

Memoranda of (Mis)Understandings (Part I)

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When thinking of international law, most lawyers' first association might not concern non-legally binding arrangements (NBAs) between States (also described as 'Memoranda of Understanding' or 'MoUs'). After all, the terms 'law' and 'non-legally binding' usually do not match well. However, NBAs have a close connection with the international law realm, particularly when delineating them from binding treaties. While [not an entirely recent phenomenon](#), NBAs are still flying somewhat under the radar of public and academic scrutiny, probably because most NBAs are never published. However, certain particularly significant NBAs are accessible and very much at the centre of attention, for example, the [Joint Comprehensive Plan of Action](#) (see also [Hollis](#)) or the [Global Compact on Safe and Orderly Migration](#) (see also [Peters](#)).

The rising popularity of NBAs in State practice – [Germany lately has been signing approximately 15 NBAs each month](#) – might be [explained](#) (pp. 65 et seq.) by their informal drafting procedure and flexible handling as well as the above-mentioned lack of scrutiny. Lately, there have even been claims of an '[overuse of MoUs](#)'. However, while treaties have featured as a cornerstone of international law for centuries and have found their firm legal footing in the [1969 Vienna Convention on the Law of Treaties](#), no comparable document has been drafted for the handling of NBAs (yet). Rather, each State defines individually what, in its view, constitutes an NBA.

To further underline their topicality, NBAs in modern State practice were the focus of a recent [workshop](#) at the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, discussing their delineation from treaties, possible indirect legal effects, as well as the question of a prospective standardisation. Regarding the latter, the workshop featured a presentation on the 2020 [OAS Guidelines on Binding and Non-Binding Agreements](#), a set of best practices relying on OAS Member State experience. Against this backdrop, the first part of our post focuses on the distinction between treaties and NBAs, examining, in particular, the practice of the German Federal Foreign Office (FFO). The second part will take a closer look at the OAS Guidelines and assess the desirability of a prospective (regional) standardisation effort.

Sufficient Normative Localisation of NBAs Within the German Legal Order?

The main provision in the German normative framework dealing with NBAs is § 41 '[Richtlinien für die Behandlung völkerrechtlicher Verträge](#)'. These 'Guidelines on International Treaties' are a government-internal administrative rule edited by the FFO's legal department, ultimately reflecting the [competence of the Federal Government to conclude international treaties](#) (para. 91). The RvV find their legal

basis in [§ 72\(6\) of the Federal Ministries' rules of procedure \(GGO\)](#), which are binding on the German Federal Ministries. It stipulates, in relevant part:

“Drafting international treaties is governed by the Guidelines on International Treaties published by the Federal Foreign Office.”

72(6) GGO explicitly only addresses the drafting of ‘international treaties’, legally defined as ‘intergovernmental treaties, intergovernmental instruments, inter-ministerial arrangements, exchange of notes, and correspondence’ (see § 72(1) GGO). Lacking any express reference to NBAs, a literal interpretation could lead to the conclusion that the FFO has no competence to prescribe rules for the other Federal Ministries regarding NBAs. However, since such an interpretation would open the door to a diverging practice, this provision is in practice interpreted to also include NBAs. If the FFO has the competence to govern the drafting of legally binding treaties, it should also be able to govern the drafting of NBAs to ensure a uniform and coherent practice of the German government.

When considering the conclusion of an international agreement with another State, any German Federal Ministry must conduct a ‘Notwendigkeitsprüfung’ (‘necessity test’, see § 72(1) GGO; repeated in § 5 RvV). In this assessment, the respective Ministry will have to weigh whether a binding treaty is truly necessary or whether the intended objective in the field of cooperation with other States can be reached by other means. If legally binding obligations are to be avoided, the instrument of choice is usually an NBA – in German practice referred to as a ‘Gemeinsame Absichtserklärung’ (Joint Declaration of Intent) – whose drafting process is regulated by § 41 RvV (see [here](#) or [here](#) for publicly available examples).

Purpose and Procedure of the Formal Assessment of NBAs by the FFO

41 RvV’s main objective is to ensure that no Federal Ministry signs an NBA without the prior assessment and consent of the FFO’s Legal Department. Therefore, § 41(3) RvV stipulates that any NBA should be submitted to the FFO early in the drafting process for formal assessment. This assessment aims to ensure that the text does not contain any language, structure or other elements resembling a binding international treaty. Any remarks produced by the FFO’s Legal Department during its formal assessment should be implemented before an NBA can be signed on behalf of the German Government (§ 41(3) RvV).

The rationale behind this procedure is to avoid the unintended conclusion of binding treaties (potentially invoking Germany’s State responsibility in case of non-fulfilment of treaty obligations) and provide the FFO with a comprehensive overview of its non-binding instruments. Such assistance and overview is, on the one hand, essential to ensure the Federal Government acts externally in a coherent and uniform manner since any Federal Ministry, in principle, is empowered to conclude NBAs on behalf of the German Government. On the other hand, it is also useful when considering that NBAs, albeit not legally binding, [can produce potential indirect effects](#) such as serving as preparatory acts for legally binding instruments or informing the terms of a related treaty (even though their specific non-binding character usually prevents NBAs from producing actual *legal* effects). After an NBA has been successfully

signed, the original texts belonging to the German side should be stored in the Federal Political Archive, § 41(5) RvV, thus complementing the FFO's overview.

Avoiding Misunderstandings – Germany's Holistic Approach in Drafting NBAs

In assessing arrangements of a disputed legal character, [international tribunals have developed a coherent approach](#) in delineating treaties from NBAs. Their main objective is to establish the true intentions of the sides by interpreting the [instrument's actual terms and the particular circumstances of its adoption](#) (para. 96). However, since objective elements like the language or various titles of NBAs frequently lack desired clarity ('[communiqué](#)' (para. 107), '[agreed minutes](#)' (paras. 21 et seq.)), to name two ambiguous examples), international courts have also taken into account external factors, such as the [capacity of the signatories](#) (para. 96) or the [subsequent conduct of the parties](#) (para. 213).

In contrast, at the drafting stage, Germany's approach is objective and holistic, in the sense that there is no single element that is determinative of an NBA's legal character. Instead, each text must be drafted carefully to ensure that its overall objective impression points clearly towards an NBA (§ 41(2) RvV):

“Other states, Germany among them, require a more comprehensive scrutiny. In our practice, the wording of the entire document as well as its structure is carefully checked to ensure that it contains not a single sentence suggesting a legally binding instrument.”

[\(German Legal Adviser Dr Christophe Eick\)](#)

41 RvV provides guidance on the essential elements for delineating NBAs from treaties. It provides a model wording for an NBA as well as an instructive (while not conclusive) [German-English glossary](#) (p. 4-10) to indicate what language is permitted and what would be considered 'treaty speak'. In considering the title of an NBA, the term 'Joint Declaration of Intent', while creating a strong presumption towards a non-binding document, would not be determinative by itself. Typical treaty elements to be avoided include using a preamble or speaking of 'articles' instead of 'sections' in structuring the document (§ 41(2) RvV). Furthermore, the document's language must strictly avoid expressing the intention to enter into binding obligations under international law. Thus, § 41 RvV prescribes wording such as 'share the view'/'jointly decide' instead of 'to agree', 'Sides'/'Participants' instead of 'Parties' or 'come into effect' instead of 'enter into force'. The present tense is usually reserved for binding treaties. To indicate the political nature of commitments in an NBA, the future tense or the conjunctive should be applied (e.g. Germany 'will' or 'should support the cooperation project by...' instead of 'Germany supports/shall support the cooperation project by...').

Avoiding Misunderstandings Internationally – Towards Standardisation?

Of course, any amendment introduced during the FFO's formal assessment must be discussed and ultimately agreed with the other side. Diverging concepts of what distinguishes a treaty from an NBA can produce misunderstandings and lead to further complicated negotiations. While the delineation exercise, thus, might

seem painstaking at times, the devil lies in the detail with potentially far-reaching consequences. Take, for example, the [confusion around the term 'Memorandum of Understanding' or 'MoU'](#). While this title for some indicates an NBA, others (particularly countries in the Anglo-American law tradition, see for example [here](#) or [here](#)) conclude treaties in the form of an 'MoU'. The usage of the 'will'-future serves as another example: while in Germany and [the UK](#) (p.15), among others, this would indicate a non-legally binding document, in the US, the term is [often seen as an expression of legal intent](#). These two examples illustrate why, for one, it is essential to pay close attention to language and structure to clearly distinguish between treaties and NBAs – which is why we commend Germany's detailed approach. What is more, they also raise the question of whether a more standardised approach and language could be beneficial for clarity and certainty in drafting NBAs. We will elaborate on this question in Part II of our post.

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