

SAN MARINO

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>Non-legally binding agreements are generally referred to as “Memoranda of Understanding”.</i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</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>They are generally non-legally binding. The non-binding (or binding) nature is usually specified therein.</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 terminology is not indicative, as there is no law governing the matter. The term to be used depends on the very content of the Agreement, Treaty or Contract.</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>As mentioned, the binding or non-binding nature of an agreement must be specified therein.</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>They are usually called MoUs, and this seems to be the term that is becoming more frequently used. However, there are also other terms for non-binding agreements (Memorandum of Understanding or - more rarely - Agreement).</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>There are no written rules. Customary law is applied to this matter.</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>There are no substantial differences.</i></p>
III. Competence
<p>9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?</p> <p><i>Such competence is attributed to the body responsible for dealing with the subject matter of the treaty.</i></p>

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, provided that the subject matter of the agreement does not exceed the competences conferred by law on the party concluding the agreement.

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?

Non-legally binding agreements do not produce any legal effect. They represent a declaration of intent at the political level and require their signatories - morally, politically and not legally - to comply with the jointly made decisions.

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?

MoUs are generally a precondition to sign broader legally binding agreements. They often follow meetings at the diplomatic level between Government members and the counterparts of another State, with whom it is agreed to enter into a declaration of intent, which often results in one or more agreements between States.

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

It is usually the Government, or even an individual Minister, although, as mentioned, MoUs often result in agreements between States.

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

As mentioned, the differences depend on the content of the agreement. In the case of a non-legally binding agreement, the signature of the person with competence in the field that is the subject of the agreement is sufficient. However, in the case of an agreement between States, ratification by the Parliament is required.

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?

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.

Technical assistance from the Legal Affairs Directorate of the Department of Foreign Affairs is usually required, although such assistance is neither compulsory nor binding.

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

The Legal Affairs Directorate of the Department of Foreign Affairs reports to 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?

There is no specific point in time. The formal assessment is carried out during the drawing up process, at the discretion of the person drawing up the agreement.

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 request is discretionary.

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?

Standards are based on customary law. The Congress of State (Government) has also issued guidelines for drafting legal texts.

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

It is generally a concern of the bodies or persons who - in the preparation of an agreement - prefer to consult with the Legal Affairs Department, so as not to make formal or procedural errors which would be more difficult to be solved after signing the agreement.

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

As mentioned, no Administration has any interest in not seeking advice or suggestions that may prove valuable in the proper drafting of an agreement. However, on some occasions one can decide to "do it oneself", taking responsibility for any consequences.

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 Administration intends to organise a meeting to be held at the beginning of each legislature on drafting and procedural techniques relating to international agreements. The meeting will be attended by new heads of staff of the 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.

It is a formal assessment carried out by the Experts of the Legal Affairs Department, who suggest any necessary changes and improvements to the text of the agreement submitted. The Administration submitting the text then decides autonomously how many and which suggestions to accept, sometimes even in consultation with the aforementioned Experts. As far as International Agreements are concerned, the parliamentary ratification process provides for an assessment of conformity of the agreement with national legislation. Such assessment is always carried out by the aforementioned Legal Affairs Directorate of the Foreign Affairs Department.

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?

Non-legally binding agreements are generally signed by the Government or a member thereof, within the scope of its powers and policy guidelines. There is no requirement for a formal notification to the legislative body.

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

See above.

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

See above.

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?

The Government cannot, by international agreement, go beyond the limits of its mandate and executive power. If a rule were to be included in an agreement, it would trigger a conflict of competence with the Great and General Council (Parliament). This conflict would be decided by the Guarantors' Panel on the Constitutionality of Rules.

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?

There is not a formal document.

VII. 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?

There is no reason why they should not be.

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?

An MoU reflects a common will between two entities and seals an understanding reached verbally. Therefore, signing the agreement is also an important opportunity for signatories to meet and develop personal relations. Electronic signature - though not prohibited - would render signing void of its human and natural meaning.

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)?

The language is freely determined by the Parties.

For International Organisations:

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

Italian, English and language of the counterpart.

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)

No such formalities are envisaged.

IX. Registration and Publication

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

The agreement is in both hard copy and digital format.

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

The Administration keeps a copy of each MoU in its official archives

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

Agreements are public due to the willingness to disseminate them among the population.

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?

Secrecy is not applied to non-legally binding agreements.

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?

As mentioned, meetings are planned to disseminate information. There are no standard forms.

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?

As mentioned, the main purpose of non-binding agreements is to establish and strengthen relations with foreign Administrations or their representatives.

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 conclusion of an increased number of MoUs goes hand in hand with the expansion of relations with foreign State Administrations.

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?

The difference lies in the name. Obviously, in case of legally binding agreements, the signatories are obliged to implement what was agreed upon, under penalty of recourse to the judicial bodies.

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?

Non-legally binding agreements cannot produce legal effects and therefore cannot produce rules. By their nature, they tend to facilitate cooperation and the effectiveness of administrative action.