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BINDING AND NON-BINDING AGREEMENTS: THIRD REPORT

(Presented by Dr. Duncan B. Hollis)

INTRODUCTION

1. At its 89th Regular Session, the Inter-American Juridical Committee held an inaugural Meeting with Legal Advisors to the Foreign Ministries of several Member States. During that meeting a proposal was made for the Committee to take up the topic of binding and non-binding agreements.[1] The Committee added the topic to its agenda and at its 90th Regular Session appointed the author to serve as Rapporteur.[2]

2. In my preliminary report, I identified three categories of international agreement – treaties, political commitments, and contracts. For each category, I introduced four separate lines of inquiry – (a) *differentiation* – what are the criteria for each agreement type, and how can States determine what type of agreement they are concluding? (b) *capacity* – in addition to States, when can other entities (e.g., government ministries, sub-national territorial units) conclude agreements? (c) *legal effects* – what legal consequences follow the conclusion of each agreement type? and (d) *procedures* – what mechanisms do States use to authorize, negotiate and conclude each agreement type?[3] In all four areas, I identified areas where the law and practice are well settled and areas where there is outstanding ambiguity or divisions of opinion. In an effort to clarify the relevant law and practice, the Committee forwarded a questionnaire to Member States (Note OEA/2.2/70/17), designed to illuminate their views on this topic.

3. In my second report on binding and non-binding agreements, I surveyed the responses received to the Committee's Questionnaire from ten Member States: Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.[4] Subsequently, the Committee has received additional responses from two states: Panama and Paraguay.[5] These latest responses help confirm and elaborate the views of Member States on various issues associated with binding and non-binding agreements. Taken together, they provide a useful summary of Member State views on five

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[1] See *Annual Report of the Inter-American Juridical Committee to the Forty-Seventh Regular Session of the General Assembly*, OEA/Ser.G, CP/doc.5261/17 (31 Jan. 2017) p. 10; *Summarized Minute,* Meeting with the Legal Advisors of the Ministries of Foreign Affairs, 5 Oct. 2016, in *Annual Report*, *supra* pp. 153, 160.

[2] *Annotated Agenda of the Inter-American Juridical Committee*, 91st Regular Session, August 7 to 16, 2017, p. 60.

[3] *See* Duncan B. Hollis. *Preliminary Report on Binding and Non-Binding Agreements,* Inter-American Juridical Committee, 91st Regular Session, OEA/Ser.Q, CJI/doc.542/17 (August 6-16, 2017) (hereinafter "Preliminary Report").

[4] *See* Duncan B. Hollis. *Second Report on Binding and non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) (hereinafter "Second Report").

[5] *See Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States*, N.V.-A.J.- MIRE-201813176 [hereinafter "Panama Response"]; *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs*, *OAS General Secretariat*, No. 635-18/MPP/OEA (June 12, 2018) [hereinafter "Paraguay Response"].

issues: (i) definitions; (ii) identification methods; (iii) capacity; (iv) effects; (v) domestic procedures; and (vi) priorities.

i. *Definitions*: The OAS Member States responding to the Committee's Questionnaire support both the existence and contours of the treaty concept, most often citing the definition found in Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties. Member States also agree on a separate category of non-legally binding agreements, or "political commitments." Opinions are divided on the possibilities for inter-state contracting. Several States report making them, while others have no such practice.[6] At the same time, several responding States report "inter-institutional agreements," which are concluded—not by the State itself—but by one of its national ministries or a sub-national territorial unit. The responding States, however, categorize such agreements differently; some suggest that they are not binding, others refer to their status under domestic law, while a few acknowledge that they could be governed by international law in certain cases.[7]

ii. *Identification Methods*: When it comes to how to identify *which* type of agreement exists, Member State views confirm the division of opinion in international legal practice. Some Member States favor the dominant subjective "manifest intent" approach (where the shared intention to create an agreement governed by international law determines the existence of a treaty).[8] Other Member States appear to favor the more "objective" test evidenced in ICJ cases (where the use of particular language and provisions determines whether an agreement is (or is not) a treaty).[9] Thus, for some Member States, structure and terminology may be determinative, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for the parties' intentions. Several Member States, moreover, support the use of textual provisions that deny an agreement legal force to create a political commitment.[10]

iii. *Capacity*: There seems to be no debate over the capacity of certain national officials (the Head of State, the Head of Government, the Foreign Minister) to conclude a treaty on behalf of the State, including ministers other than the Foreign Minister when authorized to do so. The concept of binding inter-agency agreements appears more controversial, with at least one State denying that such instruments can ever constitute a treaty. For most other States, the capacity to conclude inter-agency international agreements appears to be a matter of (a) domestic authority, which some States provide and others deny, and (b) finding a willing partner.[11] Similar practice was reported with respect to agreements

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[6] Second Report, *supra* note [4], at 15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay indicated that they had no practice of concluding inter-state contracts governed by domestic law while Ecuador, Jamaica, Mexico and the United States all acknowledged the possibility of such agreements).

[7] Id. at 13-14 (Ecuador and Colombia characterize inter-institutional agreements as non-binding while Mexico and Peru view them as binding, but with Mexico emphasizing that status under international law and Peru focusing on domestic law unless the inter-institutional agreement implements an existing treaty. Meanwhile, Uruguay contemplates that these agreements may be either binding or non-binding.). Panama indicates that its sub-national territorial units can conclude a treaty if authorized to do so by the Foreign Ministry. Panama Response, *supra* note 5.

[8] *See* Preliminary Report, *supra* note 3, at 11; Second Report, *supra* note 4, at 16 (Brazil, Colombia, Mexico and the United States emphasize 'intent' as the deciding criterion in treaty identification).

[9] *See* Preliminary Report, *supra* note 3, at 12; Second Report, *supra* note 4, at 16 (The Dominican Republic, Jamaica, and Uruguay emphasize objective factors like the agreement's structure and language to discern if it qualifies as a treaty).

[10] Second Report, *supra* note 4, at 19 (Brazil, Peru, Uruguay).

[11] Id. at 26; *see also* Preliminary Report, *supra* note 3, at 31.

by and among sub-national territorial units (e.g., Provinces).[12] Moreover, several of the States that do not permit sub-national treaty-making report that these entities could (and do) conclude inter-institutional agreements, although (as noted) it remains unclear whether these instruments are always non-binding, or, if they are viewed as binding, whether the source of their legal force lies in domestic or international law.[13]

iv. *Effects*: The OAS Member States who responded to the Committee's Questionnaire are uniform in accepting the international legal effects (i.e., *pacta sunt servanda*) that accompany the conclusion of a treaty, while acknowledging that any domestic legal effect depends on a State's national law. There is, however, more ambiguity on what, if any, legal effects follow from the conclusion of binding agreements by government agencies or sub-national territorial units. Many States who responded to the Questionnaire accept that such agreements, even if not done in the State's name, do trigger the responsibility of the State as a whole (a view that tracks Article 4.1 of the draft Articles of State Responsibility).[14] Several States, however, take the view that international legal responsibility could lie with the concluding institution, *not* the State as a whole, with one State insisting that this would always be the case.[15] Panama suggests "the possibility that a new international custom has arisen" in this context.[16] Several other states emphasize the domestic legal effects that follow the conclusion of "inter-institutional agreements" concluded by government agencies or sub-national territorial units. States are similarly divided, moreover, on whether a State would be responsible under international law for an otherwise unauthorized agreement concluded by one of its government agencies or a sub-national territorial unit.[17] For those States accepting the possibility of inter-state contracting, their legal effects are clearly tied to the relevant provisions of the governing domestic law. And, with respect to non-binding agreements, the responding OAS Member States are uniform in denying that they could generate *any* legal effects, notwithstanding earlier scholarly arguments invoking principles of estoppel.[18]

v. *Domestic Procedures:* All the OAS Member States responding to the Committee's Questionnaire have well-developed procedures for the negotiation and conclusion of treaties by the State or the Member State's national government. These procedures are, moreover, quite diverse, with varying levels of participation by the legislature and/or a Constitutional Court. In contrast, procedures for binding agreements involving government agencies or sub-national territorial units are less developed. Some Member States employ the same procedures for *all* their binding international agreements; others have crafted discrete procedures under the banner of "inter-institutional" agreements.[19] The practice is sparser when it comes to political commitments, with no explicit regulation of these agreements, although a number of States have developed practices of

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[12] Second Report, *supra* note 4, at 27.
[13] Id. at 26-28.
[14] Id. at 37-40 (noting Argentina, Jamaica and the United Sates specifically endorsed State responsibility for sub-state agreements); *see also* ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts," in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), UN Doc A/56/10 55 [3], Art. 4.1 ['ASR'].
[15] Second Report, *supra* note 4, at 38 (describing Mexico's view that liability extends only to the institution concluding the binding inter-institutional agreement).
[16] Panama Response, *supra* note 5.
[17] Id. at 41-42.
[18] Preliminary Report, *supra* note 3, at 44; *cf.* Preliminary Report, *supra* note 3, at 48.
[19] Second Report, *supra* note 4, at 50-51 (United States uses the same procedures while Mexico has a separate suite of procedures dictated by its 1992 Law on the Conclusion of Treaties).

coordinating their negotiation and conclusion with the Foreign Ministry.[20] Panama, for example, reports that agreements of this type, "are usually referred to the National Assembly for consideration and approval."[21] Other states like Paraguay, however, report having no specific procedural provisions for non-binding agreements.[22]

vi. *Priorities*: In addition to their substantive responses, a majority of the OAS Member States that responded to the Committee's Questionnaire clearly supported the Committee working on a set of general principles or best practices on binding and non-binding agreements. That said, a few States expressed concern over the need for such a project, with one supporting the idea of best practices but denying the utility of drafting any general principles.[23]

4. At its 92nd Regular Session, the Committee discussed two ways forward – either drafting "OAS Guidelines for International Agreements" focused on best practices or a different document cataloging "General Principles of Law regarding Binding and Non-Binding Agreements" that could attempt to codify the extant international law and/or offer some proposals for its progressive development. It was agreed to pursue drafting Guidelines that States could employ. Instead of attempting to clarify or resolve open questions of international law concerning binding and non-binding agreements, the Committee is interested in offering Member States candid and useful advice on the state of the law as it exists and the sorts of behaviors that may minimize future disagreements or difficulties with other States. If successful, the Committee's work may have impacts beyond the OAS region to assist States globally in how they differentiate among binding and non-binding agreements.

5. Annex I to this report includes an initial draft of what I am labelling *The OAS Guidelines for Differentiating International Agreements*. My previous title proposal – *OAS Guidelines to International Agreements* – was too broad given the more narrow focus of the question on the Committee's agenda.

6. The goal of the *Guidelines* is a practical one – to offer the OAS and its Member States a concrete and detailed set of definitions, approaches, and best practices to identify and differentiate among three types of international agreements – treaties, political commitments, and contracts – and the various actors who may make them – States, government agencies, sub-national territorial units. As such, although the *Guidelines* identify several areas where international law is unclear or disputed, I have not attempted to resolve these open questions. On the contrary, these *Guidelines* aim to facilitate international agreement by offering some "best practices" that may side-step or overcome such challenges. The proposed practices are, moreover, entirely voluntary. States and other stakeholders may decide to use them or craft their own solutions to discerning and differentiating among various forms of international agreement.

7. Annex I provides an initial draft of several guidelines. Annex II repeats these with additional commentary. Both Annexes are divided into three parts:

i. **Definitions** – The *Guidelines* begin by defining the elements that comprise each of the three main categories of international agreement – treaties, political commitments and contracts. They also define an "inter-institutional agreement" based on the actors who form it.

ii. **Capacity** – The *Guidelines* examine the capacities of "State institutions" (e.g., government ministries or agencies as well as sub-national territorial units such as provinces or regions) to conclude treaties, political commitments, and contracts. It proposes best practices aimed at ensuring transparency and communication among States

[20] Id. at 54-55 (Colombia, Mexico and Peru report practice for obtaining authorization to conclude non-binding agreements).

[21] Panama Response, *supra* note 5. Paraguay reports that "the Ministry of Foreign Affairs always participates" in agreements that are not legally binding. See Paraguay Response, *supra* note 5.

[22] See Paraguay Response, *supra* note 5.

[23] Second Report, *supra* note 4, at 57-60.

as to the extent of authority these State institutions have to make various forms of international agreement.

iii. **Methods of Identification** – The *Guidelines* take the view that any agreement's status should be identified on a case-by-case basis. They flag the possibility that different states may use different tests to determine whether their agreement constitutes a treaty. As a result, I propose a best practice whereby States will be more transparent in their negotiations (or in the agreement text itself) as to their understanding of an agreement's status. Moreover, the *Guidelines* offer a list of suggested terms, provisions, and features indicative of treaties, political commitments and contracts. Note, however, these suggestions are merely indicative *not* determinative of an agreement's status. There are no magic words to convert a text into a treaty (or a political commitment, or a contract). Still, the more States are aware of the usual terms and forms employed in each agreement type, the more they may avoid mis-aligned understandings on the nature of the agreement reached.

8. I welcome the Committee's feedback on each of the draft guidelines and the accompanying commentary in terms of both substance and structure. Are the best practices I propose an accurate reflection of the diversity of Member State laws and practices today? Are they ordered properly? (Previously, for example, I treated the issue of capacity as something to examine after other identification issues, while in this draft I considered it to flow better as a preceding question.) Perhaps most importantly, I would like to know whether – if these *Guidelines* were actually used – they could alleviate the confusion (and potential for inter-State disputes) that currently exists?

9. I hope to receive the Committee's feedback and use it to revise the *Guidelines* for further consideration at our next regular Session. At that time, I am also planning to offer an initial draft of the *Guidelines*' remaining sections. Specifically, I hope to add guidelines in three more parts:

iv. **Effects:** I would focus here on the different legal effects that treaties, political commitments, and contracts generate, and include best practices by which States can pair their desired effects with the appropriate instrument. In addition, the *Guidelines* could acknowledge that while most States accept State responsibility for binding inter-institutional agreement, not all States do so. To avoid disputes over where responsibility lies, I am planning to propose a guideline that States may consent, on the basis of reciprocity, to their State institutions concluding agreements where responsibility only extends to the concluding institution, not the State as a whole.

v. **Procedures:** As drafted so far, the *Guidelines* recognize that all States have existing (and often substantial) approval procedures for the negotiation and conclusion of treaties by the State itself. Given this, I plan to propose a best practice of freedom; that is, acknowledging that States should decide for themselves which treaties require approval by the legislature or a Constitutional Court, and which (if any) may be concluded by the Executive alone. With respect to those States willing to authorize their institutions (be they government ministries or sub-national territorial units) to conclude treaties, I am planning to propose that States put in place specific and identifiable procedures for conferring such authority and communicating it to other States with whose institutions such agreements might be concluded. A similar two-step process could be proposed for inter-institutional contracts. As for non-binding agreements, I am planning to endorse two best practices in particular: first, that States develop and implement policies and procedures for the conclusion of political commitments by the State, its ministries, or sub-national territorial units for which it is responsible; and, second, that each State consider having a national registry or database for cataloging political commitments.

vi. **Training and Education:** I would like the *Guidelines* to propose that States engage in training and education efforts to ensure that relevant actors within a Foreign Ministry are

capable of identifying and differentiating among the various types of binding and non-binding agreements. Training and education should also include other institutional actors if they are authorized to be making international agreements.

I would welcome feedback on these additional section ideas. Are there topics that seem problematic or in need of further thought? Are there any additional topics that I should include in the next draft of the *Guidelines*?

10. Finally, I seek the Committee's support in sharing the current draft with those Legal Advisers of OAS Member State Foreign Ministries who will join the Committee for the upcoming regular session. Although Member States would have a formal opportunity to comment on the *Guidelines* if they are eventually adopted by the Committee, an opportunity to get informal feedback from the Legal Advisers would be invaluable. Of course, I also welcome ideas and recommendations for other officials, persons, international organizations, or entities whose views on the *Guidelines'* subject-matter could improve their final quality.

ANNEX I

DRAFT OAS GUIDELINES TO DIFFERENTIATING INTERNATIONAL AGREEMENTS

1. DEFINITIONS

1.1 Agreement – The mutual consent of participants to a normative commitment.

1.2 Treaty – An international agreement concluded between States, State Institutions or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation or registration.

1.3 Political Commitment: A non-legally binding agreement between States, State institutions or other actors intended to establish commitments of an exclusively political or moral nature.

1.4 Contract: An agreement governed by national law.

1.5 Inter-Institutional Agreement: An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms and the surrounding circumstances, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.

2. THE CAPACITY TO CONCLUDE INTERNATIONAL AGREEMENTS

2.1 The Treaty-Making Capacity of States: Any State may conclude a treaty in accordance with the treaty's terms and whatever domestic laws and procedures it has to authorize the State's consent to be bound.

2.2 The Treaty-Making Capacity of State Institutions: States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.

2.3 Confirming Treaty-Making Capacity: States or authorized State institutions contemplating a treaty with another State's institution should endeavor to confirm that the institution has sufficient competence over the treaty's subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.

2.4 The Capacity to Make Political Commitments: States or State institutions can make political commitments to the extent political circumstances allow.

2.5 Inter-State Contracting Capacity: A State may conclude a contract with another willing State subject to the requirements of the contract's governing law.

2.6 Inter-Institutional Contracting Capacity: A State Institution may conclude a contract with a willing foreign State institution when authorized to do so by its domestic law.

3. METHODS OF IDENTIFICATION

3.1 Identifying the existence of an agreement: The existence of an agreement can be shown where all participants accept its existence or by considering the actual terms used and the surrounding circumstances from which those terms emerged.

3.2 Identifying the type of agreement concluded: Where there is an international agreement, international law suggests two methods for identifying whether an agreement constitutes a treaty, a political commitment or a contract.

- First, the type of agreement concluded may be identified by a subjective or "intentional" analysis, where the participants' shared intentions determine if it is binding or not (and if it is binding, whether it is a treaty or a contract).

- Second, a more "objective" test examines the agreement's subject-matter, language and clauses to determine its status regardless of any evidence as to one or more of the author's intentions.

The two methods often lead to the same conclusion to the extent they both focus on the text, surrounding circumstances, and subsequent conduct. Nonetheless, there is a risk that they may generate different conclusions in certain cases. Thus, whichever method a State or State institution uses to classify its own agreements, it should do so sensitive to the fact that other participants (or third parties) may use the other method, creating a risk of inconsistent views on an agreement's status.

3.3. **Specifying the Type of Agreement Concluded**: To avoid inconsistent views on the binding character of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion.

3.4 **Evidence Indicative of a Treaty:** Where agreement participants do not specify or otherwise agree on its status, certain evidence may indicate the existence of a treaty, including:

(a) The actual language employed, such as:

(i) the use of verbs of commitment like "shall," "must," "agree," or "undertake";
(ii) a description of the agreements' authors as "parties";
(iii) a title like "Treaty" or "Agreement";
(iv) a reference to the agreement's terms as "articles," "obligations," or "undertakings"; or
(v) adjectives that reference the agreement's terms as "binding," "authentic," or "authoritative";

(b) the inclusion of clauses such as those dealing with:

(i) consent to be bound;
(ii) entry into force;
(iii) depositaries;
(iv) amendment;
(v) termination; or
(vi) compulsory dispute settlement;

(c) the circumstances surrounding the agreement's conclusion; and

(d) the subsequent conduct of agreement participants.

3.5 **Evidence indicative of a political commitment:** Where agreement participants do not specify or otherwise agree on its status, certain evidence may indicate the existence of a non-binding, political commitment, including:

(a) The actual language employed, such as:

(i) the use of precatory or descriptive verbs like "should," "seek," "promote," "intend," "expect," "carry out," "understand," or "accept";
(ii) a description of the agreement's authors as "participants";
(iii) a title like "understanding," "arrangement," or "declaration";
(iv) a reference to the agreement's terms as "commitments," "expectations," "best efforts," "principles," or "paragraphs";
(v) adjectives that reference the agreement's terms as "political," "voluntary," "effective" or "equally valid";

(b) the inclusion of clauses such as those dealing with

(i) signature;
(ii) coming into effect or coming into operation;
(iii) differences; or

(iv) modifications;

(c) the circumstances surrounding the agreement's conclusion; and

(d) the subsequent conduct of agreement participants.

3.6 **Evidence indicative of a contract:** Where agreement participants do not specify or otherwise agree on its status, certain language may indicate the existence of a contract, most notably a governing law clause.

3.7 **Ambiguous or inconsistent evidence of an agreement's status:** Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions.

ANNEX II

DRAFT OAS GUIDELINES TO DIFFERENTIATING INTERNATIONAL AGREEMENTS (WITH COMMENTARY)

1. DEFINITIONS

1.1 Agreement – The mutual consent of participants to a normative commitment.

Commentary: The concept of an agreement has not been well defined in international law. In preparing the draft that became the 1969 Vienna Convention on the Law of Treaties, the International Law Commission (ILC) gave the idea little attention.[24] Nor did any of the OAS Member States responding to the Committee's Questionnaire address it. Nonetheless, there are at least two core elements to any agreement: *mutuality* and *commitment*. In terms of *mutuality*, the First ILC Rapporteur for the Law of Treaties, J.L. Brierly, noted that defining treaties as "agreements" excludes "unilateral declarations."[25] Agreements thus do not arise *sua sponte* from a single actor, but are the product of a mutual interchange or communication.[26] Brierly also identified the "essence of a 'treaty'" not in the instrument or document recording it, but in the "agreement or *consensus* brought into existence by the act of its formal conclusion."[27] By linking agreement to a "consensus," the concept is thus tied to having a "meeting of the minds" or *consensus ad idem.*[28]

Second, mutuality alone will not constitute an agreement; the *consensus ad idem* must also incorporate some commitment. *Commitment* refers to the idea that an agreement encompasses shared expectations of future behavior. It is not enough for an agreement's participants to explain their respective positions or even list an "agreed view" – commitments elaborate how participants will change their behavior from the status quo *or* continue existing behavior.[29] Of course, the precision of commitments can vary; some encompass clear rules that participants are able to fully implement *ex ante* while others are standards where compliance requires an *ex post* analysis in light of all the circumstances. Nor should the mutuality of commitments be confused with reciprocity. Agreements can be one-sided; they do not require an exchange of commitments (or what the

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[24] None of the four ILC Special Rapporteurs defined what they meant by "agreement." *See* J.L. Brierly, *First Report on the Law of Treaties*, [1950] YBILC, vol II, 227 (19-20); Hersch Lauterpacht, *First Report on the Law of Treaties* [1953] YBILC, vol II, 90, 93-94 (art. 1); Gerald G Fitzmaurice, *First Report on the Law of Treaties* [1956] YBILC, vol II, 117; Henry Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol II, 31 (art. 1(a)).

[25] Brierly, *supra* note 24, at 227 (19-20).

[26] Duncan B. Hollis and Joshua J. Newcomer. *"Political" Commitments and the Constitution*, 49 VIRG. J. INT'L L. 507, 522 (2009); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 51-53 (1996).

[27] [1950] YBILC, vol. II, 227, 19-20.

[28] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) ("The term 'agreement' can refer to (i) the concrete, i.e., a particular text in written form; or (ii) the abstract, i.e., the 'meeting of the minds' consisting of an offer and its acceptance between the parties (the *synallagma*). 'Agreement' in Article 2, subpara. 1(a) in itself contains no particular requirements and refers to the latter."); Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRITISH YBK INT'L L. 117, 119 (1979) (first element of a treaty is the agreement, the "consensus ad idem"); J.L. Weinstein, *Exchange of Notes*, 29 BRITISH YBK INT'L L. 205, 226 (1952) ("It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes").

[29] *See, e.g.,* Hollis and Newcomer, *supra* note 26, at 522; KLABBERS, *supra* note 26, at 51-53; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 584–85 (2005).

common law calls "consideration"); a single commitment by one participant to another participant (or participants) can suffice.[30]

1.2 <u>Treaty</u> – An international agreement concluded between States, State Institutions or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation or registration.

Commentary: The *Guidelines'* definition of a treaty derives from the one employed in Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT):

> For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[31]

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law.[32] Most States endorse it.[33] And scholars regularly cite it when defining the treaty concept.[34]

At the same time, the VCLT treaty definition is widely recognized as incomplete. It fails to include as treaties agreements by other subjects of international law. And yet, no one seriously disputes that agreements with or among international organizations also qualify as treaties.[35] The VCLT definition also references issues that once were controversial (i.e., that an exchange of notes may constitute a treaty) that are no longer open to serious question.[36]

The *Guidelines'* treaty definition thus expands upon the VCLT definition to accommodate modern treaty law and practice. For the purposes of these *Guidelines,* a treaty has the following elements: (a) an international agreement; (b) concluded; (c) among States, State institutions or other appropriate subjects; (d) that is recorded in writing; (e) governed by international law; and without regard to (f) its title; or (g) its registration.

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[30] See Duncan B. Hollis, *Defining Treaties, in* THE OXFORD GUIDE TO TREATIES 20 (Duncan B. Hollis, ed., 2012).

[31] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331, art 2(1)(a).

[32] *See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equitorial Guinea Intervening)* [2002] I.C.J. Rep. 249, 263. Other international tribunals have taken a similar position. *See, e.g., Texaco v. Libyan Arab Republic*, 53 INT'L L. REP. 389, 474 (1977).

[33] Duncan B. Hollis, *Second Report on Binding and non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) at 8 ("Hollis, Second Report") (9 of 10 OAS Member States surveyed accept the VCLT definition in their own treaty law and practice, while the tenth State did not address the issue); Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice,* in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis et al., eds., 2005) (among 19 representative States, "virtually every state surveyed" accepts the VCLT treaty definition).

[34] *See, e.g.,* ANTHONY AUST, MODERN TREATY LAW & PRACTICE 14 (3rd ed., 2013); MALGOSIA FITZMAURICE AND OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 6-25 (2005); KLABBERS, *supra* note 26, at 40.

[35] *See* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force), 25 ILM 543 (1986) ['1986 VCLT']; A MCNAIR, THE LAW OF TREATIES 755 (1961) ("Fifty years ago it might have been possible to say that only States could conclude treaties, but today any such statement would be out of date.").

[36] The 1935 *Harvard Draft Convention on the Law of Treaties*, for example, originally excluded exchanges of notes from its treaty definition. 29 AM. J. INT'L L. (Supp.) 653, 698 (1935). Today, however, treaties can be comprised by single or repeated exchanges of notes. *See, e.g.,* Philippe Gautier, *Article 2, Convention of 1969*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES 35 (Oliver Corten and Pierre Klein, eds., 2011); VILLIGER, *supra* note 28, at 200.

(a) *An international agreement.* A treaty constitutes a specific type of agreement: all treaties are agreements, but not all agreements qualify as treaties.[37] It is not clear, however, what other work the "international" qualifier does. It has not been employed to limit the subject-matter for treaty-making. Today, requiring an "international" agreement may best be read to reinforce the treaty's scope, whether in terms of who can conclude one or the international legal basis for the obligations that result.[38]

(b) ... *concluded* ... When is an international agreement concluded? The term may be used loosely to refer to any point from the negotiations' end to a "definitive engagement that the parties are bound by the instrument under international law."[39] Both the VCLT and State practice define conclusion as the point at which parties adopt the treaty text or when it is opened for signature.[40] For purposes of these *Guidelines,* it is important to emphasize that a treaty can be "concluded" even if it has not entered into force (or never will).[41] Conclusion and entry into force are not synonymous.[42] Thus, it is important to differentiate the legal effects that arise when a treaty merely exists from those effects imposed upon its entry into force (i.e., *pacta sunt servanda* only applies to the latter sub-set of treaties).[43]

(c) ... *among States, State institutions and other appropriate subjects* ... The VCLT defines a treaty as an agreement between States. In practice, a State may conclude a treaty directly in its own name (an inter-State agreement) or via one of its institutions – whether the national government as a whole (a government-to-government agreement), a national ministry (an agency-to-agency agreement), or via a sub-national territorial unit (e.g., a province-to-province agreement). The *Guidelines*' reference to "appropriate subjects" is meant to incorporate the possibility of some treaty-making by what Henry Waldock called "other subjects of international law."[44] This category may encompass entities such as international organizations, insurgent groups, and external territories.[45] The modifier "appropriate" is employed to acknowledge that not all entities that aspire to be a subject of international law may qualify as such. Some States claim that a State institution should be treated as an "other subject" of international law, that is, one capable of concluding a treaty directly, in its own name. That position is, however, disputed and these *Guidelines* do not purport to resolve that

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[37] *See* VILLIGER, *supra* note 28, at 77. This point was repeated throughout the ILC's preparatory work. *See* Brierly, *First Report, supra* note 24, at 227, 19; Henry Waldock. *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, 1; [1965] YBILC, vol. I, 10, 10 (Briggs).

[38] This follows from Waldock's earlier understanding. Waldock. *First Report*, *supra* note 24, at 31 (art 1(a)); *see also* VILLIGER, *supra* note 28, at 78.

[39] Waldock adopted the latter view. Waldock, *First Report*, *supra* note 24, at 30, 9. Brierly supported linking a treaty's conclusion to the establishment of the agreed text in final form. J.L. Brierly, *Second Report on the Law of Treaties* [1951] YBILC, vol II, 70-71; *see also* VILLIGER, *supra* note 28, at 78-9.

[40] The VCLT's structure favors this view – VCLT Articles 7-10 discuss the "text of the treaty" when referring to full powers, adoption and authentication of a treaty text, but to the "treaty" in those articles (arts. 11-18) elaborating various means of expressing consent to be bound. The 1986 VCLT adopts the same approach. *See* RICHARD GARDINER, TREATY INTERPRETATION 232-33 (2nd ed., 2015); AUST, *supra* note 34, at 86.

[41] Unperfected treaties—those that do not enter into force—are thus still considered treaties. *See, e.g.,* the 1986 VCLT, *supra* note 35 (not yet in force).

[42] AUST, *supra* note 34, at 86; VILLIGER, *supra* note 28, at 79.

[43] *See, e.g.,* VCLT art 24(4) (noting various provisions of "a treaty" that "apply from the time of the adoption of its text" rather than on entry into force).

[44] Waldock, *First Report*, *supra* note 24, at 30 (Article 1(a) defines an "international agreement" as "an agreement intended to be governed by international law and concluded between two or more States *or other subjects of international law*.") (emphasis added).

[45] *See* Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, in THE OXFORD GUIDE TO TREATIES 125-26 (Duncan B. Hollis, ed., 2012).

dispute. Thus, it simply lists State institutions among the actors that conclude treaties without clarifying whether they can do so independently or only as agents of a State.

(d) *... that is recorded in writing ...* The VCLT requires all treaties to be in writing – a permanent and readable evidence of the agreement. But it does not impose any particular requirements of form.[46] There is, for example, no requirement that treaties be signed.[47] Nor must they be published.[48] There are, moreover, many different ways to record a treaty, including the most obvious, traditional means – typewriting and printing. Modern communication methods, including e-mail, texts, social media accounts (e.g., Twitter), may provide additional mechanisms for recording future treaties.[49]

The VCLT excludes oral agreements from its ambit (primarily for practical reasons).[50] Today, many—but not all—States understand customary international law to allow for oral treaties.[51] U.S. domestic law, for example, provides that oral international agreements, once made, must be committed to writing.[52] By providing that a treaty be "recorded in writing," these *Guidelines* avoid endorsing the oral treaty concept specifically, although the definition includes any oral treaties if they are subsequently recorded in written form.

(e) *... and governed by international law, ...* This is the essential criterion of the treaty definition. Simply put, treaties are agreements governed by international law. The challenge, however, lies in understanding what this phrase means. Using the "governed by international law" qualifier clearly distinguishes treaties from the other two categories of international agreement: contracts (agreements governed by national law) and political commitments (agreements not governed by law at all).[53] But it is not clear precisely how it does so. For starters, the idea that treaties are governed by international law may be read as more of a

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[46] AUST, *supra* note 34, at 16.

[47] Gautier, *supra* note 36, at 38; AUST, *supra* note 34, at 20-21; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment, 20 April 2010) [2010] I.C.J. Rep. 132-50 (treating an unsigned joint press communique as an "agreement").

[48] FITZMAURICE AND ELIAS, *supra* note 34, at 23-24; KLABBERS, *supra* note 26, at 85-86.

[49] AUST, *supra* note 34, at 16 (supporting the idea that a treaty could be concluded via e-mail).

[50] *See* VCLT Art. 3. The ILC emphasized it focused exclusively on written agreements "in the interests of clarity and simplicity" and had "not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements." [1966] YBILC, vol II, 189 [7].

[51] *See, e.g.,* Hollis. *A Comparative Approach, supra* note 33, at 12-13 (surveying treaty law and practice of Canada, Germany, Japan, Switzerland, and the United Kingdom); Jan. G. Brower, *The Netherlands,* in NATIONAL TREATY LAW & PRACTICE 486 (Duncan B. Hollis et al., eds., 2005) (Dutch Government has opposed practice of oral agreements since 1983); German Cavelier, *Colombia,* in NATIONAL TREATY LAW & PRACTICE 196 (Duncan B. Hollis et al., eds., 2005) (Colombia not bound by verbal agreements because of domestic promulgation requirements); K. Thakore, *India,* in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis et al., eds., 2005) 352 (oral agreements "are not resorted to in Indian practice"); Neville Botha, *South Africa,* in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis., eds., 2005) 583 (neither South African law nor practice makes any provision for oral agreements and they lack official sanction).

[52] *See* 1 U.S.C. §112b.

[53] Both distinctions were raised at the ILC and in the Vienna Conference. On the distinction between treaties and contracts, *see* [1966] YBILC, vol II, 189, 6; [1959] YBILC, vol II, 95, 3; U.N. Conference on the Law of Treaties, *Official Records: Documents of the Conference*, A/CONF.39/11/Add.2, 9, 6 ["Vienna Conference, Official Records"]. On the distinction between treaties and political commitments *see* [1959] YBILC, vol II, 96-97, 8 ("instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties"); Vienna Conference, Official Records, *supra* at 111-112; U.N. Conference on the Law of Treaties, *Summary Records of First Session*, A/CONF.39/11, 23, 26 ["Vienna Conference, First Session"] (Mexican delegate distinguishes treaties from "declarations of principle or political instruments"); *id* at 28, 65.

consequence of treaty-making rather than a constitutive element of the concept.[54] And, as discussed further below, States and scholars have never fully resolved how to decide which agreements are governed by international law. Today, there are two different camps. The first favors subjective indicators to discern when an agreement is governed by international law based on the intention of the States (or other subjects) who make it. In other words, an agreement is a treaty where that reflects the shared intentions of its authors. In contrast, a second camp contemplates an agreement's objective markers (whether its subject-matter or the use of certain text) as more indicative of when it is governed by international law. As a practical matter, applying the treaty definition evidences an "oscillation between subjective and objective approaches."[55]

(f) ... *regardless of its designation* ... International law has not imposed any requirements of form or formalities for concluding treaties.[56] Thus, a treaty need not bear the title "treaty." In practice, treaties bear many different titles, including "act," "agreed minute," "charter," "convention," "covenant," "declaration," "memorandum," "note verbale," "protocol," "statute," and, of course, "treaty." International tribunals have classified instruments as treaties notwithstanding the agreement being housed in very different forms. In *Qatar v. Bahrain,* the International Court of Justice analyzed the 1990 "Agreed Minutes" of a meeting among Foreign Ministers as a treaty.[57] More recently, in the *Pulp Mills* case, the Court concluded that a press release constituted a binding agreement for the parties.[58]

At most, an agreement's title may provide some indication of the authors' intentions (which, of course, assumes that intention is relevant to ascertaining an agreement's treaty status). When two States use the title "treaty," it suggests that they anticipated making one. But, the fact an agreement bears a particular title is not determinative of whether it is (or is not) a treaty. Thus, although some States prefer to use "Memorandum of Understanding" (MOU) as the title for their political commitments, the fact that an agreement bears that heading does not automatically make it non-binding. MOUs can still be treaties.[59]

(g) ... *or registration.* UN Charter Article 102(1) requires that "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."[60] Does this mean unregistered agreements are not treaties? The answer

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[54] That perspective was clearly at work in the ILC's origination of the phrase. See [1959] YBILC, vol II, 95, 3 ("the Commission felt that the element of subjection to international law was so essential an aspect of a treaty … that this should be expressly mentioned in any definition or description …").

[55] Martti Koskenniemi, *Theory: implications for the practitioner*, in THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 19-20 (Philip Allott et al., eds., 1991).

[56] *See, e.g., An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of Philippines v. The People's Republic of China*), Award on Jurisdiction, PCA Case No. 2013-19 (Oct. 29, 2015) 214 (hereinafter, "*South China Sea Arbitration*") ("The form or designation of an instrument is ... not decisive of its status as an agreement."); *South West Africa* (*Ethiopia/Liberia v South Africa)* (Preliminary Objections) [1962] I.C.J. Rep 331 ("terminology is not a determinant factor as to the character of an international agreement").

[57] *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] I.C.J. Rep 112, 21-30.

[58] *Pulp Mills, supra* note [47], at 138.

[59] Alternatively, States may ascribe a different status to the same MOU as the United States and its treaty partners did with respect to certain defense-related MOUs that the United States considered treaties, but which its partners (Australia, Canada, and the United Kingdom) regarded as non-binding. *See* J. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 821 (1994).

[60] UN Charter, Art. 102(1); *see also* VCLT art 80(1) ("Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and

appears to be clearly in the negative.[61] Neither the U.N. Charter nor the VCLT explicitly tie treaty registration to an agreement's legal status. For its part, the United Nations is careful to regularly indicate that the Secretariat's acceptance of an instrument for registration "does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status."[62] Thus, like its title, registration of an agreement may indicate, at most, some sense of the registering State's intentions to regard the agreement as a treaty. Since other States do not regularly monitor treaty registrations, registration has little to say about the views of other States parties. Similarly, the fact that an agreement goes unregistered cannot deny it the status of a treaty. As the ICJ noted in *Qatar v. Bahrain,* "[n]on-registration or late registration … does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties."[63]

1.3 Political Commitment: A non-legally binding agreement between States, State institutions or other actors intended to establish commitments of an exclusively political or moral nature.

Commentary: Unlike the treaty, international law lacks a widely accepted definition for political commitments. Nonetheless, States and scholars have recognized these agreements for more than a century, albeit under different headers: e.g., gentleman's agreements, informal agreements, *de facto* agreements, non-binding agreements, political texts, extra-legal agreements, non-legal agreements, international understandings, and political commitments.[64] The "political commitment" label captures all of these variations to the extent they refer to agreements that lack legal force.

Today, States clearly support the practice of concluding mutual commitments whose normative force lies outside of any sense of legal obligation.[65] These are commitments for which compliance derives not from law, but rather a sense of moral duty or the political relations from which the agreement originated. They stand in contrast to agreements governed by law whether international (for treaties) or national (for contracts). The difference is an important one as the U.S. State Department described it in referencing several political commitments concluded alongside the START Treaty:

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publication"). In contrast, Article 18 of the League of Nations' Covenant went further, indicating that "a treaty or international engagement" was not binding until registered.

[61] Accord AUST, *supra* note 34, at 302-03; FITZMAURICE AND ELIAS, *supra* note 34, at 23; KLABBERS, *supra* note 26, at 84; D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty*, CURRENT LEGAL PROBLEMS 257, 265-276 (1993).

[62] U.N. Secretary-General, *Note by the Secretariat*, in 2856 TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS VII (2012). In cases of doubt, the United Nations favors registration. But it has occasionally refused to register a text that it did not consider a treaty.

[63] *Qatar v. Bahrain*, *supra* note 57, 29. The failure to register or publish a 1983 U.S.-U.K. MOU was, however, a factor in the Heathrow Arbitration's decision to regard it as non-legally binding. *Award on the First Question, US/UK Arbitration concerning Heathrow Airport User Charges* (1992) ch 5 155, 6.5.

[64] *See* KLABBERS, *supra* note 26, at 18; *see also* Hollis and Newcomer, *supra* note 26, at 516-24; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT'L L. 65, 95 (1980).

[65] *See, e.g.,* AUST, *supra* note 34, at 28-29, 35-39; MCNAIR, *supra* note 35, at 6 (finding that "frequently, heads of States or duly empowered ministers concur in making declarations of policy which they regard as morally and politically binding but which do not create legal obligations between their states"); Bothe, *supra* note 64, at 66 (using empirical approach to reveal political commitment practice); PAUL REUTER, AN INTRODUCTION TO THE LAW OF TREATIES 74 (J. Mico and P. Haggenmacher, trans., 1989). *But see* KLABBERS, *supra* note 26, at 119 ("[I]f states wish to become bound, they have no choice but to become legally bound.") *and* Ian Sinclair, *Book Review—The Concept of Treaty in International Law*, 81 AM. J. INT'L L. 748 (1997) (disputing Klabbers's views).

> An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A "political" undertaking is not governed by international law .... Until and unless a party extricates itself from its "political" undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.[66]

Of course, political force may also attach to legal norms. A treaty breach can, for example, generate *both* legal and political consequences. Thus, what separates treaties from political commitments is the *additional* application of international law to treaties (e.g., the law of State responsibility).

The concept of a political commitment should not be confused with "soft law." Although the term "soft law" has multiple meanings, it essentially views law—not as a binary phenomenon where something is/is not law—but as a spectrum of different degrees of bindingness or enforceability ranging from soft to hard.[67] Soft law thus incorporates two different ideas: (a) norms that, while precise, are not intended to give rise to obligations under international law; and (b) legal norms incapable of enforcement because they are too vague or lack monitoring or enforcement mechanisms.[68] Political commitments involve agreements on norms of the first, but not the second, type.

Moreover, as elaborated in Part II below, because political commitments do not depend on international or national law for their authority, they are not constrained by legal rules on capacity. States can, of course, conclude political commitments. So too can sub-national territorial units.[69] But since political commitments do not derive from international law, there is no reason to limit political commitment-making to the entities that can conclude treaties.[70] Thus, the definition of a political commitment includes all other actors who have the capacity to engage in a political or moral undertaking. This would presumably include business firms and/or individuals. Political commitments can be concluded, moreover, among a group of participants with a shared identity (i.e., only States, or only firms). Or, they can be concluded by a range of different actors in a multistakeholder framework.

1.4 <u>Contract</u>: An agreement governed by national law.

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[66] Transmittal of the Treaty with the U.S.S.R. on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), Nov. 25, 1991, S. TREATY DOC. NO. 102-20, at 1086; CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 58-59 (Comm. Print 2001).

[67] *See, e.g.*, Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L. Q. 901 (1999); Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law,* 38 INT'L & COMP. L. Q. 850, 865-66 (1989).

[68] *See* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 414-415, n7 (1983). Others have offered a narrow definition limiting soft law to non-legally binding normative agreements. *See, e.g.*, Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 76 n.3 (Dinah Shelton ed., 2000).

[69] *See* Duncan B. Hollis, *Unpacking the Compact Clause,* 88 TEXAS L. REV. 741 (2010) (surveying U.S. state agreements with foreign counterparts and noting that they have "heartily endorsed the political commitment form").

[70] *See* Hollis & Newcomer, *supra* note 26, at 521.

Commentary: Like treaties (and unlike political commitments), contracts generate legally binding obligations. Instead of international law, however, a national legal system governs the formation, interpretation, and operation of the contract.[71]

Contracts are usually defined as agreements by private actors (firms or individuals) that are governed by the relevant national legal system.[72] But as the ILC acknowledged, States may choose to use laws other than international law to govern their agreements.[73] Thus, public actors, whether States as a whole or their various institutions, may choose to conclude their agreements as contracts.

The existence of an inter-State (or inter-institutional) contract will often be a function of intent – did the parties intend their agreement to be governed by national law (and, if so, which one)? At the same time, however, the relevant national legal system will have its own rules on which agreements qualify as contracts.[74] Thus, there is a possibility that States could desire to create a contract that is invalid under the selected (or otherwise applicable) national law. In such cases, there is an open question whether international law would step in to govern the agreement.[75]

1.5 Inter-Institutional Agreement: An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms and the surrounding circumstances, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.

Commentary: States currently use the term inter-institutional agreement to reference agreements concluded by State institutions, whether (i) national ministries or agencies or (ii) sub-national territorial units like regions or provinces. Mexico, for example, defines the scope of its inter-institutional agreements as those "concluded in written form between any area or decentralized entity of the federal, state, or municipal public administration and one or more foreign government entities or international entities ..." [76] Peru indicates "'interinstitutional agreements' ... may be concluded, within their purview, by Peruvian governmental entities, including municipalities and regional governments, with their foreign counterparts or even with international organizations."[77]

The concept of inter-institutional agreements has received relatively little attention from international law. Practice, moreover, appears quite diverse. Some States like Mexico classify inter-

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[71] Widdows, *supra* note 28, at 144-49. To say a contract is governed by domestic law does not mean it can never have international legal effect. Depending on the circumstances, international legal responsibility may follow a State's breach of contract. But, as the ILC noted, "this did not entail the consequence that the undertaking itself, or rather the instrument embodying it, was ... a treaty or international agreement. While the obligation to carry out the undertaking might be an international law obligation, the incidents of its execution would not be governed by international law." [1959] YBILC, vol. II, 95, 3.

[72] Each nation's legal system dictates which contracts fall within its jurisdiction, whether because the parties choose that legal system or because of that system's contacts with the parties. Where contracts involve actors from different States, multiple States may assume jurisdiction over that agreement. In such cases, conflict of law rules dictate which national legal system takes priority in cases of conflict.

[73] [1966] YBILC, vol. II, 189 [6].

[74] In Paraguay, for example, Law No. 5393/201 governs the law applicable to international contracts. See *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs*, *OAS General Secretariat*, No. 635-18/MPP/OEA (June 12, 2018) [hereinafter Paraguay Response].

[75] Lauterpacht was of this view, as was the ILC, at least initially. Lauterpacht, *First Report*, *supra* note 24, 100; [1959] YBILC, vol II, 95.

[76] *See Law Regarding the Making of Treaties, reprinted in* 31 I.L.M. 390 (1992), CDLX *Diario Oficial de la Federación* 2 (Jan. 2, 1992) (1992 Mexican Law Regarding the Making of Treaties).

[77] Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (hereinafter "Peru Response"); see also Hollis, *Second Report*, *supra* note 33, at 14.

institutional agreements as "governed by public international law," making them treaties as that term is defined in these *Guidelines*.[78] Ecuador, in contrast, indicates that its "lower-level state institutions usually sign with their counterparts or with international organizations *non-binding* understandings known as inter-institutional instruments."[79] Other States take a hybrid approach. Uruguay provides that inter-institutional agreements may be *either* binding or non-binding.[80] Peru suggests that inter-institutional agreements may be "governed by international law" if "they develop international commitments established under treaties in force"; otherwise inter-institutional agreements may be political commitments or contracts.[81] Jamaica, in contrast, does not view its institution's agreements as treaties but notes that "[s]ub-national territorial units and agencies may conclude non-binding agreements *or* contracts ..."[82] The United States, meanwhile, indicates that its national ministries may conclude inter-institutional agreements that can be either treaties, "non-binding" political commitments, or contracts.[83]

The diversity of State practice suggests that inter-institutional agreements may not be defined exclusively as treaties, political commitments, or contracts. Their legal (or non-legal) status should, therefore, be determined by reference to the institution's capacity to conclude international agreements and the same methods of identification employed to differentiate among inter-State agreements.

2. THE CAPACITY TO CONCLUDE INTERNATIONAL AGREEMENTS

[78] 1992 Mexican Law Regarding the Making of Treaties, *supra* note 76. This stands in contrast to how some States define the treaty concept internally. In both Mexico and the United States, for example, only instruments that receive parliamentary approval are called treaties even as both states conclude other "international agreements" that would qualify as treaties as a matter of international law. Thus, we may refer to certain inter-institutional agreements as treaties in the international law sense of that term, notwithstanding that as a matter of constitutional law they would not be capable of bearing such a label.

[79] Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (hereinafter "Ecuador Response") (emphasis added); Hollis, *Second Report*, *supra* note 33, at 13.

[80] *See* Uruguay, *Reply to questionnaire on "binding and non-binding agreements"* (hereinafter "Uruguay Response") (listing "Inter-Institutional Agreements" as non-binding agreements, but later noting inter-institutional agreements may "bind not the State but themselves."). Panama advises that representatives of its territorial units may enter into treaties if they receive full powers from the Foreign Ministry. *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States*, N.V.-A.J._MIRE-201813176 ["Panama Response"].

[81] Peru Response, *supra* note 77 (citing Article 6 of Supreme Decree No. 031-2007-RE). Peru notes "'nonbinding' agreements … coming into increasing use … at the inter institutional level (between Peruvian governmental entities—including municipalities and regional governments—and their foreign counterparts)" at the same time these entities "are authorized to conclude contracts for the procurement of goods and services." *Id.*

[82] Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 December 2017 (hereinafter "Jamaica Response") (emphasis added).

[83] *See* United States, *Inter-American Juridical Report: Questionnaire for the Member States* (hereinafter "U.S. Response") ("Departments and agencies of the United States may enter into agreements with agencies of other states that fall within the definition of a treaty contained in Article 2 of the Vienna Convention on the Law of Treaties. Departments and agencies of the United States also enter into non-legally binding instruments and contracts governed by domestic law with agencies of other states."). U.S. practice with respect to its sub-national territorial units (that is, U.S. states) is more complex as they are denied a treaty-making capacity under the Constitution but can conclude agreements or compacts with foreign counter-parts where authorized by Congress. *Id.* In contrast, Argentina allows its sub-national territorial units to conclude treaties, but denies that capacity to its national ministries or agencies. Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (hereinafter "Argentina Response").

2.1 <u>The Treaty-Making Capacity of States</u>: Any State may conclude a treaty in accordance with the treaty's terms and whatever domestic laws and procedures it has to authorize the State's consent to be bound.

Commentary: By virtue of their sovereignty, all States have the capacity to enter into treaties.[84] Through both the VCLT and custom, international law has devised a robust set of default rules on State treaty-making. VCLT Article 7, for example, indicates who can consent to a treaty on a State's behalf – its head of government, head of state, foreign minister, and anyone else granted "full powers" to do so.

A treaty's terms may, however, limit which States are capable of joining. Multilateral treaties, for example, may be open to all States, only to States from a specific region,[85] or only to States engaged in a specific activity.[86] States only have the capacity to join treaties where the treaty's terms allow them to do so.[87]

International law also recognizes that every State has domestic laws and procedures governing its treaty-making. In theory, these rules may only rarely (if ever, in practice) override a State's consent to be bound to a particular treaty.[88] That said, as a best practice, a State should only exercise its capacity to join treaties that have been approved through its domestic laws and procedures. In other words, if the State's constitution requires a particular treaty to receive prior legislative approval, the State should not exercise its capacity to consent to be bound to that treaty until after the legislature has given that approval.

States should be sensitive, moreover, to the fact that other States' domestic laws and procedures may either facilitate or restrict their capacity to conclude treaties. States should not assume equivalence between their own domestic rules and those of prospective treaty partners. One State may only have the capacity to conclude a particular treaty with prior legislative approval, while another State's domestic law and practice may authorize the conclusion of the same treaty without any legislative involvement. States should thus exercise their treaty-making capacity in ways that ensure each of the participating States is given an opportunity to complete the necessary domestic approvals before it gives its consent to be bound by a treaty.

2.2 <u>The Treaty-Making Capacity of State Institutions</u>: States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.

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[84] *See, e.g., Case of the SS Wimbeldon (Great Britain v Germany)* [1923] P.C.I.J. Rep. Ser A No 1 25, 35 ("the right of entering into international engagements is an attribute of State sovereignty").

[85] *See, e.g.,* Inter-American Convention to Prevent and Punish Torture (1985) OAS Treaty Series No. 67, Arts. 18, 20 (participation limited to American States).

[86] *See* Constitution of the Association of Natural Rubber Producing Countries (1968) 1045 UNTS 173, 21 (treaty open to "countries producing natural rubber"). In addition, some treaties are open to additional States only by invitation. *See* International Sugar Agreement (1992) 1703 U.N.T.S. 203, Art. 37 (Agreement open to governments "invited to the United Nations Sugar Conference, 1992").

[87] The treaty's terms may, of course, empower existing States parties to decide whether or not to admit a new State as a party; this is often the case with respect to the constituent treaties of international organizations.

[88] See VCLT Art. 46(1) ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."). Efforts to invoke Art. 46 in practice have not proved terribly successful. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening),* [2002] ICJ Rep. 265-67; KLABBERS, *supra* note 26, at 564 ("Whether Article 46 qualifies as customary international law would seem debatable. There is little practice, after all, and while the rule is sometimes invoked, it is rarely honoured.")

Commentary: Unlike questions surrounding the treaty-making capacity of international organizations, international law has not devoted substantial attention to treaty-making by a State's institutions.[89] Nonetheless, State institutions – whether national ministries or sub-territorial units – clearly do conclude instruments that at least some States (including those States of which these institutions form a part) regard as treaties.[90] When should these institutions have the capacity to do so? For starters, the subject-matter of the agreement should be one over which the institution has competence. For example, a State's Finance Ministry may have the competence to engage in tax information sharing with its counter-parts but would not have the competence to share defense related data. In federal States, moreover, some matters fall within the exclusive competence of a sub-national territorial unit (e.g., a province or region), which may create incentives for that territorial unit to conclude a treaty directly rather than having the State consent to doing so on the unit's behalf.

It would be a mistake, however, to conflate competence over a treaty's subject-matter with the capacity to make treaties on that matter. For institutions to enter into treaties, international practice suggests two additional conditions: (1) the State responsible for the institution consents to it making treaties on matters within the institution's competence; and (2) the willingness of potential treaty partners to enter into a treaty with the institution.[91]

As a first order consideration, it is up to each State to decide whether to authorize any of its institutions to engage in treaty-making. Some States may opt not to do so at all.[92] In such cases, the institution would presumptively lack any treaty-making capacity.

When States do authorize treaty-making by their institutions, they can do so for all their institutions or only some of them. Mexico, for example, has authorized treaty-making by all types of State institutions.[93] Other States have focused on authorizing (or denying authority) to make treaties to specific categories of institutions. For example, several States in the region (e.g., Jamaica, Panama, the United States) permit their national ministries to conclude treaties, while other States (e.g., Colombia, the Dominican Republic, Peru) report a lack of any domestic authority for those ministries to do so.[94] Meanwhile, there are States like Argentina that authorize their sub-national territorial units to conclude certain types of treaties, but deny their ministries can do so.[95] Other States, in contrast, have not authorized sub-national territorial units to engage in any treaty-making.[96]

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[89] *Compare* 1986 VCLT, *supra* note 35.

[90] *See, e.g.,* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law,* 23 BERKELEY J INTL L 137, 146-47 (2005).

[91] Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71, 84 (1968); see also [1962] YBILC, vol. I, 59, 20 (Briggs) (laying out a similar two part test); Grant, *supra* note 45, at 131.

[92] See *Paraguay Response, supra* note 74 ("Under domestic law, the Ministry of Foreign Affairs is the only agency with the capacity to conclude treaties governed by international law").

[93] *See supra* note 76, and accompanying text.

[94] Hollis, *Second Report*, *supra* note 33, at 24-25; *See* Panama Response, *supra* note 80.

[95] *See* Argentina Response, *supra* note 83(suggesting that since Argentina's ministries are not subjects of international law, they cannot conclude treaties and noting that under Article 124 of Argentina's Constitution its provinces and the Autonomous City of Buenos Aires can enter into "international agreements provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation").

[96] *See, e.g.,* Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (hereinafter "Brazil Response") ("Subnational entities (states, municipalities, and the Federal District) do not have the power, under the Brazilian Constitution, to conclude international legal acts that bind the Brazilian state"); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (hereinafter "Colombia Response") (domestic Colombian legislation does not authorize "sub-national territorial units" (e.g., Colombian

States may, moreover, authorize their institutions to negotiate and conclude treaties in various ways. Some – particularly European States – have constitutional provisions delineating the authority of institutions to make treaties with respect to matters falling within their exclusive competence.[97] Others, like Mexico, have used a statute to lay out the procedure for authorizing certain treaty-making by federal agencies and sub-national territorial units. Several states offer their consent on a more *ad hoc* basis. Under a 1981 Social Security treaty with the United States, for example, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec's distinct pension system.[98] And in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.[99]

Second, in addition to having the "internal" consent from the State of which it forms a part, an institution's capacity to make treaties will also turn on the "external" consent of the other State(s) or institution(s) with which it seeks to form a treaty. Just because one State has authorized a national ministry (or a province) to conclude treaties on certain matters does not mean potential treaty-partners must accept that authority. States can—and do—regularly decline to conclude such treaties or insist that the other State conclude the treaty on the institution's behalf (i.e., in the form of a state-to-state treaty or a government-to-government one).

States can decide to conclude bilateral treaties with a foreign State institution (or authorize one of its institutions to do so). In the multilateral treaty context, such authorizations are more infrequent, but there are several cases where States have agreed to accept a treaty relationship with sub-state actors. For example, Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated States and territories to sign and ratify the Convention with all the attendant rights and obligations the Convention provides.[100] And the

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departments, districts, municipalities and indigenous territories) to conclude treaties governed by international law.").

[97] See, e.g., Austria Constitution 1920 (reinst. 1945, rev. 2013), B-VG Art. 16 (Eng. trans. from constituteproject.org) ("In matters within their own sphere of competence, the Länder can conclude treaties with states, or their constituent states, bordering on Austria to conclude treaties with states, or their constituent states"); Belgian Constitution 1883 (rev. 2014), Art. 167(3) (Eng. trans. from constituteproject.org) ("The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament."); Germany, Basic Law of 1949 (rev. 2014) Art. 32(3) (Eng. trans. from constituteproject.org) ("Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government."); Swiss Constitution (1999), Art. 56(1) (Eng. trans. from constituteproject.org) ("A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers."). Such authorization is not an entirely European phenomena; States like Russia also authorize treaty-making by certain sub-state units (e.g., Yaroslav, Tatarstan). See W. E. BUTLER, RUSSIA, IN NATIONAL TREATY LAW AND PRACTICE 151, 152-53 (D. Hollis et al., eds., 2005); Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

[98] *See* Agreement With Respect to Social Security, Mar. 11, 1981, U.S.-Can., art. XX, 35 U.S.T. 3403, 3417. Quebec and the United States concluded that agreement in 1983, which the United States include in its treaty series. *See* Understanding and Administrative Arrangement with the Government of Quebec, Mar. 30, 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

[99] *Self-Governing and Non-Self-Governing Territories*, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 5, at 436, 438-40 (regarding testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs on July 17, 1986, regarding international activities of U.S. territories and commonwealths). Subsequently, Puerto Rico withdrew from the Bank.

[100] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 305(1)(c)-(e), 306, 1833 U.N.T.S. 396, 517-18 [hereinafter UNCLOS] (authorizing ratification or acceptance of the Convention by (1) "self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations"; (2) "self-governing associated States . . . [with] instruments of association"; and (3) "territories that enjoy full internal self-government, recognized as such by

Agreement Establishing the World Trade Organization is open to any "customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements."[101]

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the United Nations, but [which] have not attained full independence"). The same approach has been followed in the related U.N. Fish Stocks Agreement. *See* Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, arts. 1(2)(b), 37-40, 2167 U.N.T.S. 88, 90, 125-26.

[101] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII, 1867 U.N.T.S. 3, 162.

2.3 Confirming Treaty-Making Capacity: States or authorized State institutions contemplating a treaty with another State's institution should endeavor to confirm that the institution has sufficient competence over the treaty's subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.

Commentary: States currently have very different views on whether State institutions have the capacity to conclude inter-institutional agreements as treaties.[102] Some States clearly contemplate their national ministries and/or their sub-national territorial units having such a capacity. Other States just as firmly deny any authority to one or both types of their own institutions. As such, there is a risk of unaligned expectations in inter-institutional agreements, where one side assumes both institutions have a treaty-making capacity and the other assumes that one or both institutions do not. Such an event can not only cause confusion, but can also lead to diplomatic tensions and disputes if the two institutions conclude an agreement.

One way to avoid such problems is to increase transparency and an understanding of the respective capacities of an agreement's participants. As a best practice, therefore, States should always endeavor when faced with the prospect of an inter-institutional agreement to verify what capacities are accorded to the foreign institution(s) involved. Such verification may be formal or informal. In 2001, for example, the United States asked the United Kingdom to confirm that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States. The United Kingdom provided an instrument of "entrustment" verifying the sub-national territorial units of the United Kingdom had the requisite competence and authority to conclude the treaty.[103]

What happens if the State cannot confirm the institution's treaty-making capacity? The State could opt not to conclude the treaty at all. Or, it could revise the treaty to make it between the foreign State responsible for the institution in question. Thus, when the United States determined that the Cayman Islands lacked the necessary entrustment to sign a tax information exchange agreement in its own name, the United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman Islands.[104] And when the United States and Canada discovered that the city of Seattle and the Province of British Colombia had concluded a significant agreement concerning the Skagit River, they stepped in to "consent" to and indemnify that agreement via a treaty of their own.[105]

Can State institutions conclude treaties with willing partners when they lack domestic authority? There seems no legal basis for them doing so. Yet, there is substantial evidence of inter-institutional agreements being concluded without clear authorization.[106] Many of these agreements are more likely to qualify as political commitments or contracts, but some may, in fact, otherwise meet the definition of a treaty. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba to oppose certain inter-basin

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[102] *See supra* notes 78-83, and accompanying text. This confusion likely extends to agreements between a State and a foreign State's institution.

[103] *See*, *e.g.*, Press Release, U.S. Treasury Department, *Treasury Secretary O'Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information* (Nov. 4, 2002),

[104] *See, e.g.*, Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, Nov. 21, 2001, U.S.-U.K., T.I.A.S., CTIA No. 15989.000.

[105] *See* Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088.

[106] *See* Hollis, *Unpacking the Compact Clause, supra* note 69 (identifying 340 agreements concluded by U.S. states with foreign powers).

water transfer projects contemplated by U.S. federal law.[107] Other sovereign states have experienced similar problems. Before the end of the twentieth century, for example, Quebec had reportedly concluded some 230 "ententes" with foreign governments, nearly 60% of which were with foreign states.[108] At present, it does not seem a good practice to regard such agreements as treaties. But it is an area worthy of further State discussions.

2.4 <u>The Capacity to Make Political Commitments</u>: States or State institutions can make political commitments to the extent political circumstances allow.

Commentary: Political commitments are, by definition, free of any legal force under international or domestic law. As such, international law imposes no capacity conditions for which actors can conclude them. Similarly, domestic legal systems usually do not regulate which actors may conclude these commitments.[109] Unlike treaties, therefore, there are no concrete distinctions between the capacity of States and State institutions to conclude these non-binding agreements.

Politics, rather than law, serves as the guiding criterion for who within a State may enter into political commitments and on which subjects. Most States have little to no experience with regulating the capacity to make political commitments on behalf of the State or State institutions. On some occasions however, States have adopted policies organizing the capacity of the State or State institutions to enter into political commitments. In Colombia, for example, only those with the legal capacity to represent the State institution can sign memoranda of understanding or letters of intent even though these instruments are regarded as non-binding (and even then, only after the instrument has undergone a legal review).[110] And, of course, international politics can have a significant influence on which States or State institutions can conclude political commitments and on what subjects.

In a few high-profile cases, a State may impose domestic legal constraints on political commitments. As part of the controversy over the Joint Comprehensive Plan of Action (JCPOA), for example, the U.S. Congress passed a statute, the Iran Nuclear Review Act, requiring the U.S. President to submit "any agreement with Iran" (i.e., not just a legally binding one) to Congress for review and an opportunity for disapproval.[111] President Obama then submitted the JCPOA as required under the Act, although Congress eventually declined to approve or disapprove of that instrument.[112] Peru and Ecuador have reported similar practices of coordinating and reviewing their political commitments, with Peru reporting different policies for the review of inter-State and inter-institutional political commitments.[113]

2.5 <u>Inter-State Contracting Capacity</u>: A State may conclude a contract with another willing State subject to the requirements of the contract's governing law.

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[107] *See Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba*, 2001 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, § A, at 179-98.

[108] Nikravesh, *supra* note 97, at 239. France, moreover, reportedly regards its ententes with Quebec as governed by international law. *Id.* at 242.

[109] This is the case so long as the commitment does not infringe on the constitution or domestic law. Of course, should an agreement do so, its status as a political commitment would likely be called into question.

[110] Colombia Response, *supra* note 96. Thus, among Colombia's government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole. *Id.*

[111] *See* Pub. L. No. 114-17, 129 Stat. 201 (2015). The JCPOA is a political commitment relating to Iran's nuclear program between Iran, the 5 Permanent Members of the U.N. Security Council, Germany and the European Union. U.S. President Trump withdrew from the JCPOA on May 8, 2018.

[112] Kristina Daugirdas & Julian Davis Mortensen. *Contemporary Practice of the United States relating to International Law*, 109 AM. J. INT'L L. 873, 874-78 (2015) (due to a minority filibuster, Congress failed to take any action on the JCPOA to approve or disapprove it.).

[113] Peru Response, s*upra* note 77 (assessment of political commitments "made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ..."); *see also* Ecuador Response, *supra* note 79.

Commentary: Consistent with the earlier views of the ILC, some States in the region assert a capacity to enter into contracts with other States.[114] At the same time, however, other States indicate that they do not engage in such agreements.[115] Thus, it appears that nothing in international law precludes a State from entering into a contract with another willing State. A State's own legal system could, in theory, limit the capacity of the State to conclude inter-State contracts, but there are no examples of such limitations to date.

Any capacity constraints to inter-State contracting are more likely to come from either the choice or content of the contract's governing law. The choice of governing law may, as a practical matter, limit the frequency of such agreements since it requires at least one (if not both) contracting States to agree to a governing domestic law other than their own. Contracting capacity is, moreover, a function of the law of the contract. Domestic legal systems each have their own rules for who can form a contract and on which subjects. As such, whether a foreign State can conclude a contract governed by a State's domestic law depends on a legal analysis of the applicable law (whether the one selected by the parties, or, in appropriate circumstances, the governing law determined according to the application of conflict of law rules).

2.6 Inter-Institutional Contracting Capacity: A State Institution may conclude a contract with a willing foreign State institution when authorized to do so by its domestic law.

Commentary: The capacity of State institutions to conclude contracts with foreign State institutions appears less controversial than inter-State contracting. Many of the States that disclaim any role in inter-State contracting admit the capacity of their institutions to do so.[116] Unlike inter-State contracting, however, the capacity of State institutions to conclude inter-institutional contractual agreements is not solely a function of the choice and content of the contract's governing law. As creatures of a State's legal system, the contracting capacity of a State institution will be governed by that State's domestic law, whether or not it is the same as the contract's governing law. Colombia, for example, authorizes its "public legal entities or public bodies with the capacity to enter into contracts" to do so "subject to the authorities those entities are accorded under the Constitution and by law."[117]

Indeed, in some cases, States from the region appear to have constitutional or legislative mandates requiring the use of their own law as the governing law for certain public contracts, which would appear to include inter-institutional ones. Mexico's Constitution, for example, requires public tenders for certain types of behavior (e.g., procurement, leasing of assets, and public services) via "contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal)."[118] States like Peru and Ecuador have procurement laws that provide similar authorizations and conditions for contracts by State institutions.[119]

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[114] In responding to the OAS Questionnaire, Ecuador, Jamaica, Mexico and the United States, in contrast, all acknowledged the possibility of such agreements. See Hollis, *Second Report, supra* note 33, 15; *see also* [1966] YBILC, vol II, 189 [6].

[115] Hollis, *Second Report, supra* note 33, 15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay all indicated that they had no practice of concluding contracts governed by domestic law for binding agreements among States.).

[116] *See* Hollis, *Second Report, supra* note 33, 30 (Argentina, Colombia and Peru, who declined any practice of inter-state contracting, reported significant experience with inter-institutional contracting).

[117] Id. at 30.

[118] See Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (hereinafter "Mexico Response") (discussing Mexico Constitution 1917 (rev. 2015) Art. 134).

[119] Hollis. *Second Report, supra* note 33, 15, 30.

Thus, the domestic law of the State institution may direct its capacity to conclude contracts with foreign State institutions directly through authorizations or indirectly through governing law mandates. But inter-institutional agreements can still be concluded that select one State's governing law over another. Article 9 of the 1998 Agreement between the National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist, provides, for example, that "[t]he Parties hereby designate the United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement ..."[120] It is possible, moreover, that two State institutions could select a third State's domestic law to govern their contract (subject to the caveat that the third State's law permits such a selection).

3 METHODS OF IDENTIFICATION

3.1 Identifying the existence of an agreement: The existence of an agreement can be shown where all participants accept its existence or by considering the actual terms used and the surrounding circumstances from which those terms emerged.

Commentary: How can States and others determine whether any particular text comprises a treaty, a political commitment, or a contract? There are two steps involved. First, there must be a discernable agreement. Second, there needs to be some method(s) for differentiating within the category of agreements: which ones are treaties? which ones are political commitments? and which ones are contracts?

How can States and others complete the first step and identify the existence of an agreement? In some cases, the participants make it easy and jointly concede its existence. In the *Pulp Mills* case, for example, neither Argentina nor Uruguay disputed that their Presidents had reached an agreement expressed via a 31 May 2005 press release; their dispute revolved around whether the agreement was binding (i.e., governed by international law) or not.[121] Similarly, in the *Iron Rhine ("Ijzeren Rijn") Railway* arbitration, both Belgium and the Netherlands acknowledged that they had reached an agreement in a Memorandum of Understanding (MOU) *and* that the MOU was not a "binding instrument."[122]

In other cases, participants may not all accept the existence of an agreement. In the *Aegean Sea* case, Greece and Turkey disputed the existence of an agreement and, if so, whether it was legally binding. The ICJ emphasized looking in such cases at the written text to find agreement with "regard above all to *its actual terms and to the particular circumstances* in which it was drawn up."[123] That test provides a useful framework for identifying the conditions of any agreement – i.e., mutuality and commitment. In the *Aegean Sea* case, for example, the Court reviewed both prior communications and the language used in a Joint Communiqué between Greece and Turkey's Prime Ministers, concluding that the Communiqué did not constitute a "commitment" to submit the States' dispute to the Court.[124] The ICJ affirmed this approach in *Qatar v. Bahrain*, examining a set of "Agreed Minutes" signed by Qatar and Bahrain's Foreign Ministers and finding that they did constitute an agreement; they were "not a simple record of a meeting ... they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented."[125] The ICJ continued this approach in the *Case*

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[120] An excerpt of the contract, including Article 9, is reprinted in BARRY CARTER ET AL, INTERNATIONAL LAW 86-87 (7th ed., 2018).

[121] *See Pulp Mills, supra* note 47, at 132-33.

[122] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, (2005) 27 RIAA 35, 156.

[123] *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment, [1978] I.C.J. Rep. 3 (Dec. 19), 95 (emphasis added).

[124] *Id.* at 107.

[125] *Qatar v. Bahrain*, *supra* note 57, at 24.

Concerning Kasikili/Sedudu Island, reading the varying views contained in exchanges of notes and letters between South Africa and Bechuanaland with regard to a boundary location and finding that they "demonstrate the absence of agreement."[126]

For its part, the International Tribunal for the Law of the Sea (ITLOS) has suggested that otherwise "conditional" language in a shared text can preclude assigning it the status of an agreement.[127] International tribunals have also declined to identify an agreement where one side is non-responsive to an offer made by the other side. Thus, ITLOS refused to find Japan had, by its silence, agreed to a methodology for setting bonds that Russia presented in certain joint meetings and recorded subsequently in written Protocols between the two States.[128] Similarly, a PCA Tribunal declined to find that Jordan had reached an agreement to arbitrate when it failed to respond to two letters from an Italian Ambassador asserting that the two States had concluded an oral agreement to that effect.[129]

3.2 Identifying the type of agreement concluded: Where there is an international agreement, international law suggests two methods for identifying whether an agreement constitutes a treaty, a political commitment or a contract.

- First, the type of agreement concluded may be identified by a subjective or "intentional" analysis, where the participants' shared intentions determine if it is binding or not (and if it is binding, whether it is a treaty or a contract).
- Second, a more "objective" test examines the agreement's subject-matter, language and clauses to determine its status regardless of any evidence as to one or more of the author's intentions.

The two methods often lead to the same conclusion to the extent they both focus on the text, surrounding circumstances, and subsequent conduct. Nonetheless, there is a risk that they may generate different conclusions in certain cases. Thus, whichever method a State or State institution uses to classify its own agreements, it should do so sensitive to the fact that other participants (or third parties) may use the other method, creating a risk of inconsistent views on an agreement's status.

Commentary: Where there is an existing agreement, one way to determine if it is binding (or not) involves asking what its authors intended. The ILC ended up endorsing this methodology to determine which agreements would meet the treaty requirement of being "governed by international law."[130] The Vienna Conference delegates agreed.[131] Today, a majority of States,

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[126] *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, [1999] I.C.J. Rep. 1045 (Feb. 15), 63.

[127] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of Mar. 14, 2012) 2012 ITLOS Rep. 4, 92 ("The Tribunal considers that the terms of the 1974 Agreed Minutes confirm that these Minutes are a record of a conditional understanding reached during the course of negotiations, and not an agreement within the meaning of article 15 of the Convention. This is supported by the language of these Minutes, in particular, in light of the condition expressly contained therein that the delimitation of the territorial sea boundary was to be part of a comprehensive maritime boundary treaty.").

[128] *See "Hoshinmaru" (Japan v. Russian Federation)* (Prompt Release, Judgment) 2007 ITLOS Rep. 18 (Aug. 6), 85-87.

[129] *Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 Jan. 2006), 98.

[130] [1966] YBILC, vol, II, 189 [6] ("The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase 'governed by international law', and it decided not to make any mention of the element of intention in the definition"). Before reaching this conclusion, the ILC oscillated between subjective and objective approaches. Brierly proposed an objective look for agreements establishing "a relationship under international law" while his successor, Hersch Lauterpacht defined treaties as agreements "intended to create legal rights and obligations." *Compare* Brierly, *First Report, supra* note 24, at 223 with

scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties.[132] This includes a number of OAS Member States.[133] Under this view, if the parties intend an agreement to be a treaty, it is a treaty.

The ICJ has, however, signaled a more objective approach to identifying when an agreement is a treaty (i.e., governed by international law). In *Qatar v. Bahrain*, the ICJ found that the parties *had* concluded a legally binding agreement accepting ICJ jurisdiction in the form of Agreed Minutes, notwithstanding protestations by Bahrain's Foreign Minister that he had not intended to do so.[134] The Court viewed the Agreed Minutes as a treaty based on the "terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention."[135] Some suggest the Court might simply have been emphasizing the intention expressed in the Agreed Minutes over later, self-serving claims of intention issued in anticipation of litigation.[136] For others, however, the Court's approach suggests that objective criteria – *e.g*., the language and types of clauses included in the instrument, and perhaps even its very subject-matter – may dictate whether it is a treaty or not.[137] The Court's more recent cases – e.g., *Pulp Mills* and

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Lauterpacht, *First Report, supra* note 24, at 93. The ILC's Third Rapporteur, Sir Gerald Fitzmaurice tried to combine the two approaches, defining a treaty as an agreement "intended to create legal rights and obligations, to establish relationships, governed by international law." [1959] YBILC, vol II, 96. He later fell back on just using the governed by international law formula as a stand in for a subjective test. *See* Fitzmaurice, *First Report, supra* note 24, 117.

[131] U.N. Conference on the Law of Treaties, Summary Records of Second Session, A/CONF.39/11, Add.1, 225 [13] ['Vienna Conference, Second Session'] (Drafting Committee "considered the expression 'agreement ... governed by international law' ... covered the element of intention to create obligations and rights in international law").

[132] *South China Sea Arbitration*, *supra* note 56, at 213 ("To constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties"); *France v. Commission*, C-233/02 (E.C.J., Mar. 23, 2004) ("the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding"); AUST, *supra* note 34, at 20-21 ("It is the negotiating states which decide whether they will conclude a treaty, or something else"); KLABBERS, *supra* note 26, at 68 ("Notwithstanding its awkwardness, there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations"); Widdows, *supra* note 28, at 120-39.

[133] *See* Hollis, *Second Report, supra* note 33, 16 (Five Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked "intent" as the deciding criterion for identifying a treaty); *see also* Brazil Response, *supra* note 96 (relies "on the intention of the parties"); Colombia Response, *supra* note 96 (looks for "an expression of or an agreement/arrangement on the intent of the States to enter into legally binding obligations"); Mexico Response, *supra* note 118 ("'Non-binding' instruments, use words emphasizing the intent of the participants involved"); Peru Response, *supra* note 77 (describing efforts to ensure the agreement records "the common intent of the parties"); U.S. Response, *supra* note 83 (United States works to "ensure that the text of written instruments it concludes with other states accurately reflects the intentions of the states involved with respect to the legal character of the instrument and the law, if any, that governs it").

[134] *Qatar v. Bahrain*, *supra* note 57, at 27.

[135] *Id.* ("The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister is not in a position to say that he intended to subscribe only to a 'statement recording a political understanding', and not to an international agreement"); see also *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* Judgment, [1995] I.C.J. Rep. 6 (Feb. 15).

[136] AUST, *supra* note 34, at 51-52; *Accord* Widdows, *supra* note 28, at 94 (in determining an agreement's status, "the views of one party at the time of conclusion of the instrument will be of some assistance, subject to all other considerations being equal, but one party's statements made at a later stage should be disregarded . . . as self-serving").

[137] *See* Christine Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States*, 10 LEIDEN J. INT'L L. 223, 236-37 (1997); KLABBERS, *supra* note 26, at 212-216

Maritime Delimitation in the Indian Ocean – have reinforced this objective approach.[138] A number of OAS Member States have likewise emphasized the structure and language used in a text as more determinative of its legal (or non-legal) status.[139]

The purposes of these *Guidelines* is not to pronounce one of these methods superior to the other, let alone resolve which one more accurately reflects international law. Rather, they offer advice to States and others on how to create and differentiate among international agreements in a world where different methods may be employed to do so. To that end, it is extremely useful to note that, in many respects, the intentional and objective methods overlap in the evidence they use:

(a) the text;
(b) the surrounding circumstances; and
(c) subsequent conduct.

For example, those adhering to the intent test regularly regard the structure and language of the agreed text as the best manifestation of the authors' intentions.[140] That same structure and language forms the crux of the objective test.

Nonetheless, there are cases where the two approaches may produce divergent results; *i.e.*, where external manifestations of consent differ from those manifested in the language of the document. In the *South China Sea Arbitration*, for example, the agreement contained language – such as "undertake" and "agree" – that in other contexts is taken as objective evidence of a treaty.[141] Nonetheless, the Tribunal discounted such language given the context in which it was used and the parties' characterization of the instrument as a "political document."[142] That Tribunal was, however, clearly engaged in a search for the parties' intentions. Tracking the objective approach of *Qatar v. Bahrain* or *Pulp Mills* might have produced a different result; *i.e.*, holding the language used in the agreement itself is sufficiently determinative to forgo any need to consult the *travaux preparatoires* or other statements by States of their intentions.[143]

Thus, for some Member States, structure and terminology are determinative of treaty status, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for party intentions. This creates a risk that different participants will categorize their agreement differently (or that third parties such as international courts or tribunals might do so). Such disagreements can have important international and domestic law consequences. Whether an agreement is binding under international law or not, for example, determines whether counter-

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[138] *See, e.g., Pulp Mills*, *supra* note 47, at 128, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, 2017 ICJ Rep. ___ (Feb. 2), 42.

[139] *See, e.g.,* Jamaica Response, *supra* note 82 ("The language used in an agreement characterizes the type of agreement"); Uruguay Response, *supra* note 80. The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty's status as such. Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements,* 29 Nov. 2017 (hereinafter "Dominican Republic Response").

[140] *See, e.g.,* Brazil Response, *supra* note 96 ("language used in an instrument is key"); Colombia Response, *supra* note 96 ("treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties"); Mexico Response, *supra* note 118 (noting verbs and words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 77 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); Uruguay Response, *supra* note 80; U.S. Response, *supra* note 83.

[141] *South China Sea Arbitration*, *supra* note 56, at 216.

[142] *Id.* 217-218. The Tribunal undertook a similar analysis of several bilateral joint statements, finding that they were non-binding despite containing language like "agree." *Id.* at 231, 242.

[143] *See Qatar v. Bahrain*, *supra* note 57, at 27 ("The Court does not consider it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar.").

measures are an available option in cases of breach.[144] Domestic laws can also require certain agreements to take a treaty form, creating difficulties when other participants do not regard them as such.[145] Conversely, some States need an agreement to be non-binding because they do not (or cannot) get the requisite domestic approvals that would be required if the agreement were a treaty.

These potential difficulties counsel States, whatever their view on the appropriate method for identifying international agreements, to be sensitive to the possibility that others may not share their view. As such, whenever possible, States and State institutions should take measures to reduce the risk of inconsistent views on the type of agreement reached. This may best be done expressly whether in the agreement text or communications related to its conclusion.

3.3 Specifying the Type of Agreement Concluded: To avoid inconsistent views on the binding character of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion.

Commentary: One way to mitigate the risk of disputes over the type of agreement reached lies in the participants' control – they can specify a shared understanding of its status. States can—and probably should—in the course of negotiations confirm if there's any doubt with other participants on the type of agreement envisioned. A record that the parties understood themselves to be forming a treaty, for example, can reduce the risk that its status as such will come into later dispute.

States and State institutions can, moreover, employ text in the agreement itself to specify its status. Treaty texts rarely do so, but States and State institutions regularly use language to specify their shared view that an agreement is non-binding. In some cases the title alone may be sufficient specification as in the appropriately titled, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*.[146] Or, the specification may come via a clause that rejects the treaty label. In 2010, for example, the Republic of Moldova and the U.S. State of North Carolina concluded a "Memorandum of Principles and Procedures" on their mutual relations, which clarified in paragraph A that "This Memorandum does not create any obligations that constitute a legally binding agreement under international law."[147] In other cases, participants specify the political character of their commitments.[148] Most famously, the Helsinki Accords specified the agreement as a political commitment by describing it as not "eligible for registration" under Article 102 of the U.N. Charter.[149] States in the region may wish to adopt such practices to make clear when they understand their agreements to be non-binding.

At the same time, it is important to recognize that the agreements' authors may not always have complete control over what type of agreement they conclude. If the participants lack a treaty-

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[144] See ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts" in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), UN Doc A/56/10 55 [3], Art. 22 ['ASR'].

[145] *See supra* note 59 (discussing disagreement between the United States and its allies on the binding status of certain MOUs).

[146] 31 ILM 882 (1992) (emphasis added).

[147] **Memorandum of Principles and Procedures between the Republic of Moldova and the State of North Carolina (USA) concerning their Desire to Strengthen their Good Relations (2010), excerpted in THE OXFORD GUIDE TO TREATIES 656 (D. Hollis, ed., 2012).**

[148] *See, e.g., Political Declaration*, International Carbon Action Partnership (2007), available at http://www.icapcarbonaction.com/index.php?option=com_content&view=article&id=12&Itemid=4; Founding Act on Mutual Relations, Cooperation and Security, (NATO-Russia), 36 ILM 1006, ¶1 (1996) (describing the agreement as an enduring political commitment undertaken at the highest political level").

[149] Final Act of the Conference on Security and Co-operation in Europe (The Helsinki Final Act) (1975) 14 ILM 1293.

making capacity, for example, they cannot create a treaty even if they included a clause claiming their agreement qualifies as such. And whatever specifications are employed, international law may disavow the treaty status of an agreement that results from coercion or violates *jus cogens*.[150] Similarly, even if States or State institutions adopt the contract label for their agreement, the governing law of that contract will have the last say on whether they may do so. Finally, although never litigated, there remain open questions about whether certain subjects require the treaty form, the parties' views notwithstanding.[151]

3.4 Evidence Indicative of a Treaty: Where agreement participants do not specify or otherwise agree on its status, certain evidence may indicate the existence of a treaty, including:

(a) The actual language employed, such as:

(i) the use of verbs of commitment like "shall," "must," "agree," or "undertake";
(ii) a description of the agreement's authors as "parties";
(iii) a title like "Treaty" or "Agreement";
(iv) a reference to the agreement's terms as "articles," "obligations," or "undertakings"; or
(v) adjectives that reference the agreement's terms as "binding," "authentic," or "authoritative";

(b) the inclusion of clauses such as those dealing with:

(i) consent to be bound;
(ii) entry into force;
(iii) depositaries;
(iv) amendment;
(v) termination; or
(vi) compulsory dispute settlement;

(c) He circumstances surrounding the agreement's conclusion; and

(d) he subsequent conduct of agreement participants.

Commentary: Differentiating among treaties, political commitments, and contracts involves a holistic examination of the language used, the presence or absence of specific clauses, the circumstances surrounding the agreement's conclusion, and the subsequent practice of participants. Regardless of the method used, all such evidence is relevant to the identification of treaties.

Language. In practice, States and scholars have identified certain formulas to identify an agreement as a treaty. In the English language, for example, the use of the verb "shall" strongly suggests the commitment is a binding one. Several Member States have confirmed such usage along with verbs like "must" and "agree" and terms like "party" to describe agreement participants.[152] The *Guidelines* thus offer a non-exhaustive list of the sort of language often used in treaties.

It is important to emphasize, however, that there are no "magic words" that guarantee an agreement treaty status. For starters, there is the divide between the intentional and objective methods discussed in Guideline 3.3 above. Those who favor the intentional approach emphasize a holistic approach, where all manifestations of party intention must be considered rather than allowing one word or phrase alone to dictate the result. But even those who ascribe to an objective analysis should be reluctant to treat any single verb or noun as outcome-determinative. Clever drafters can turn otherwise imperative language into precatory form. It matters for example,

[150] *See, e.g.,* VCLT, art. 52 (coercion), and art. 53 (*jus cogens*).
[151] Roberto Ago, for example, famously suggested that commitments on certain subjects (e.g., territorial boundaries) must be treaties whatever the parties' intentions. [1962] YBILC, vol I, 52, 19.
[152] Hollis, *Second Report, supra* note 33, at 18.

whether a verb like "agree" stands alone or is prefaced by language such as "intend to agree" or "hope to agree." Thus, the language used is an important indicator of the agreement's status, but readers should be careful not to rely on any one single piece of evidence to reach their conclusion.

Clauses. Similarly, certain clauses are often standard in treaty texts and thus their presence may be indicative that an agreement qualifies as a treaty. Treaties often contain elaborate provisions on consenting to be bound via options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval. When treaties are concluded as an exchange of notes, State practice has devised a common formula both sides use to signal their consent to be legally bound. A paradigmatic example is found in an Exchange of Notes between the United Kingdom and Uruguay. The United Kingdom concluded its proposal by saying:

> If the Government of Uruguay accepts this proposal, I have the honour to propose that this Note and your reply in the affirmative shall constitute an Agreement between our two governments ...

And Uruguay's reply note indicated:

> With regard to the above, I wish to inform Your Excellency of the consent of the government of the Oriental Republic of Uruguay to the arrangements as set out, and therefore this Note and Your Excellency's Note shall constitute an Agreement between our two Governments which will come into force today.[153]

Other "final" clauses are regularly used in treaties and the *Guidelines* offer an illustrative list of those whose existence may be indicative of a treaty. For example, the use of a clause on "entry into force" is a well-recognized marker of a treaty. In the *Maritime Delimitation in the Indian Ocean* case, the ICJ found that "the inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character."[154] And treaties also regularly incorporate notice requirements for termination or withdrawal (for example, requiring six or twelve months advance written notice).

None of these clauses are, however, essential to treaty status. The VCLT, for example, acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.[155] At the same time, like the form of language used, the presence of any of these clauses is, at most, indicative of a treaty; no single clause can guarantee an agreement of that status. Countervailing evidence, whether in the agreement or outside of it, may point to the existence of a political commitment rather than to a treaty. For example, the Conference on Security and Cooperation in Europe (now the OSCE) produced a "Document on Confidence and Security Building Measures in Europe" in 1986 that provided that it would "come into force on 1 January 1987" – the sort of entry into force clause usually associated with a treaty. This clause should not, however, be determinative where the same sentence also clarified that the "measures adopted in this document are politically binding."[156]

Surrounding Circumstances. The search for a treaty is not limited to its text. Both the intentional and objective tests view similar external evidence – namely the surrounding circumstances and the participants' subsequent conduct – in identifying treaties. Under the intentional test, the search for intention is a holistic one and thus includes the *travaux preparatoires* that precedes the agreement as well as any of the participants' subsequent conduct relevant to identifying the nature of the agreement. In the *Bay of Bengal* case, for example, the ITLOS

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[153] AUST, *supra* note 34, at 425, 427; *see also* HOLLIS, THE OXFORD GUIDE TO TREATIES, *supra* note 30, at 678-79; HANS BLIX AND JIRINIA H. EMERSON, THE TREATY-MAKER'S HANDBOOK 80 (1973).

[154] *Maritime Delimitation in the Indian Ocean*, *supra* note [138], at 42.

[155] *See* VCLT, Art. 56.

[156] CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe (1986) [1987] 26 ILM 190, 101.

Tribunal emphasized that "the circumstances" in which the Agreed Minutes were adopted "do not suggest that they were intended to create legal obligations" where one of the participants, Myanmar, had made clear early on of its intention to only agree to a comprehensive agreement rather than a separate agreement like that alleged to be found in the Agreed Minutes.[157]

At the same time, the objective test may prioritize text, but it does not exclude analysis of external evidence, such as in cases where the actual text is ambiguous or contradictory. Thus, the ICJ's more objective analysis in *Qatar v. Bahrain* was expressly contingent on considering the circumstances surrounding an agreement's conclusion.[158]

Subsequent Conduct. In addition to the surrounding circumstances, both intentional and objective methods may also invoke the parties' subsequent conduct. For example, in searching for the parties' intentions, the *South China Seas* Tribunal concluded that an agreement was not intended to be a treaty given China's repeated use of the term "political document" to describe it after its conclusion.[159] The failure to submit an agreement to the domestic procedures required for treaties may also signal the parties' intentions to conclude a political commitment.[160] That kind of behavior may, however, also be cast in a more objective light. Thus, the ICJ has found the parties' subsequent behavior – e.g., making technical corrections to an agreement – as indicative of a binding commitment.[161]

What about the fact that a participant registered an agreement with the United Nations pursuant to Article 102 of the U.N. Charter? As noted above, registration is not a requirement for treaties. In *Qatar v. Bahrain,* the ICJ emphasized that the failure to register the Agreed Minutes could not deprive what it otherwise viewed as a legally binding agreement of that status.[162] On the other hand, in the *Maritime Delimitation in the Indian Ocean* case, the ICJ emphasized that Kenya had intended the MOU in question to be a treaty, having requested its registration at the United Nations, and that Somalia did not object to that request for almost five years.[163] In other words, even if not determinative, registration (or non-registration) may still be somewhat indicative of an agreement's binding or non-binding character.

3.5 <u>Evidence indicative of a political commitment</u>: Where agreement participants do not specify or otherwise agree on its status, certain evidence may indicate the existence of a non-binding, political commitment, including:

(a) The actual language employed, such as:

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[157] *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 127, at 93; *Accord Aegean Sea* case, *supra* note 123, at 107. Similarly, in the *South China Seas Arbitration,* the Tribunal emphasized how China had repeatedly labeled the agreement at issue as a "political document" in the run-up to its conclusion. *South China Sea Arbitration*, *supra* note 56, at 216.

[158] *Qatar v. Bahrain*, *supra* note 57, at 23 (In order to ascertain whether an agreement of that kind has been concluded, "the Court must have regard above al1 to its actual terms and to the particular circumstances in which it was drawn up").

[159] *South China Sea Arbitration*, *supra* note 56, at 218.

[160] *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 127, at 97 ("[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding.") .

[161] *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra* note 88, at 253 (concluding that the Maroua Declaration was legally binding where it was published (without any condition suggesting a need for further ratification); subsequent letters were exchanged making technical corrections to its contents; and the boundary line it contained was notified to the relevant U.N. Secretariat).

[162] *Qatar v. Bahrain*, *supra* note 57, 28-29.

[163] *Maritime Delimitation in the Indian Ocean*, *supra* note [138], at 19.

(i) the use of precatory or descriptive verbs like "should," "seek," "promote," "intend," "expect," "carry out," "understand," or "accept";
(ii) a description of the agreement's authors as "participants";
(iii) a title like "understanding," "arrangement," or "declaration";
(iv) a reference to the agreement's terms as "commitments," "expectations," "best efforts," "principles" or "paragraphs";
(v) adjectives that reference the agreement's terms as "political," "voluntary," "effective" or "equally valid";

(b) the inclusion of clauses such as those dealing with

(i) signature;
(ii) coming into effect or coming into operation;
(iii) differences; or
(iv) modifications;

(c) the circumstances surrounding the agreement's conclusion; and

(d) the subsequent conduct of agreement participants.

Commentary: Just as certain language and clauses may indicate a treaty, the same is true for identifying political commitments. State practice has developed a set of linguistic markers to delineate an agreement as non-binding. In contrast to language of commitment like "shall," political commitments often contain the more precatory "should." Other words and clauses are often employed to signal non-binding intent. For example, instead of treaty "parties," political commitments often refer to "participants"; instead of "articles," a political commitment is more likely to reference paragraphs; instead of describing "obligations" that are "binding," political commitments may reference "principles" that are "voluntary."

Similar juxtapositions may be found in the types of clauses used. Treaties often precede the parties' signatures with standard phrasing (i.e., "Done at [place], this [date]…"). Political commitments may not be signed (the text may simply be released to the press or otherwise published), and when they are, they usually forgo the more formal signature language employed in the treaty context. Similarly, treaties may have clauses on amendments or termination, while a political commitment will (if it addresses the issue at all) sometimes use the term "modifications."

Here again, however, it is important to caution that these markers are just indicative of a political commitment; they cannot guarantee such a status. Indeed, not all States employ the same linguistic markers, titles or clauses to differentiate a treaty from a political commitment. Thus, the identification of a political commitment rests on a more holistic analysis (whether based on a subjective or objective approach) of the nature of the agreement reached. That analysis should include attention to the context surrounding the agreement's conclusion and the subsequent conduct of the participants.[164]

3.6 <u>Evidence indicative of a contract</u>: Where agreement participants do not specify or otherwise agree on its status, certain language may indicate the existence of a contract, most notably a governing law clause.

<u>Commentary</u>: In differentiating among agreements, the possibility of a contract only emerges after two previous questions are answered affirmatively. First, is there an agreement? Second, is the agreement binding or not? Where there is a binding agreement, the question then arises whether it constitutes a treaty or a contract? The capacity of the participants may assist in this inquiry as certain participants may not be authorized to make treaties (or, for that matter, contracts).

[164] For a discussion of how the context surrounding an agreement and the participants' subsequent conduct may indicate whether it is a treaty or a political commitment, see the Commentary for Guideline 3.4 above.

As with the identification of treaties and political commitments, moreover, the language used in the agreement may be indicative of its contractual status. Contracts, for example, may be titled as such. Or, as indicated above, they may specify a governing law other than international law (thereby excluding the treaty option).[165] Care should be taken, however, not to conclude that any agreement that references a State's laws or legal system is a contract. States may condition their treaty obligations, for example, to only extend so far as domestic law allows (or to disavow as obligatory behavior that would violate such law). In such cases, the domestic law reference serves to limit the scope of the obligation governed by international law rather than to re-define what law governs the agreement.

3.7 <u>Ambiguous or inconsistent evidence of an agreement's status</u>: Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions.

<u>Commentary:</u> In some cases, the evidence relating to the type of agreement concluded can be ambiguous. Consider, for example, the title "Memorandum of Understanding." For certain States this title is indicative of a political commitment, rather than a treaty. But other States have not found this title preclusive of treaty status. Similar ambiguity surrounds the verb "will" in English. Among some States, particularly those associated with the British Commonwealth, the verb "will" is regarded as aspirational rather than mandatory. Hence, those States regularly use "will" to signal a non-binding intent. For other States, however, "will" is synonymous with "shall" and can be read as conveying a binding commitment. Thus, States and State institutions should exercise caution in their assumptions that such language will be indicative of an agreement's status.

What happens when a text is clearly binding but silent as to its status as a treaty or a contract? Where the participants are subjects of international law, binding agreements are most often presumed to constitute treaties.[166] Thus, binding inter-State agreements are more likely to qualify as treaties absent evidence indicative of a contract (e.g., a governing law clause). Where the participant is a State institution, however, this presumption may not hold, requiring careful analysis of not just the agreed text, but also the surrounding context and the parties' subsequent conduct. There are, moreover, some academic suggestions that the two categories of binding agreement need not be mutually exclusive, i.e., that some agreements could take a "hybrid" form where certain terms are governed by international law, while others are governed by national law.[167] As yet, however, there is insufficient State practice to support this as a new agreement form.

Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding because a political commitment cannot, by definition, be binding in any part. State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—that (famously) uses the verb "should" to define the parties' central obligation on emission reduction targets, while using the verb "shall" in other

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[165] *See, e.g., supra* note 120 (governing law clause of 1998 NASA-AEB Agreement designated "United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement .. .").

[166] Professor Jan Klabbers devoted an entire book to establishing this presumption. *See* KLABBERS, *supra* note 26. For others favoring it, see Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L & COMP. L. Q 787, 798 (1986); Widdows, *supra* note [28], at 142; Hersh Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, vol II, 125. These views have come to supplant earlier suggestions that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). *See* Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 297 (1977); JES Fawcett, The Legal Character of International Agreements, 30 BRIT. YBK INT'L L. 381, 400 (1953).

[167] *See* Paul Reuter, *Third report on the question of treaties concluded between States and international organizations or between two or more international organizations*, [1974] YBILC, vol. II (1), 139.

provisions on future meetings and reporting.[168] In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any application of the intent test, since it requires evaluating the parties' intentions on a provision-by-provision basis.

In other cases, evidence may not be ambiguous but contradictory. In such cases, the participants (or a third party) will need to carefully weigh all the evidence, whether in the text, the surrounding circumstances or subsequent conduct. If possible, in such cases, it would be good to determine whether the results of an intentional and objective approach reach the same conclusion. Where they do not, the participants may wish to pursue dispute settlement mechanisms, including the possibilities of (a) clarifying or otherwise reaching an understanding on the agreement's status, (b) terminating the agreement or (c) replacing it with a more clearly delineated agreement.

[168] *Compare* U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, FCCC/CP/2015/L.9, Dec. 12, 2015 art. 4.4 *with* arts. 4.9 & 4.12. The Paris Agreement's intended treaty status is also evident in the presence of clauses on consent, entry into force, and withdrawal/termination.