

SPAIN

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 defined in article 2 c) of Law 25/2014 on treaties and other international agreements as: “agreement of an international nature not constituting a treaty or international administrative agreement that is concluded by the State, the Government, the organs, bodies, agencies and entities of the General State Administration, the Autonomous Communities and Cities of Ceuta and Melilla, Local Entities public universities and any other subject of public law with competence to do so, which contains declarations of intent or establishes commitments for action of a political, technical or logistical content, and does not constitute a source of international obligations nor is governed by International Law”</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>Memoranda of Understanding do not create any obligations, they simply express intentions or commitments for the future or describe current situations without creating obligations or legal relations. They therefore fall into the category of non-normative agreements</i></p>
II. Distinction
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>These definitions can be found in the Article 2 of Act 25/2014 of 27 November on Treaties and other International Agreements</i></p> <ul style="list-style-type: none">- <i>International Treaties: agreement between Spain and other international law subjects which is governed by international law</i>- <i>Non-legally binding agreements: international treaty but not a treaty nor international civil law contracts which contains intentions declarations or action compromises with political, technical or logistic content but without any kind of international obligations and is not governed by international law.</i> <p><i>Therefore, the main difference between a non-legally binding agreement with and international treaties and international civil law contract is the lack of international obligations for non-legally binding agreements.</i></p> <p><i>International civil law contracts are regulated in Article 47.2 d) of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector as “agreements not constituting an international treaty, an international administrative agreement, or a non-legally binding agreement, signed between the public administrations and the organs, public bodies or entities of a subject of international law, which shall be subject to the domestic legal system determined by the parties” . Hence, we can indicate that the difference with treaties is that the parties have the autonomy to decide under which legal system they are governed.</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> <ul style="list-style-type: none">- <i>Its content: mere declarations of intent or commitments to act</i>

<p>- Does not constitute a source of international obligations</p> <p>- Not governed by international law</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>No</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>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 is no difference between a state and an international organisations in concluding a non-legally binding agreement.</i></p>
<p>III. Competence</p>
<p>9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?</p> <p><i>As it is established in the article 44, the following shall have competence: “The Government, Ministries, agencies, and entities of the General State Administration, the Autonomous Communities, the Cities of Ceuta and Melilla, local authorities, public universities and any other subjects of public law empowered to do so. Other subjects of public law are defined as “a State, an international organization or any other international body that has the legal capacity to enter into international treaties.”</i></p>
<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>As stated in the article 53.1: “The Autonomous Communities may conclude non-binding international agreements on matters falling within their powers. if the scope of a non-binding international agreement falls within the sphere of powers of the Cities of Ceuta and Melilla or of local authorities, it may be concluded by these.”. These must be made conditional on strict compliance with the principles of budget stability and financial sustainability established in the Organic La 2/2012 of 27 April, on Budget Stability and Financial Sustainability.</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>IV. (Indirect) Legal Effects</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>These agreements can produce indirect effects and become a precedent for a normative agreement, since they can be used to deal with the regulation of matters in respect of which it is desired to avoid the emergence of legal consequences, in so far as their functioning, their difficulties and their effectiveness are better calibrated, so that if the result is positive, the parties can consider regulating legally what they have previously tried out “politically”. On the other hand, the regulation of a matter by means of a political agreement would in principle allow the government of a state to avoid the mandatory intervention of the legislative power in the</i></p>

conclusion of treaties on such material that its domestic law provides for. It can be concluded that in many cases it can serve as a precedent, but this is not its function.

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?

The main factor in determining whether it is a normative agreement or not, is the intention of the parties. That is, whether they want to create international obligations or simply rules of conduct or commitments. In addition, as mentioned in the previous question, non-normative agreements can be seen as a means of testing whether or not an agreement can be established in the future.

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

It shall be the respective legal service of the public bodies or agencies to conclude them. In this case shall be the International Legal Office which shall study and decide on the nature of the text.

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

The signatories of the non-legally binding agreement have autonomy to decide the procedure. There are some requirements that they have to fulfil:

- *Report of the International Legal Office*
- *Report from the Ministry of the Treasury if the agreement involves financial obligations*
- *Cognizance of the Council of Ministers when their importance makes this advisable*
- *Sending to the Ministry of Foreign Affairs for entry into the administrative register*

While the binding agreements there is a procedure marked with the intervention of the Parliament.

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?

Yes, they should be report to the respective Legal Service of the public body that is to conclude them, on the nature, procedure and most appropriate implementation under international law.

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

International Legal Office.

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

Before de celebration of 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

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>same formal assessment applicable for agreements of the (federal) government/international organisation?</p> <p><i>Yes, there are the same</i></p>
<p>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?</p> <p><i>There is a Circular Order 9/2018 of 10 July 2018 on rules for the processing of international treaties, international administrative agreements and non-legally binding agreements issued by the Ministry of Foreign Affairs.</i></p>
<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>This formal assessment that the parties must follow to formalise a non-legally binding agreement is explained in the of Act 25/2014 of 27 November on Treaties and other Internationals Agreements and further specified in Circular Order 9/2018 of 10 July 2018 on rules for the processing of international treaties, international administrative agreements and non-legally binding agreements issued by Ministry of Foreign Affairs</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>The parties must undertake to follow this procedure; otherwise, the MoU cannot be concluded.</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>There is a Circular Order 9/2018 of 10 July 2018 on rules for the processing of international treaties, international administrative agreements and non-legally binding agreements issued by Ministry of Foreign Affairs explaining the entire procedure for the processing of a MoU.</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><i>It is the same as for the states</i></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>Unlike legally binding treaties, parliamentary involvement is not required. The council of Ministers will only be informed if the importance of the agreement requires it.</i></p>
<p>25. If so, at what stage of the process is the legislature usually involved?</p> <p><i>Once the non-legally binding agreement is concluded.</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>Is not necessary; only the Council of Ministers at the joint proposal of the Minister of Foreign Affairs and Cooperation and the competent Ministry by reason of the subject-matter, shall take</i></p>

cognizance of the conclusion of non-binding international agreements when their importance makes this advisable

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?

No, there are just 3 requirements for signature: issuance of reports, the cognizance of the Council of Minister if is needed and the obligation to conclude with a reference to the "Kingdom of Spain"

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

Yes

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

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)?

It is advisable but it is not necessary for the MoU to be written in Spanish. Any other language is acceptable.

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).

No

IX. Registration and Publication

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

Yes

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

The centralised register of all non-legally binding agreements in the ministry of foreign affairs called "memoranda" managed by the Technical Secretariat General.

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

No

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?

No

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?

No

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?

With non-legally binding agreements we manage to create political commitments with other countries in a quicker and more efficient way. And the biggest concern would be their misuse or abuse.

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?

Yes, it has been increasing over the years due to its ease of creation and the benefit it brings.

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?