REPUBLIC OF KOREA

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?

We rarely use the term "non-legally binding agreement" in practice, as we interpret “agreement” to mean legally binding instrument. However, if the term “agreement” is used in certain contexts, it usually refers to an agreement as political consent which does not involve any form of legal instrument.

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

In our practice, the instruments which the central administrative agencies conclude with foreign government agencies or international organizations within the scope of their own competence - therefore lacking any binding force under international law - are usually referred to as "agency-to-agency arrangements." Their titles are generally "Memorandum of Understanding between … the Ministry of the Republic of Korea and … the Ministry of …" to signify that they are not legally binding agreements. In addition, we do not conclude those arrangements under the name of the State or Government lest they be mistaken to be legally binding agreements under international law.

In this regard, Article 3 of the Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree) provides that treaties, including agreements, which are agreements between States creating rights and obligations governed by international law, shall be distinguished from agency-to-agency arrangements.

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

They can be both. The sole fact that a certain instrument is entitled "Memorandum of Understanding" does not establish its legal nature. Although we endeavour to apply the designation "Memorandum of Understanding" only to non-legally binding arrangements under international law in order to prevent any confusion or misunderstanding with regard to their legal nature, there have been occasions where we have concluded legally binding instruments with the title of "Memorandum of Understanding". For example, the Memorandum of Understanding between the Government of the Republic of Korea and the Government of the Kingdom of Denmark concerning a Working Holiday Programme - which was signed in 2010 and entered into force in 2011, was intended, without a doubt, to be a legally binding agreement under international law, despite its title.

II. Distinction

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

Treaties are, as defined in the Vienna Convention on the Law of Treaties, international agreements that are concluded between subjects of international law. Therefore, we consider them to be legally binding under international law.

International civil law contracts are agreements that are regulated by the domestic law of a certain State. They might be international in the sense that they contain some international

aspects in terms of substance, but they are concluded between non-government/non-State subjects and therefore should be distinguished from treaties.

Non-legally binding agreements have, by definition, no legal effect, both domestically and internationally.

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)?

No. To determine the legal nature of a certain instrument, several factors should be taken into account, including the language of the text, the context, situation, and procedures. But if a certain agreement contains a provision explicitly stating its legal character, such as a provision stipulating "this agreement is not intended to create legally binding obligations under international law", it would be unrealistic to view such an agreement as being legally binding. As a matter of course, for such instruments, we do not conduct the internal process necessary for the conclusion of treaties, since they are not agreements that have legally binding effect under international law.

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?

No. We do not distinguish between these concepts, since, in our practice, the title itself is relatively unimportant when determining the legal nature of a certain instrument.

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

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?

We refrain from using the term "non-legally binding agreement" as this places two contradicting words together, as noted in the answer to question 1. However, regarding non-legally binding "arrangements", we do not formally differentiate between them on the basis of the character of the other side.

III. Competence

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

For the purpose of concluding non-legally binding agency-to-agency 'arrangements', it is usually the head of the relevant government ministry or agency that acts as signatory.

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?

Regarding agency-to-agency arrangements, sub-national territorial units are allowed to conclude their own non-legally binding arrangements, but regarding any kind of binding treaties (including agreements) sub-national territorial units are prohibited by law (Local Autonomy Act, Article 15) from concluding such treaties.

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?

Since we, in principle, do not use the concept "non-legally binding agreement", this question is not applicable.We rarely use non-legally binding instrument as a prerequisite for concluding a legally-binding instrument.

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?

In a general sense, if the subject matter of a certain instrument mainly deals with cooperation between States or central governments, it tends to take the form of a treaty. In contrast, when intending to conclude an instrument whose principal aim is to promote cooperation merely between government ministries or agencies, not at the State level, non-legally binding arrangements are usually employed.

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

If the Government decides to conclude an agreement as a form of treaty, i.e., legally binding agreement, it is subject to the prior approval of the President. If it is for a non-legally binding arrangement, each relevant ministry or government agency ultimately decides whether to conclude it.

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

Treaties may be concluded only after going through several phases of an internal process, including examination by the Ministry of Government Legislation, cabinet meetings and approval by the President, in accordance with relevant laws and regulations of the Republic of Korea. In addition, treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters are subject to the consent of the legislature before steps are taken to bring the treaty into force.

In contrast, for non-legally binding arrangements, there is no legally required process for concluding them. However, it is still advised to get a "legal scrubbing" from the Ministry of Foreign Affairs.

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?

No. There is no mandatory centralised formal assessment for non-legally binding arrangements. The Ministry of Foreign Affairs advises on the conclusion and text of such arrangements upon request, but this process is not mandatory.

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 10), 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?

We have the Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree). However, these are applicable only to non-legally binding arrangements concluded between a government ministry or agency of the Republic of Korea and its foreign counterpart agency, within the scope of its own competence and duties.

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

We do not have any legal or specific means to ensure the relevant rules are observed when government ministries or agencies conclude non-legally binding arrangements. It is left to their discretion.

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

There is no such centralised formal assessment for non-legally binding arrangements. However, in practice, in many cases, those arrangements are concluded after going through review and revision by the Ministry of Foreign Affairs, since the Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree) encourages prior examination by the Ministry of Foreign Affairs.

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)?

Upon request, the Ministry of Foreign Affairs provides advice regarding the conclusion of non-legally binding arrangements, as well as correcting and revising the texts of the arrangements. In addition, the Ministry of Foreign Affairs has distributed booklets on best practices for concluding agency-to-agency arrangements.

[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.

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?

There is no such requirement. Although the National Assembly may ask for explanations concerning the conclusion of any non-legally binding arrangement, it is rarely involved in the process itself.

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?

They may, as they have the right to monitor the general foreign policy of the executive branch.

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?

VIII. Signature and Format

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

There is no such formal procedure for non-legally binding arrangements in the Republic of Korea.

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

There is no relevant rule in force in the domestic law of the Republic of Korea.

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?

There is no relevant rule in the domestic law of the Republic of Korea.

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)?

There is no rule regarding the language of the text, so the matter is left to the discretion of the government ministry or agency which concludes the non-legally binding arrangement in question.

    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).

There is no such formal requirement in the Republic of Korea.

IX. Registration and Publication

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

Yes, there is a database for the registration of agency-to-agency arrangements which are not legally binding under international law. Government ministries and agencies are required to register the full text of the arrangements they conclude on the database within ten days after their conclusion in accordance with Article 8(1) of the Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree), but, in practice, not all of them are registered, especially because many agencies are not aware of such requirement under the Decree.

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

Though the Ministry of Foreign Affairs operates the above-mentioned database, the implementation and management of the non-legally binding arrangement remains the responsibility of the government ministry or agency which concluded the arrangement. The original copies are kept by that government ministry or agency.

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

We do not require the publishing of non-legally binding arrangements. However, in many cases, such arrangements, or their main substance, become publicly known following their conclusion since government ministries and agencies usually announce the conclusion of agency-to-agency arrangements in the form of a press release. The full text of the majority of such arrangements is registered on the database stated above, but the database is open only to government officials, not to the public.

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?

Article 8(2) of the Regulations on the Conclusion and Management of Agency-to-Agency Arrangements with Foreign Government Agencies (Prime Minister's Decree) stipulates that the text of certain agency-to-agency arrangements may be exempt from the mandatory registration on the database if this is necessary for reasons of national security or other national interests.

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?

To raise awareness about matters relating to international agreements, the Ministry of Foreign Affairs has distributed booklets and has held training sessions for officials of government ministries and regional authorities in charge of international cooperation. The booklet contains a standard form of a non-legally binding international arrangement to help government ministries and agencies draft international arrangements they plan to conclude with their foreign counterparts.

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 most practical benefit of employing non-legally binding arrangements is that they may be concluded without going through the complicated and time-consuming procedures for concluding a treaty.

Our main concern is the possibility that government ministries or agencies sometimes conclude an international instrument whose legal nature appears ambiguous, which may lead to disagreements between the signatories regarding its legal effect in the future.

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?

Government ministries and agencies appear to be concluding increasingly more non-binding international arrangements, primarily because it is now more common that government ministries and agencies other than the Ministry of Foreign Affairs deal with international affairs and cooperate with their foreign counterparts.

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?