

ITALY

A. SUBSTANTIVE ASPECTS
I. Definitions
<p>1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it?</p> <p><i>The term “agreement” is not used when referring to non-binding instruments.</i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</p> <p><i>Memorandum of Understanding is by far the preferred term when referring to non-binding instruments. Other used terms include “Protocol”, “Arrangement”, “Technical Arrangement”, “Declarations”, “Twinings” and others. Apart from their formal “nomen iuris”, they are all characterized by the fact that no rights or obligations under international law may arise from those instruments.</i></p>
<p>3. Do you consider “Memoranda of Understanding” to be legally binding or non-legally binding instruments? Or can they be both?</p> <p><i>Memorandum of Understanding is the “nomen iuris” normally used for non-binding instruments. However, the binding nature cannot be inferred from the name of the instrument alone. In some cases, a binding instrument might be referred to as “Memorandum of Understanding”.</i></p>
II. Distinction
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>The will of the parties shall be duly taken into consideration when it comes to differentiating the abovementioned instruments. In our system, the will of the parties to create non-legally binding instruments must be expressed through specific clauses and terminology.</i></p>
<p>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)?</p> <p><i>The absence of the will of the parties to create rights and obligations under International law. This absence should be enshrined in a specific clause, such as the following:</i></p> <p><i>“This MoU does not constitute an international agreement that may lead to rights and obligations under international law. No provision of this MoU is to be understood and performed as a legal obligation or commitment of the Parties”.</i></p>
<p>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?</p> <p><i>Non-legally binding instruments may have different nomina iuris. Political Declarations and Joint Declarations are not considered non-legally binding instruments. This distinction is based on the content of the two instruments. Whereas a MoU commonly establishes forms of policy consultations and technical cooperation between two or more public administrations of different Countries, a Political Declaration is generally delivered by Heads of Government or Members of the Government and its content has merely the nature of a political statement.</i></p>

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

No. The same rules apply to every non-legally binding instrument. Different procedural rules apply to Political Declarations.

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, there is no distinction between non-legally binding agreements concluded with international organization or States. Therefore, there are no different rules applying to non-legally binding agreements concluded with States or international organization.

III. Competence

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

Any organ qualified as a "Public administration" under domestic legislation, authorised by the MFA on a case by case basis.

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?

Yes. Twinning, for instance, constitute a special non-legally binding agreement concluded by municipalities. Regions, provinces, metropolitan cities and municipalities can stipulate arrangements on subject-matters within their competences.

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)?

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?

A non-binding instrument is not capable to produce any direct or indirect legal effect because it produces only a political commitment or a technical cooperation. In addition, a non-binding instrument may anticipate the conclusion of a legally binding agreement. As such, they may potentially be used on a case by case basis as a means of interpretation of connected legally binding agreements.

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?

Non-binding instruments may constitute a framework for subsequent negotiations. They are more flexible than binding agreements and they generally become valid upon signature(s) and no ratification/deposit process is needed. Non-legally binding agreements may as well be used when a binding agreement is not a feasible solution for political, technical, practical or negotiating reasons.

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

The executive branch. The single Ministries assess the opportunity whether to conclude a treaty or a non-binding instrument. The Ministry of Foreign Affairs, which is involved in every negotiation process, may recommend changes or redrafting or suggest to stipulate an Agreement instead of a non-legally binding instrument.

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

Legally binding treaties require the concession of Full Powers and possibly further steps other than the mere signatures. They usually require a proper ratification by the President of the Republic and, in certain cases, the ratification must be authorized via a specific law approved by the Parliament. The procedural distinction is more blurred in case of non-legally binding agreements since there are no legal prescriptions governing their entry into force.

VI. Formal Assessment¹ 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?

Public administrations that are interested in the conclusion of non-legally binding instruments maintain regular contacts with the competent offices of the Ministry of Foreign Affairs that may assist them in the negotiation.

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

The Legal Service of the Ministry of Foreign Affairs has the authority to assess the wording of non-binding instruments in order to avoid that the provisions may be interpreted as binding and in order to avoid breach of domestic, EU or international law.

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

Generally, at the end of the negotiation and, in any case, when a draft text has been preliminarily accepted by the Participants.

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?

Yes.

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?

They are assessed on the basis of internal guidelines developed by the MFA Legal Service.

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.

<p>20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?</p> <p><i>Diplomatic counsellors are present within central Public Administrations and they ensure continuous contacts with the competent offices of the Ministry of Foreign Affairs. The offices of the Ministry of Foreign Affairs are aware that internal guidelines oblige them to require the advice of the Legal Service of the MFA.</i></p> <p><i>A specific circular on international treaties, published on the Official Journal of the Italian Republic, includes detailed provisions on the negotiation and conclusion of non-legally binding instruments.</i></p>
<p>21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?</p> <p><i>On the base of the internal guidelines of the Ministry of Foreign Affairs.</i></p>
<p>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)?</p> <p><i>Yes, as mentioned above, diplomatic counsellors, detached to other Ministries, are in charge with liaising with the MFA on the negotiation and drafting of non-legally binding instruments.</i></p>
<p><u>For International Organisations:</u></p>
<p>23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.</p>
<p>VII. Democratic Review/Parliamentary Participation</p>
<p><u>For States:</u></p>
<p>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?</p> <p><i>No, the Parliament is not involved, as non-legally binding instruments cannot produce changes on domestic legislation.</i></p>
<p>25. If so, at what stage of the process is the legislature usually involved?</p> <p><i>N/A</i></p>
<p>26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?</p> <p><i>The Parliament is enabled to monitor the international activities undertaken by the executive branch through those means envisaged by parliamentary regulations, "question time" "motions", "parliamentary questioning". It is important to point out that these instruments are conceived to monitor and control the overall activity of the government in any field.</i></p>
<p>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?</p> <p><i>No it does not, because the Parliament is not involved in the conclusion of non-binding instruments.</i></p>
<p><u>For International Organisations:</u></p>

<p>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?</p>
<p>VIII. Signature and Format</p>
<p>29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?</p> <p><i>A clearance of the cabinet of the Minister of Foreign Affairs is required.</i></p>
<p>30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?</p> <p><i>Signatures are usually on the same document. Exceptionally, non-binding instruments may take the form of exchanges of Note Verbale or Letters, whose signatures are, as a result, on different documents.</i></p>
<p>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?</p> <p>Yes.</p>
<p>32. <u>For States:</u></p> <p>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)?</p> <p><i>Texts drafted in the partner's language are accepted, when also drafted in Italian. Texts in English only are accepted when English is not the official language of the counterpart.</i></p> <p><u>For International Organisations:</u></p> <p>What language do you usually require for the text of your non-legally binding agreements?</p>
<p>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)</p> <p><i>No. A special paper is only required for binding agreements.</i></p>
<p>IX. Registration and Publication</p>
<p>34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?</p> <p><i>No, there is no a unique register/archive/database for non-legally binding instruments. Single offices of the Ministry of Foreign Affairs and/or other Public Administration may act as decentralized registrars.</i></p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p> <p><i>See above</i></p>
<p>36. Do you publish your non-legally binding agreements and are they openly accessible?</p> <p><i>They are not subject to any publication procedure. In most cases they are openly accessible under domestic legislation (es FOIA).</i></p>

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?

N/A

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?

In some cases the Legal Service of the MFA provides other departments or administrations with standard models previously agreed upon.

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?

Flexibility, as well as rapidity in their formation may be consider the main benefits when dealing with non-binding instrument. The main concern consists in the fact that they may be used to regulate issues that, for their importance, would require an international agreement. On the other side, non-legally binding instruments may also be misused when international contracts would be the preferential tool to regulate the interests of the signatories.

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?

The number of non-legally binding instruments has increased considerably over the course of the years as a result of the flexibility of this instrument.

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?