

## NETHERLANDS

### 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?

*No. The Netherlands considers that using the term “agreement” with respect to non-legally binding instruments may in some cases cause confusion as regards to their legal status, as several States use the term “agreement” exclusively for legally binding instruments. That having been said, the Netherlands is of the opinion that the term “agreement” does not necessarily refer to a legally binding instrument and that its significance for assessing the legal status of an instrument should be weighed alongside other relevant factors.*

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

*We use the term ‘international policy arrangements’ to refer to politically and morally binding agreements, laid down in writing, between different governments or between government authorities and international organisations. International policy arrangements do not create legally binding obligations.*

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

*In our view, the name of an arrangement merely provides an indication of its legal status and is not therefore decisive. The legal status of an arrangement is evident from its content and form and the intention of the signatories. In the Netherlands, international policy arrangements should preferably be called Memoranda of Understanding. Therefore, it may be assumed that MoUs concluded by the Netherlands are not intended to be legally binding.*

#### II. Distinction

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

*- treaties contain legally binding provisions, governed by public international law;  
- international civil law contracts contain legally binding provisions, governed by domestic law;  
- non-legally binding agreements contain politically and morally binding arrangements, but no legally binding provisions.*

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 our view, several factors are relevant in determining the status of an arrangement:*

- 1) Intention of the signatories. The signatories may explicitly agree that the arrangement is not legally binding.*
- 2) Content. The status of an arrangement may be decided on the basis of whether it contains any provisions indicating that it is legally binding.*
- 3) Form. The status of an arrangement may be decided on the basis of the title, signatories or text of the arrangement.*

*The requirements of content and form are less important if there is an explicit (written) provision that the arrangement is not legally binding.*

<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>No. We use the term international policy arrangements as an umbrella term for all non-legally binding instruments. For us, the term Memorandum of Understanding is a sub-category of international policy arrangements. In practice, the term MoU is generally used for non-legally binding instruments with a limited number of participants.</i></p>
<p>7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?</p> <p><i>n/a</i></p>
<p>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?</p> <p><i>No.</i></p>
<p><b>III. Competence</b></p>
<p>9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?</p> <ul style="list-style-type: none"> <li>- <i>The Head of State of the Kingdom of the Netherlands, the Minister of Foreign Affairs of the Government of the Kingdom of the Netherlands and the Heads of Government of the Netherlands, Aruba and Sint Maarten have the competence to sign a non-legally binding instrument;</i></li> <li>- <i>Other Ministers, as well as Secretary-Generals within the Ministry and heads of implementing organisations, are internally and permanently mandated to sign a non-legally binding instrument on a particular area in which they are competent;</i></li> <li>- <i>Other officials may also sign a non-legally binding instrument if they have been mandated on an ad-hoc basis or after this has been internally agreed upon.</i></li> </ul>
<p>10. <u>For States</u>: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements?</p> <p><i>Functionally decentralised authorities (autonomous administrative authorities (ZBOs)) or geographical decentralised authorities are competent to conclude an international policy arrangement. The competence of sub-national territorial units depends on the powers delegated to them.</i></p> <p><u>For International Organisations</u>: 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)?</p>
<p><b>IV. (Indirect) Legal Effects</b></p>
<p>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?</p> <p><i>Non-legally binding agreements may contain arrangements of a technical or administrative nature which are connected to certain treaty provisions. However, provisions in non-legally binding agreements do not produce legal effects by itself. An international policy agreement should not be used to confer rights and obligations intended to be internationally enforceable.</i></p>

## 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?

*As they are not legally binding, it is our view that international policy arrangements are suitable for arrangements of a technical or administrative nature; this notwithstanding, non-legally binding instruments may also be used for cooperative arrangements of a political or financial nature. By concluding an international policy arrangement, the signatories indicate that they wish to work together more closely in a particular area in which they are competent.*

*An international policy arrangement could be used to facilitate the conclusion of a legally binding agreement. For example, in the event that the details of a treaty require further elaboration in additional documents, those details can often be laid down in an international policy arrangement.*

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

*The Legal Affairs Department (International Law Division) of the Ministry of Foreign Affairs is to be consulted in order to avoid possible international misunderstanding about the legal status of the arrangement and prevent possible incompatibility with the provisions on treaties in the Constitution. The conclusion of the assessment may be that an international policy arrangement is not possible or that there should be a treaty. The competent ministry or organisation decides whether compliance with the international policy arrangement is possible in conformity with or within the limits of Dutch legislation.*

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

- 1) *The conclusion of a treaty needs to be authorised by the Council of Ministers and approved by parliament. Non-legally binding arrangements do not require authorisation from the Council of Ministers or parliamentary approval.*
- 2) *Treaties and decisions of international organisations are (electronically) published in the Treaty Series of the Kingdom of the Netherlands. In contrast, there is no stipulation requiring international policy arrangements to be published.*

### VI. Formal Assessment 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. Instruction 8.1 of the legislative drafting instructions and No. 220 of the legislative procedure instructions state: "The Legal Affairs Department (International Law Division) of the Ministry of Foreign Affairs should be consulted at the earliest possible opportunity about the preparation of an international policy arrangement in order to avoid possible international misunderstanding about the legal status of the arrangement and prevent any incompatibility with the provisions on treaties in the Constitution."*

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

*The Legal Affairs Department (International Law Division) of the Ministry of Foreign Affairs.*

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

*At the earliest possible stage during the negotiations of preparing and drafting the text of the international policy arrangement.*

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?

*The assessment is carried out for MoUs concluded by:*

- *central government ministries or agencies;*
- *the Caribbean parts of the Kingdom of the Netherlands; and*
- *autonomous administrative authorities (ZBOs).*

*MoUs concluded by provinces and municipalities are not assessed by the Legal Affairs Department (International Law Division) of the Ministry of Foreign Affairs.*

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?

*Yes. Instruction 8.1 of the legislative drafting instructions and No. 220 of the legislative procedure instructions describe the difference between legally binding and non-legally binding agreements. Additionally, the Ministry of Foreign Affairs has drawn up a brochure on MOUs.*

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 legislative drafting instructions are electronically published since they have a legal status as instructions of the prime minister. The MoU brochure is available on the central government intranet.*

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

*The ministries or agencies preparing the international policy arrangement are responsible for consulting the Legal Affairs Department (International Law Division) of the Ministry of Foreign Affairs. There is no additional monitoring to ensure that this procedure is carried out.*

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)?

*Yes. Guidance on drafting the international policy agreement is provided in the MoU brochure, which contains an overview of terms to be avoided and used and a model arrangement.*

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?

*Parliamentary notification or consultation about the conclusion of non-legally binding agreements is not required.*

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

*n/a*

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

*Parliament has a constitutional right to information from Cabinet ministers and state-secretaries. However, Dutch legislation does not contain a specific right to monitor and/or review non-legally binding agreements. Non-legally binding agreements are not usually shared with parliament, due to their administrative/technical nature.*

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?

*n/a*

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?

*No.*

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

*No, but it has to be clear who the signatories are. Under no circumstances may an international policy arrangement be concluded by or on behalf of the Kingdom of the Netherlands (i.e. the State).*

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?

*Yes, electric signatures and the electronic transmission of non-binding agreements is acceptable. Additional authorisation is not required.*

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 agreements do not need to be concluded in Dutch. Most international policy arrangements with a Dutch participant are concluded in English.*

For International Organisations:

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

<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. In order to differentiate between treaties and international policy arrangements, international policy arrangements are not formatted in MS Word the same way treaties are, they are not printed on treaty paper and no treaty map is provided.</i></p>
<p><b>IX. Registration and Publication</b></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 formal registry or database maintained for non-binding international agreements. The Ministry of Foreign Affairs has established and maintains a non-exhaustive repository of (mainly) Memorandums of Understanding.</i></p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p> <p><i>n/a</i></p>
<p>36. Do you publish your non-legally binding agreements and are they openly accessible?</p> <p><i>Non-legally binding agreements are not usually openly accessible. In contrast to treaties, non-legally binding agreements are not published in the Dutch Treaty Series. However, they may be published in the Government Gazette, in a ministry's publication journal, on the central government website or on the website of an implementing organisation. Non-legally binding agreements may be disclosed actively or by request. The Dutch Open Government Act allows a request for disclosure to be denied if the reasons for disclosing a non-legally binding agreement would not outweigh a serious disadvantage caused by disclosure for the international relations of the Netherlands (e.g. when the instrument contains a confidentiality clause).</i></p>
<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?</p> <p><i>n/a</i></p>
<p><b>X. Education/Training</b></p>
<p>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?</p> <p><i>The MoU Brochure, which is available on the central government intranet, contains an overview of terms to be avoided and used, and a model MoU which can be used as a drafting aid.</i></p>
<p><b>C. GENERAL OBSERVATIONS ON STATE PRACTICE (AND WAY FORWARD)</b></p>
<p>39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?</p> <p><i>In our view, the main benefit of non-legally binding agreements is that they can be used to facilitate effective cooperation, including as necessary on short notice.</i></p> <p><i>Our main concern is that the legal status of non-legally binding agreements is not clear or that the provisions in the arrangements are possibly incompatible with the provisions on treaties in the Constitution.</i></p>
<p>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?</p>

*There does not appear to be an increase in the number of non-binding international agreements concluded in recent years.*

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?