federal legislative process – informs the legal department.

However, the requirement of a formal assessment through the Federal Foreign Office is also built on cooperation and trust that other Federal Ministries will submit their draft arrangements.

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)?

The RvV, including the annexed instructions and glossary, are published electronically and are distributed in print to other ministries. Federal Ministries and ministries of the Länder can contact the Federal Foreign Office's International Treaty Law Division responsible for the formal assessment of non-legally binding arrangements (division 501) with any questions. From time to time, the unit organises seminars and workshops for other ministries, which also cover the formal procedures on non-legally binding arrangements. The Federal Foreign Office has developed a short checklist

comprising a brief summary of necessary steps for the units responsible for the arrangement in question, which is distributed regularly to other Federal Ministries.

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.

VII. Democratic Review/Parliamentary Participation

For States:

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?

The conclusion of non-legally binding arrangements does not require parliamentary notification, consultation, or approval. There is hence no automatic process to that effect. Nevertheless, the Federal Government regularly informs parliament on important foreign policy initiatives, which may also include non-legally binding arrangements.

25. If so, at what stage of the process is the legislature usually involved?

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26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?

Parliament has general rights of control and information towards the Federal Government. The latter entails the Members' of Parliament right to put questions to the Federal Government (right of interpellation), including about planned or concluded non-legally binding arrangements.

The Federal Government regularly informs parliament of relevant foreign policy activities. This can include politically relevant non-binding arrangements. However, absent concrete parliamentary inquiries (interpellations), the topics and scope of parliamentary information lies in the government's discretion.

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?

Parliament may invoke its rights before the Federal Constitutional Court. However, since there is no concrete right of participation or consultation in cases of non-legally binding arrangements, there are few situations conceivable in which such an action could be successful.

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?

VIII. Signature and Format

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

It is necessary that the division inside the Federal Foreign Office responsible for the subject matter issues its specific authorisation of signature. This authorisation does not require specific formalities (particularly no full powers).

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

While less frequent than the regular procedure, the option of signing non-legally binding arrangements on two separate documents is not precluded. This allows, for example, a signature

during a video conference (particularly useful during the pandemic). Both sides sign one set of the declaration in the original. Since they sign on the same date (only this date is noted on the declaration), the declaration will be treated as effective from this date (unless a later date is expressly agreed). Subsequently, the originals are each sent to the other side to obtain the missing signatures.

Non-legally binding arrangements can also be concluded through exchange of instruments (notes verbales, letters), e.g. arrangements of mutual support.

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 possibility for electronic signature of non-legally binding arrangements is not regulated by the internal guidelines. However, if the sides agree on certain conditions an electronic signature should suffice for signing non-legally binding arrangements.

These conditions are:

- There is consensus among the sides involved that the non-legally binding arrangement should be signed using a digital signature.

- All sides involved jointly decide in good time before the signing date on mutually compatible electronic signature platforms.

There have not been any precedents for the use of electronic signature for non-legally binding arrangements in German practice yet.

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)?

Non-legally binding arrangements are also signed in other languages than German. If the arrangement is signed in English, usually an additional German language version is not required (unless the other side has English as native language). However, if the other side insists on their own language version, Germany also requires its own copy in German. In this case, it is up to the sides whether they choose to also add a third language (most frequently English) as a tool for interpretation.

For International Organisations:

What language do you usually require for the text of your non-legally binding agreements?

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)

Usually, signing non-legally binding arrangements requires fewer formalities than signing binding treaties. However, even for non-legally binding arrangements a special (more durable) paper is prescribed (cf. § 41 section 2 RvV).

IX. Registration and Publication

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

All non-legally binding arrangements of the Federal Government and its Ministries are supposed to be stored in the Political Archive, located in the Federal Foreign Office in Berlin. The German Federal Archive Law (§ 11 section 1 Bundesarchivgesetz) provides that the general protection period for federal archival records is 30 years. Thus, any non-legally binding arrangement, which is older, may be publicly accessed, if not otherwise classified.

Apart from the Political Archive, there is no proper digital database where Germany's non-legally binding arrangements are systematically registered.

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

(*see previous question*)

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

Non-legally binding arrangements signed by Germany are not necessarily published in an official gazette. However, in individual cases there might be an interest in publishing a non-legally binding arrangement, e.g. on the website of the competent Federal Ministry. Furthermore, as mentioned above in question 34, these arrangements are stored in the Political Archive of the Federal Foreign Office and can be accessed there by the public under certain conditions (protection period of 30 years has passed; arrangement is not otherwise classified).

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?

After the 30 years protection period mentioned above, non-legally binding arrangements cannot be withheld from public access, unless there are additional reasons for their classification.

According to § 1 Freedom of Information Act ("Informationsfreiheitsgesetz" – IFG) in principal everyone has the right to access official information. However, this right can be restricted if the publication of the information could have detrimental effects on, for example, international relations, on military or other security sensitive aspects of the German army or on matters of internal or external security (etc.).

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?

Before the pandemic, there have been workshops by the division in the Federal Foreign Officer responsible for the formal assessment. Apart, a brief summary checklist has been prepared to assist Federal Ministries with the formal procedures and requirements. The internal guidelines RvV contain a "Model Non-Binding Arrangement" with exemplary provisions as well as a glossary indicating which terminology should be used and which should be avoided.

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

39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?

The main advantage seems to be the flexible and speedy drafting and conclusion of these types of arrangements. While international treaties are needed when legal obligations shall be instituted, frequently the speed of everyday politics requires instruments which lay down a common understanding and a common intent in writing without running the risk of entering into legal obligations.

This development, while supporting their increased usage, is also a source of concern. While it may seem handy to rely on these swiftly drafted instruments without much risk, they also might replace, to a certain extent, treaties, which previously were concluded in their place. This introduces a trend towards more informality in international relations, and thus, perhaps, less reliability.

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?

In recent years, Germany has been formally assessing about 15 non-legally binding arrangements per month. This seems to have increased in comparison with years past. However, there has been no systematic account of the number of non-legally binding arrangements concluded by Germany or the German Länder.

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?
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?