

# ORGANIZATION OF AMERICAN STATES

## INTER-AMERICAN JURIDICAL COMMITTEE

CJI



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95<sup>th</sup> REGULAR SESSION  
July 31 – August 9 2019  
Rio de Janeiro, Brazil

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# ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

## 2019

General Secretariat  
Organization of American States  
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**EXPLANATORY NOTE**

Until 1990, the OAS General Secretariat published the “Final Acts” and “Annual Reports of the Inter-American Juridical Committee” under the series classified as “Reports and Recommendations”. In 1997, the Department of International Law of the Secretariat for Legal Affairs began to publish those documents under the title “Annual Report of the Inter-American Juridical Committee to the General Assembly.”

According to the “Classification Manual for the OAS official records series”, the Inter-American Juridical Committee is assigned the classification code OEA/Ser. Q, followed by CJI, to signify documents issued by this body (see attached lists of resolutions and documents).

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## **INTRODUCTION**



The Inter-American Juridical Committee is honored to submit to the General Assembly of the Organization of American States its Annual Report on the activities carried out during the year 2019, in accordance with the terms of Article 91.f of the Charter of the Organization of American States and Article 13 of its Statutes, and with the instructions contained in General Assembly Resolutions dealing with the preparation of annual reports by the organs, agencies, and entities of the Organization, such as resolutions AG/RES. 2873 (XLV-O/15), AG/RES. 2886 (XLVI-O/16), AG/RES. 2909 (XLVII-O/17), AG/RES. AG/RES. 2926 (XLVIII-O/18) and AG/RES. 2930 (XLIX-O/19), all of which were approved over the past years.

In 2019, the Inter-American Juridical Committee held two working meetings at its headquarters in Rio de Janeiro, Brazil. The first meeting, its 94<sup>th</sup> Regular Session, took place between February 18-22, while the second meeting, its 95<sup>th</sup> Regular Session, took place between July 31 and August 9.

In the period covered by this report, the committee adopted a "guide to the law applicable to international commercial contracts in the americas", which aims to promote substantive aspects in this area and, to that end, proposes recommendations to a wide range of actors at the domestic level, including lawmakers, judicial organs, and contracting parties. The instrument encourages economic integration, growth, and development in the hemisphere, as well as contributing to the harmonization of internal legal regimes in the region's countries (where disparities in contractual matters are visible).

In addition, the committee advanced its discussion of the topics on its agenda, such as "validity of foreign judicial decisions"; "electronic warehouse receipts for agricultural products"; "binding and non-binding agreements"; "access to public information"; "cyber-security"; "conventionality control"; and "protection of personal data."

It added five new items to its agenda, one of which responds to a mandate from the general assembly: "model law on the use of fireworks, whether for personal use or in large-scale firework displays." Four other topics were included on the committee's initiative: "guidelines for the further development of regulations on diplomatic asylum"; "electoral fraud as an international crime in the inter-american system"; "particular customary international law in the context of the americas"; and, "legal aspects of foreign debt." Finally, it should be noted that the item "dissolution and winding up of simplified corporations" was removed from the agenda.

At the end of its August 2019 session, the Committee agenda comprised thirteen items.

This Annual Report contains mostly the work done on the studies associated with the aforementioned topics and is divided into three chapters. The first chapter explains the origins, legal basis and the structure of the Inter-American Juridical Committee and provides an account of the meetings, which took place over the year. The second chapter describes the topics fleshed out by the Juridical Committee and includes the texts of the approved resolutions and specific documents. Lastly, the third chapter recounts the activities carried out by the Committee and its members over the past year. As is customary, a detailed list of the approved resolutions and documents are attached to the Report as an annex.

The Annual Report of 2019 has been approved as drafted by Dr. Ruth Stella Correa Palacio in her capacity as Chair of the Inter-American Juridical Committee.

All this information may be accessed at the webpage of the Inter-American Juridical at:

[http://www.oas.org/en/sla/iajc/inter-american\\_juridical\\_committee.asp](http://www.oas.org/en/sla/iajc/inter-american_juridical_committee.asp)



## **CHAPTER I**



## 1. The Inter-American Legal Committee: its origin, legal bases, structure and purposes

The forerunner of the Inter-American Juridical Committee was the International Board of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although the most important was in 1927. There, it approved twelve draft conventions on public international law and the Bustamante Code in the field of private international law.

Then in 1933, the Seventh International Conference of American States, held in Montevideo, created the National Commissions on Codification of International Law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C. in April 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held in Panama, September 26 through October 3, 1939, established the Inter-American Neutrality Committee, which was active for more than two years. Then in 1942, the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, adopted Resolution XXVI, wherein it transformed the Inter-American Neutrality Committee into the Inter-American Juridical Committee. It was decided that the seat of the Committee would be in Rio de Janeiro.

In 1948, the Ninth International Conference of American States, convened in Bogotá, adopted the Charter of the Organization of American States, which *inter alia* created the Inter-American Council of Jurists, with one representative for each Member State, with advisory functions, and the mission to promote legal matters within the OAS. Its permanent committee would be the Inter-American Juridical Committee, consisting of nine jurists from the Member States. It enjoyed widespread technical autonomy to undertake the studies and preparatory work that certain organs of the Organization entrusted to it.

Almost 20 years later, in 1967, the Third Special Inter-American Conference convened in Buenos Aires, Argentina, adopted the Protocol of Amendments to the Charter of the Organization of American States or Protocol of Buenos Aires, which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. Accordingly, the Committee was promoted as one of the principal organs of the OAS.

Under Article 99 of the Charter, the purpose of the Inter-American Juridical Committee is as follows:

... to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Under Article 100 of the Charter, the Inter-American Juridical Committee is to:

... undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Although the seat of the Inter-American Juridical Committee is in Rio de Janeiro, it may meet elsewhere after consulting the Member State concerned. This advisory body of the Organization on legal affairs consists of eleven jurists who are nationals of the Member States of the Organization. Together, those jurists represent all the States and enjoy as much technical autonomy as possible.

## 2. Period covered by the Annual Report of the Inter-American Juridical Committee

### A. Ninety-fourth regular session

The 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee took place February 18-22, 2019 at the Committee headquarters in Rio de Janeiro, Brazil.

The Members of the Inter-American Juridical Committee present for that Regular Session were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the "Rules of Procedure of the Inter-American Juridical Committee":

- Mariana Salazar Albornoz (Mexico)
- Luis García-Corrochano Moyano (Peru)
- José Antonio Moreno Rodríguez (Paraguay)
- George Rodrigo Bandeira Galindo (Brazil)
- Ruth Stella Correa Palacio (Colombia)
- Carlos Alberto Mata Prates (Uruguay)
- Milenko Bertrand-Galindo Arriagada (Chile)
- Miguel Angel Espeche-Gil (Argentina)
- Iñigo Salvador Crespo (Ecuador)

The following members did not attend the meeting: Alix Richard and Duncan B. Hollis. It must be noted that the latter made a presentation via video conference on the issues under his Rapporteurships.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law and Luis Toro Utillano, Senior Legal Officer at the Department of International Law; and Maria Lúcia Jecker Vieira as well as Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 245 (XCIII-O/18), "Agenda for the ninety-fourth regular session of the Inter-American Juridical Committee":

#### **CJI/RES. 245 (XCIII-O/18)**

#### **AGENDA FOR THE NINETY-FOURTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(Rio de Janeiro, Brazil, February 18 to 22, 2019)

#### **Current topics:**

1. Law applicable to international contracts  
Rapporteur: Dr. José Antonio Moreno Rodríguez
2. Guide for the application of the principle of conventionality  
Rapporteur: Dr. Ruth Stella Correa Palacio

3. Binding and non-binding agreements  
Rapporteur: Dr. Duncan B. Hollis
4. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards  
Rapporteur: Dr. Ruth Stella Correa Palacio
5. Protection of personal data  
Rapporteur: Dr. Carlos Mata Prates
6. Access to public information  
Rapporteur: Dr. Luis García-Corrochano
7. Electronic warehouse receipts  
Rapporteur: Dr. José Antonio Moreno Rodríguez
8. Cyber-security  
Rapporteur: Dr. Duncan B. Hollis
9. Foreign interference in a state's electoral process: a threat to democracy and sovereignty of states, response under international law  
Rapporteur: Dr. Alix Richard
10. Dissolution and liquidation of simplified corporations  
Dr. Ruth Stella Correa Palacio

This resolution was unanimously approved at the session held on 14 August, 2018, by the following members: Doctors José Antonio Moreno Rodríguez, Íñigo Salvador Crespo, Miguel A. Espeche Gil, João Clemente Baena Soares, Carlos Alberto Mata Prates, Alix Richard, Duncan B. Hollis and Ruth Stella Correa Palacio.

It must be noted that the decision of the “Date and venue of the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee” was made on August 10, 2018, under resolution CJI/RES. 242 (XCIII-O/18).

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**CJI/RES. 242 (XCIII-O/18)**

**DATE AND VENUE OF THE  
NINETY-FORTH REGULAR SESSION OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 94<sup>rd</sup> Regular Session from 18 until 22 February, 2019 in the city of Rio de Janeiro.

This resolution was approved unanimously at the meeting held on August 10, 2018, by the following members: Drs. José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano,

Miguel A. Espeche Gil, João Clemente Baena Soares, Carlos Alberto Mata Prates, Joel Antonio Hernández García, Alix Richard, Duncan B. Hollis, Ruth Stella Correa Palacio and Hernán Salinas Burgos.

Concluding its work the Juridical Committee adopted the resolution to pay homage to Dr. Hernán Salinas Burgos, who resigned from the Committee on August 27, 2018, due to his appointment as Permanent Representative of Chile to the OAS. The resolution underline highlighting the contributions of Dr. Salinas to the democracy in the inter-American system.

\* \* \*

**CJI/RES. 248 (XCIV-O/19)**

**HOMAGE TO DOCTOR HERNÁN SALINAS BURGOS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the resignation of Dr. Hernán Salinas Burgos on August 27, 2018, as a member of this organ in view of his appointment as Permanent Representative of the Chilean Mission to the OAS;

RECALLING, in addition, that Dr. Salinas Burgos served as president of this organ between October 2016 and August 2018, and as such he represented the Committee in various international forums;

AWARE of the valuable contribution lent to the work of the Committee by Dr. Salinas Burgos in the course of his mandates, and that his reports provided an inestimable service to the development and codification of International Law and the Inter-American System, especially as regards his report on "Democracy in the Inter-American System";

HIGHLIGHTING the various qualities and professionalism of Dr. Salinas Burgos, among which his juridical and academic culture, together with his cordiality, all of which distinguish him among the members of the Committee,

RESOLVES:

1. To express its gratitude to Dr. Hernán Salinas Burgos for the work carried out as a member and President of the Inter-American Juridical Committee.
2. To wish him continued success in his future undertakings, in the hope that he maintains his relationship with the Inter-American Juridical Committee.
3. To transmit this resolution to Dr. Hernán Salinas Burgos and the other organs of the Organization.

This resolution was unanimously approved at the regular session held on February 21, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, George Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil and Íñigo Salvador Crespo.

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At its February session, the CJI unanimously adopted a "Declaration on the Situation in the Bolivarian Republic of Venezuela", document CJI/DEC. 01 (XCIV-O/19), by which it states that the humanitarian aid sent to the Bolivarian Republic of Venezuela does not violate "the principle of nonintervention in the domestic affairs of states" and further determines that the crisis in that country "constitutes a serious alteration of the democratic order that should be resolved as soon as possible."

**CJI/DEC. 01 (XCIV-O/19)****DECLARATION ON THE SITUATION  
IN THE BOLIVARIAN REPUBLIC OF VENEZUELA**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING with great concern the current grave situation in the Bolivarian Republic of Venezuela;

TAKING INTO CONSIDERATION that the Committee has been a promoter of the strengthening of the “effective exercise of representative democracy”, pursuant to the provisions contained in the Charter of the Organization of American States and in the Inter-American Democratic Charter; and,

BEARING IN MIND THAT since the year 1945, the Committee, which is known as the “juridical conscience of the Continent”, has produced several reports on various aspects of democracy in America, and that since 2001 it has adopted numerous resolutions on the follow-up of the application of the Inter-American Democratic Charter.

DECLARES:

1. That the current crisis in the Bolivarian Republic of Venezuela constitutes a grave alteration of the democratic order, that must be resolved as soon as possible, pursuant to the provisions contained in Article 3 of the Inter-American Democratic Charter, by means of free and fair elections, based on universal suffrage and secret balloting as an expression of the sovereignty of the Venezuelan people.

2. That the necessary humanitarian aid sent to the Bolivarian Republic of Venezuela does not infringe the principle of non-intervention in the domestic matters of States, and therefore, whatever the State of its origin, it must be accepted and distributed in an equitable manner among the Venezuelan population.

3. To send this Declaration to the political organs of the Organization.

This Declaration was approved unanimously at the regular session held on February 22, 2019, in the presence of the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, George Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil and Íñigo Salvador Crespo.

**B. Ninety-fifth regular session**

The 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee took place between July 31 and August 9, 2019 at its headquarters in the city of Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that Regular Session were the following, listed in the order of precedence determined by the lots drawn at the session’s first meeting and in accordance with Article 28.b of the Rules of Procedure of the Inter-American Juridical Committee:

- Mariana Salazar Albornoz                      Mexico
- Luis García-Corrochano Moyano              Peru
- José Antonio Moreno Rodríguez            Paraguay
- George Rodrigo Bandeira Galindo            Brazil
- Ruth Stella Correa Palacio                    Colombia
- Carlos Alberto Mata Prates                    Uruguay

- Milenko Bertrand-Galindo Arriagada Chile
- Miguel Angel Espeche-Gil Argentina
- Iñigo Salvador Crespo Ecuador
- Duncan B. Hollis EUA
- Alix Richard Haiti

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law and Luis Toro Utillano, Senior Legal Officer at the Department of International Law; and Maria Lúcia Iecker Vieira as well as Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

At the beginning of the sessions, the Chair of the Committee, Dr. Ruth Correa, announced the results of the election of the two members by the General Assembly (held in Medellín, Colombia, in June of 2019), having elected for a period of four year: Doctors José Moreno from Paraguay and Eric Rudge from Suriname (both of their mandates will start in January 2020).

The Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 250 (XCIV-O/19), “Agenda for the ninety-fifth Regular Session of the Inter-American Juridical Committee”:

**CJI/RES. 250 (XCIV-O/19)**

**AGENDA FOR THE NINETY-FIFTH REGULAR SESSION OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE**

(Rio de Janeiro, Brazil, July 31 to August 9, 2019)

**Current topics:**

1. Guide for the application of the principle of conventionality  
Rapporteur: Dr. Ruth Stella Correa Palacio
2. Binding and non-binding agreements  
Rapporteur: Dr. Duncan B. Hollis
3. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards  
Rapporteur: Dr. Ruth Stella Correa Palacio
4. Protection of personal data  
Rapporteur: Dr. Carlos Mata Prates
5. Access to public information  
Rapporteur: Dr. Luis García-Corrochano
6. Electronic warehouse receipts for agricultural products  
Rapporteur: Dr. José Antonio Moreno Rodríguez
7. Cyber-security  
Rapporteur: Dr. Duncan B. Hollis
8. Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of states, response under international law  
Rapporteur: Dr. Alix Richard

9. Dissolution and liquidation of simplified corporations  
Dr. Ruth Stella Correa Palacio

This resolution was unanimously approved at the regular session held on February 22, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, Jorge Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche Gil and Íñigo Salvador Crespo.

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It should be noted that at the February session, the Committee determined the date and venue of its next two meetings, which will be held at its headquarters in Rio de Janeiro, Brazil.

The ninety-fifth Regular Session of the Inter-American Juridical Committee was scheduled for July 31 to August 9, 2019, resolution CJI/RES. 246 (XCIV-O/19).

It was decided that the ninety-sixth Regular Session would take place from March 2 to 6, 2020, while the ninety-seventh Regular Session would be held from July 29 to August 7, 2020.

**CJI/RES. 246 (XCIV-O/19)**

**DATE AND VENUE OF THE  
NINETY-FIFTH REGULAR SESSION OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 95<sup>th</sup> Regular Session from July 31 to August 9, 2019 in the city of Rio de Janeiro.

This resolution was unanimously approved at the regular session held on February 19, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Jorge Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche Gil and Íñigo Salvador Crespo.

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**CJI/RES. 251 (XCV-O/19)**

**DATES AND VENUE OF THE  
NINETY-SIXTH AND NINETY-SEVENTH REGULAR SESSIONS  
OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that Article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 96<sup>th</sup> Regular Session from 2 to 6 March, 2020, in the city of Rio de Janeiro, and the 97<sup>th</sup> Regular Session from 29 July to 7 August, 2020, also in the same venue.

This resolution was unanimously approved at the regular session held on August 6, 2019, by the following members: Drs. Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Ruth Stella Correa Palacio, Íñigo Salvador Crespo, Carlos Alberto Mata Prates, Duncan B. Hollis, Mariana Salazar Albornoz, Alix Richard, George Rodrigo Bandeira Galindo, Milenko Bertrand-Galindo Arriagada and Miguel A. Espeche-Gil.

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Finally, the Committee approved its agenda for the upcoming session, consisting of thirteen topics, as listed in resolution CJI/RES. 253 (XCV-O/19), “Agenda for the Ninety-Fourth Regular Session of the Inter-American Juridical Committee”.

### **CJI/RES. 253 (XCV-O/19)**

#### **AGENDA FOR THE NINETY-FIFTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(Rio de Janeiro, Brazil, 2 – 6 March, 2020)

#### **Current topics:**

1. Guide for the application of the principle of conventionality  
Rapporteur: Dr. Ruth Stella Correa Palacio
2. Binding and non-binding agreements  
Rapporteur: Dr. Duncan B. Hollis
3. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards  
Rapporteur: Dr. Ruth Stella Correa Palacio
4. Protection of personal data  
Rapporteurs: Drs. Carlos Mata Prates, Mariana Salazar Albornoz and Milenko Bertrand-Galindo Arriagada
5. Access to public information  
Rapporteur: Dr. Luis García-Corrochano
6. Electronic warehouse receipts for agricultural products  
Rapporteur: Dr. José Antonio Moreno Rodríguez
7. Cyber-security  
Rapporteur: Dr. Duncan B. Hollis
8. Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of states, response under international law  
Rapporteur: Dr. Alix Richard
9. Legal aspects of foreign debt  
Rapporteur: Dr. Miguel A. Espeche-Gil
10. International customary law in the context of the American Continent  
Rapporteur: Dr. George Rodrigo Bandeira Galindo
11. Guidelines for the further development of regulations on diplomatic asylum.  
Rapporteur: Dr. Íñigo Salvador Crespo
12. Electoral fraud as an international crime in the Inter-American system  
Rapporteur: Dr. Miguel A. Espeche-Gil
13. Model Law on the use of Fireworks, for either personal use or in mass firework displays.  
Rapporteur: Dr. Milenko Bertrand-Galindo Arriagada

This resolution was unanimously approved in the regular session held on August 8, 2019, by the following members: Doctors Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Duncan B. Hollis, Mariana Salazar Albornoz, Alix Richard, George Rodrigo Bandeira Galindo, and Miguel A. Espeche-Gil.

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On August 7, 2019, the plenary paid homage to Dr. Carlos Mata whose term come to an end on December 31, 2019. On the occasion, it was highlighted his contributions in the field of state immunity, statelessness and the protection of personal data.

**CJI/RES. 252 (XCV-O/19)**

**HOMAGE TO DOCTOR CARLOS MATA PRATES**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND the termination of the mandate of Doctor Carlos Mata Prates on December 31, 2019 as a member of this Organization;

RECALLING that during his mandate Doctor Mata Prates served as Vice-Chair of this body, and as such represented the Committee in various international forums;

AWARE of the valuable contributions to the work of the Committee by Doctor Mata Prates throughout his mandates, and that his reports provided an incalculable contribution to the development and codification of International Law and the Inter-American System, especially as regards his reports in the area of Immunity of States, Stateless Persons and the Protection of Personal Data.

HIGHLIGHTING the numerous personal and professional qualifications of Doctor Mata Prates, among them his legal and academic expertise in addition to his cordial demeanor, all of which distinguish him among the members of the Committee,

RESOLVES:

1. To express its gratitude to Doctor Carlos Mata Prates for his work as a member and Vice-Chair of the Inter-American Juridical Committee.
2. To wish him every success in his future work, in the hope that he will continue to maintain his relationship with the Inter-American Juridical Committee.
3. To have this resolution distributed among the Organs of the Organization.

This resolution was approved unanimously in the regular session held on August 7, 2019, in the presence of the following members: Drs. Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Ruth Stella Correa Palacio, Íñigo Salvador Crespo, Duncan B. Hollis, Mariana Salazar Albornoz, Alix Richard, George Rodrigo Bandeira Galindo, Milenko Bertrand-Galindo Arriagada and Miguel A. Espeche-Gil.

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## **CHAPTER II**



**TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE  
AT THE REGULAR SESSIONS HELD IN 2019**

**THEMES UNDER CONSIDERATION**

Following is a presentation of the topics addressed by the Committee during the year 2019, along with, where applicable, documents prepared and approved by the Inter-American Juridical Committee.

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**1. Guide for the Application of the Principle of Conventionality**

At the 87<sup>th</sup> Regular Session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2015, Dr. Ruth Stella Correa Palacio introduced the document “Guide for the Application of the Principle of Conventionality (Preliminary Presentation)” (CJI/doc. 492/15) with a view to its inclusion as a new item on the Committee’s agenda.

From the methodological standpoint, she suggested the following steps: send the States a questionnaire to gain insight on the status of the issue from states’ point of view; and review decisions adopted by the Inter-American Court of Human Rights and domestic courts.

Dr. Baena Soares expressed concern over the recurring problem of states’ lack of response to the Committee’s questionnaires, while Dr. Salinas commented on the enforcement of human rights treaties, whose nature precludes their automatic enforcement; he said that there were considerations involving respect for national sovereignty, for example, that have to be taken into account. He noted for the record the fundamental value of that doctrine and recalled the issue of the Protocol of San Salvador and the necessary distinction with respect to its enforcement, given the principle of conventionality. Lastly, he suggested shortening the questionnaire.

Dr. Moreno Guerra congratulated the Rapporteur for starting from the premise that the constitution cannot be above treaties. He acknowledged the relevance of the proposed questions, including the references to the conventions on torture and forced disappearance.

Dr. Stewart mentioned that in the common law system, international treaties are not directly enforceable but require laws or a written rule to enable their implementation.

Dr. Collot suggested that the comparative law methodology be used in Dr. Correa’s study.

Dr. Mata Prates said that the first issue to be discussed concerned the principle of conventionality, which entails considering the significance of provisions contained in international treaties, as well as the implementation of the decisions of the Inter-American Court of Human Rights. The latter, necessitates a determination as to whether the *considerando* clauses (preambular paragraphs stating grounds) of a decision impose additional obligations.

Dr. Correa noted that there is nothing ideological about this study; its aim is to examine the status of the matter; moreover, the questions are not designed to analyze the scope of domestic obligations. She also stressed that her study does not cover social and economic rights because their incorporation in her country would require mechanisms other than human rights instruments, owing to their different nature.

Acting as Chair, Dr. Mata Prates noted for the record the agreement of the members and moved to approve the item’s inclusion on the agenda of the Inter-American Juridical Committee and designate Dr. Correa as its rapporteur.

On October 2, 2015, the Secretariat of the Juridical Committee, in accordance with the Committee's request, distributed the questionnaire (document CJI/doc.492/15 rev.1) to the Member States of the Organization.

At the 88<sup>th</sup> Regular Session (Washington, D.C., April 2016), the Rapporteur presented document CJI/doc. 500/16 "Guide for the Application of the Principle of Conventionality" and reviewed the background on the subject.

She explained that the report was divided into two main parts: the first deals with the concept of conventionality control, while the second sets out her conclusions based on the responses of the five countries that had answered the questionnaire distributed by the Committee Secretariat (Chile, Colombia, Jamaica, Mexico, Peru and Guatemala), clarifying that the latter's response was not included because it had arrived after she submitted her written report.

With regard to the first part, she highlighted the scope ascribed to the principle by the Inter-American Court of Human Rights based on the following assumptions: either human rights conventions are incorporated into a country's legal system, or convention provisions are observed by the country's judges. She also pointed out that there is a distinction between enforcing convention provisions and the effect that may be accorded to the principle of conventionality.

She noted that conventionality control occurs when a domestic legal provision is rendered ineffective by a treaty-based provision.

She said that conventionality control is usually identified with constitutionality control, since most countries in the Americas incorporate treaty-based provisions on human rights into their domestic system of laws at the constitutional level, falling in step with the conventional block. In that context, such rights also enjoy constitutional rank and can be used to interpret, amend or remove lesser legal provisions, or make them unenforceable. She stressed that such issues have to do with the way in which states express their sovereignty and, therefore, should be taken into account in preparing the guide.

Among the responses received thus far, she noted that all of the States that had replied were parties to the American Convention, which was not necessarily to say that they had accepted the jurisdiction of the Court. She further noted that, as a rule, in the countries reviewed lawmakers were not taking steps to incorporate the treaties into their domestic legal systems by or assigning them the rank of law, or that of constitutional provision in the case of countries that adopt the constitutional block. In this regard, she emphasized that constitutionality control systems have not been an obstacle to conventionality control, regardless of whether the country has adopted consolidated or diffuse constitutionality control. She also indicated that she had found that the enforcement of international standards serves as justification for domestic judgments, and that there was a perceptible intention on the part of states to apply international standards at the domestic level based on criteria established by the Inter-American Court.

By way of a general conclusion, she observed that it is important to have more information with which to prepare the guide. In that connection, she thanked the Committee Secretariat for its efforts to encourage responses from states on the subject and she asked that another reminder be sent out.

Dr. Salinas urged the Rapporteur to address two issues in her report: (1) the effectiveness of human rights laws and their implementation in the domestic system of law; and (2) the interpretation of constitutional provisions in the light of convention norms, and whether or not the interpretation of the Inter-American Court of Human Rights should be enforced, taking precedence over constitutional norms. He said that the guide should clarify the issue of conventionality control, not so much from the point of view of compliance with the provisions of treaties, but rather with regard to the interpretation of domestic laws in the light of conventions and the interpretations of the Inter-American Court of Human Rights.

Dr. Pichardo referred to the positive contribution that a guide would make in terms of facilitating the efforts of countries to meet their international obligations.

Dr. Stewart observed that the concept is not very well known in the common law tradition. In that regard he asked the Rapporteur if the principle applies only to those countries that have accepted the jurisdiction of the Court and if the principle should be understood as imposing additional obligations; that is, in the sense of making binding the opinions of interpretative international bodies, such as the Committee against Torture. In his opinion, states could take the comments of such international bodies into consideration, but not regard them as binding, despite the fact that some members of such committees regard them as compulsory and binding. As he understood the presentation, the doctrine of conventionality control was apparently even stronger and entailed a treaty-based obligation to give enforce the interpretations of the Inter-American Court of Human Rights.

Dr. Correa said that Dr. Stewart's questions went to the heart of the matter under consideration and were precisely what she sought to verify in her research. In fact, she stated that she had observed in the Inter-American Court's jurisprudence statements that attribute to the "authorized judicial interpreter" — which in the case of the American Convention on Human Rights would be the Court itself — authority to enforce its decisions and interpretations in all states parties to the Convention, whose standards afford the minimum of protection that is needed. She also mentioned certain pronouncements by the Inter-American Court that would appear to establish an enforcement obligation for all OAS Member States, even ones that are not parties to the American Convention, in cases that concern interpretations in relation to the limits and legal effects of *jus cogens*, bearing in mind the *erga omnes* nature of the rights enshrined by this principle.

Dr. Salinas suggested that these obligations be compared with principle of the margin of appreciation that derives from state sovereignty.

At the 89<sup>th</sup> Regular Meeting (Rio de Janeiro, October 2016), the Rapporteur referred to a study carried out by the Inter-American Institute of Human Rights on the subject of conventionality control (Self-training Manual for Justice Operators on Enforcement of Conventionality Control), which has many merits since it explains how the concept evolved in the Inter-American Court of Human Rights.

She noted that the Committee had only received 10 replies to date, and explained that the purpose of the study is to draft a guide to assess the scope of the issue and states' concept of it.

The Chair mentioned that he was advising on a doctoral thesis precisely on the subject of conventionality control, the conclusions of which found that there are three different postures that states adopt: (1) compliant; (2) opposed – the Court lacks the authority; and (3) undecided. Therefore, he found it unlikely to obtain uniformity with regard to what the Court imposes.

He urged the Rapporteur to continue her work despite not having received more responses from States, and suggested that her report at the next meeting cover the reactions of states to the judgments enforced by the Court.

Dr. Hernández García noted there is a directive from the Supreme Court of Mexico that was mandatory for the country's courts and indicated that all courts must judge based on the *pro homine* principle. He said that the challenge for the Rapporteur is to determine the scope of international human rights law. The directive is very broad as it implies the principle of *ex officio* application in addition to the need to rely on the standards underpinning all the court's jurisprudence, which seems excessive. Although the State is bound and the judiciary is part of the State, the Mexican State should not take part in the development of standards in which it has not played a role. He said that a collegial discussion of the topic could allow the Juridical Committee to adopt conclusions.

Dr. Mata Prates acknowledged the complexity of the issue and agreed with the opinion of the other members in favor of developing a guide, given its usefulness. He mentioned having attended a seminar on the subject in Uruguay, but from the perspective of constitutional law. In that context, a

multitude of opinions were put forward on the subject. For that reason, he said that it was well-nigh impossible to set out a single position on the part of States, since the response was closely bound up with the jurisprudence of each country. Hence, the vital importance of Dr. Correa's work for explaining the various interpretations of the concept of conventionality control.

Dr. Villalta mentioned that protection standards should be sought, not only in the American Convention, but also in other human rights treaties.

Dr. Correa emphasized that the Court had decided that the rationale for its decisions should be used to interpret treaty provisions in justifying decisions at the domestic level. She said that the states that had replied were Argentina, Chile, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay and Peru. In the case of Jamaica, she said that the response noted that the country did not accept the jurisdiction of the Court, despite being a party to the American Convention. She explained that, in part, the study serves to verify all the elements of the principle's scope. The Court, for example, makes the principle of conventionality control binding upon all states simply by virtue of having signed the American Convention. She expressed concern in that regard, given that the judges' background is in domestic law, not treaty law. She said that it is important to have the opinion of non-signatories of the American Convention; or of countries, such as Jamaica, that are signatories but are not subject to the jurisdiction of the Court. She agreed with working with the information that had been made available but said that it was very important to have the responses of the other States so that a single standard could be advanced, given that this was a self-imposed mandate of the Committee.

Dr. Salinas reiterated that a conceptual definition should be the starting point of the study. Naturally that involved implementing the Court's interpretation; the enforceability of international treaties is a separate matter, however. It is important to know the concept because if we restrict it to the Court's interpretation, then states parties, particularly those subject to the jurisdiction of the Court, will be taken into account, but we would not get a complete overview.

Dr. Hernández García explained that it was important to have a practical, accessible, and readable document on which they could then offer considerations, which should cover three levels:

1. Link to the jurisdiction of the Court;
2. Link to the regulatory contents of the American Convention; and,
3. Unenforceability of the domestic provision *vis-à-vis* the international rule.

The Chair consulted the Rapporteur on ways to avoid the final report being regarded as an extension of powers that do not belong to the Inter-American Juridical Committee, but to the Inter-American Court, to which Dr. Correa replied that, as the document was developed, it would be necessary to take the precautions to avoid any clash of competencies. However, she said that the objective is to harmonize criteria for applying principles.

During the 90<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the Rapporteur on the subject, Dr. Ruth Stella Correa Palacio, presented her proposal "Guide for the Application of the Principle of Conventionality," (document CJI/doc.526/17).

Dr. Mata Prates first noted a limitation in that only 15 States have accepted the jurisdiction of the Court and therefore this guide would not be applicable in the States that have not ratified the Convention. Secondly, the response rate to the questionnaire was not very good and of those States that did respond, only 7 have ratified and acknowledged the jurisdiction of the Court. Likewise, he pointed out that as regards the principle of conventionality, it would be necessary to choose one of the interpretations to validate. He said that if we were to begin from a perspective of hierarchy, we must determine how the Convention would be framed in domestic law and the rank that would be conferred onto it by a domestic judge. For some, the interpretation of the Convention by the Court should be treated as binding legal precedent; however, he said that Uruguay does not keep to that tradition.

He asked whether the intention was to include only decisions or also interpretations and, secondly, whether the intention was to extend this provision only to the parties to the Convention or to all States. He was in agreement with item 5 until the second comma and suggested that the clause thereafter be revised to read something like "... and that judges take into account the decisions of the Court." Dr. Mata continued onto item 7 and expressed his agreement only with the middle section, but voiced concern over the way judges would be called upon to interpret law and the reference addressing domestic matters unique to each State. He suggested rewording the part of item 11 relating to supervision of the application of the decisions of the Court, in particular, its follow-up through meetings with the State and the parties.

Dr. Hollis requested further explanation from the Rapporteur about the scope and wondered whether the catalogue was intended to be applied only to States party that have accepted the jurisdiction of the Court or to all OAS Member States. He expressed fear that the guidelines would not align with the domestic laws of some States. By way of example, he explained that, although the United States accepts the principle of *pacta sunt servanda* and the principle that domestic law is no excuse for non-compliance with treaty obligations, the problem arises with "non-self-executing treaties", in which case, the domestic judge is not allowed to apply the treaty provisions directly and must apply domestic law.

He further pondered whether the guidelines were intended for monist States that accept international law as predominant or for dualist States that put domestic law above international law. He asserted that for dualist States, the guidelines would be problematic and referred specifically to item 5, which grants binding nature to interpretations of the courts and he suggested adding an explanation to limit the guidelines to those States that would be able to apply conventionality.

Dr. Hernández noted that even those 15 States would each have a different interpretation of the principle of conventionality and suggested it would be useful to provide a definition. On this issue, he compared the title of the document with the title of the attached Guide and noted that the scope of the guidelines related more to domestic implementation.

He turned to item 5 and said that in some States, such as Mexico, the interpretations used by the Supreme Court are not limited to those cases where Mexico has been a party, but includes application of all jurisprudence. On this score, he said, the proposal to observe the interpretation of the Inter-American Court would not be realistic in a judicial system as complex as Mexico's. Dr. Hernández concluded by pondering whether the purpose of this work should be addressing the intended meaning of the concept of conventionality, in light of the different understandings of the concept.

Dr. Baena Soares posed the question of who would be the target audience of the guide. He assumed it would only be States party to the Convention, but he felt that non-party States could also benefit from a guide.

Dr. Villalta recalled her experiences with courts in El Salvador and noted that in many OAS States, judges were unaware of rulings by the Court or the conventions in force. Regarding item 13 on the creation of an institution, she requested clarification on how it would function, especially given that not all States are parties to the American Convention.

The Chair began his remarks by addressing the lack of a definition of the core concept. He said that one aspect would be less controversial and could be solved by the law of treaties, inasmuch as all human rights adhere to the principle of *pacta sunt servanda*. Secondly, this becomes more complex and highly controversial if national courts are required to take into account the jurisprudence of the Court. If we exempt those that are not parties, then we also exempt those that have not accepted jurisdiction of the Court; and hence the scope of application would be reduced even further. In his view, the principle of conventionality should be seen as a means towards fulfillment of treaties, not as an end in and of itself, given that most States do not consider the judgments of the Court as mandatory.

Lastly, he asked the Rapporteur to start by crafting a definition that would serve as the start of a path to follow.

The Rapporteur members to recall the discussion with the legal advisors as to the importance and currency of this topic. She reminded the plenary that this was her second report and that the discussions on the definitions were reflected in the first one. She said that this concept did not come from the Rapporteurship, but was instead based on precepts previously used by the Court. She thought it was clear that the objective was not simply to apply the Convention, but also to use the interpretations as a basis for rulings. In response to the question of the intended audience, she said it could be split into two groups. The first group is based on the recommendation that all OAS Member States should ratify the Convention, i.e. it consists of countries that have not ratified the instrument. The second group consists of countries that have ratified it. Thirdly, she explained that reference to the concept that interpretations be treated as binding was only for those States that had accepted the Court's jurisdiction. The paper is geared toward the second theory, which would not only include parties to the decision but also those that had accepted the Court's jurisdiction. It is obvious that such a differentiation leads to a clear conclusion that the decision is binding only on the parties and those that have accepted jurisdiction. Not only are there binding effects, but the Court is allowed to interpret. That is the conformity principle of interpretation and is intended to be taken into account by States. The Rapporteur finished by stating that the purpose was to recommend follow-up for those States that have ratified the Convention and nothing more. She said that in many States -Mexico, Peru, Colombia- judges are talking about conventionality and not only in the higher courts. As to item 10, the intention is that training should be made available to all administrative officials – not only judges – including those in charge of protecting human rights and interpreting the decisions of the Court. She said that this is closely connected to access to justice.

Dr. Villalta suggested, with the support of Dr. Moreno, changing the title to “Recommendations” rather than “Guidelines.”

Dr. Hernández said it was important to clarify the interpretations and the jurisprudential interpretations as a whole.

Regarding the content of the recommendations, he agreed that the first recommendation was clear and valid: the call for ratification. But he clarified that, at the end of the day, it is a sovereign decision, suggesting differentiating between those States party (25) and those that recognize the jurisdiction of the Court (15). This would make the guide much easier to follow.

Dr. Mata Prates endorsed the suggestion to change the first part in order to look at different positions regarding the scope of the principle of conventionality before continuing with the recommendations, such as calling for the ratification of the Convention and recognition of the jurisdiction of the Court. In regard to the jurisprudence of the Court, he requested being cautious because constitutional aspects play an important role in the way each State brings decisions into its domestic law. It is essential for jurisprudence to be known not only by judges, but also by the administration.

Dr. Villalta agreed with the recommendation about training, as there is generally a lack of knowledge about all human rights instruments – not just the Inter-American ones.

The Chair agreed that the Committee could only invite and not recommend acceptance by States of the jurisdiction of the Court.

Secondly, he said in-depth study was important for fine-tuning the principle of conventionality and its application by human rights courts. He proposed including the discussion on compliance with judgments as well as rulings (as precedents) of the European Union Court. He thought it also important to cover the sovereignty of States and to refer, for example, to the empowerment of the state regarding

compatibility with domestic laws. Thus, he proposed making additional efforts, due to the complexity and importance of the topic, to secure responses from the States that have not responded.

The Chair suggested the Rapporteur prepare a new report for the upcoming session, and closed discussion on the topic.

On March 30, the Technical Secretariat of the Committee sent out a reminder to the States that have not responded to the questionnaire.

During the 91<sup>st</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the topic was not considered, but at the 92<sup>nd</sup> Regular Session (Mexico City, Mexico, February 2018), the Rapporteur presented an outline of the study of the topic by the CJI, drawing some conclusions that are included in the Guide for the Application of the Principle of Conformity (document CJI/doc.557/18).

Dr. Mata congratulated the Rapporteur on the quality of the work presented and suggested making a slight modification in the wording so that the document might appear to be more operational and less descriptive. He pointed out that the legislator neither enforces the norms nor is he the first addressee of the international norm, being the one with least entitlement to apply it. He also said that the international law focuses its provisions on the State, and the State, in turn, has to regulate enforcement of the norm in its domestic legislation.

Regarding the consultative opinions of the Inter-American Court of Human Rights, he pointed out that the report presented does not address them adequately, and that in view of the relevance that these opinions have gained recently, it would be advisable to provide details on its obligatory nature, explaining whether enforcement is obligatory for all the States that recognize the jurisdiction of the Court or only for those who so request it, or for none of the States. He also suggested adding a sub-chapter on the legal effects of consultative opinions.

Dr. Hollis thanked the Rapporteur for the work and effort displayed in the document presented and suggested altering the proposal of the Guide, which should be directed only to the States that are members of the American Convention on Human Rights.

The Chair congratulated the Rapporteur on her valuable contribution to the work of the CJI, and commented that the obligation of the Inter-American Court of Human Rights to communicate its rulings to the States does not necessarily imply that the latter accept the Principle of Conventionality as an obligatory compliance. He repeated that the State is sovereign to implement the decisions of the Court, and recalled that consultative opinions are not binding, in the terms of the Convention itself.

The Rapporteur explained that she had taken into account some of the comments made in the previous session by Dr. Mata with regard to the role of judges vis-à-vis the Principle of Conventionality. She clarified that she avoided using the word “sentences” due to the fact that the interpretation is made by means of judicial decisions, monitoring procedures and consultative opinions.

She went on to explain that the local judges of the Member States of the Convention, when they apply the conventionality norm, must bear in mind the interpretation that the Court has made in sentences and consultative opinions; this is why she did not wish to suggest in her text that the opinions are *per se* binding.

In this regard, the Chair suggested revising the wording for the sake of clarification of the last item discussed, in the sense that the only obligation as such is that of enforcing the Convention.

Dr. Mata made further reference to the inclusion of consultative opinions of the Inter-American Court. Accordingly, he asked to include a sub-chapter explaining and providing the fundamentals as to i) whether the enforcement of these opinions is “preferential” but not binding, ii) whether the State requesting the consultative opinion must necessarily adopt it, and iii) if all the remaining party States are obliged to enforce consultative opinions.

Seconding this view, the Chair suggested removing the reference to consultative opinions and limiting the Guide to enforcement of the Court's decisions. In his opinion, considering that the Court's jurisprudence is a precedent, it goes beyond the scope of the wording of the Convention and the intent of party States. He submitted the topic to the consideration of the members.

Dr. García-Corrochano said that in the area of international law, conventions usually set up a tribunal for interpreting the convention itself, and that said organ cannot exceed the scope of the convention that actually created the organ. However, some courts at the international level claim that they are entitled to produce norms. He clarified that when States wish to take on obligations they reach agreements through their representatives rather than ask the tribunal to create those obligations.

The Rapporteur informed that the Guide is the result of the study of several factors, including the practice of the States, and that it is based on the scope that the Court itself has provided for the control of conventionality. She offered to present a revised version for the consideration of members, clarifying the items previously addressed. She then announced that she would provide comments on the role played by consultative opinions and follow-up decisions, but would not remove the references to these opinions.

The Chair asked the rapporteur to provide a change in wording to reflect the consensus of the minimum criteria of the CJI so as to avoid voting on the item; should this prove impractical, he proposed omitting the discussion of the issue. The members agreed to this proposal.

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2018), the Rapporteur, Dr. Ruth Stella Correa Palacio, began her presentation by recalling that the principle of conventionality is based on an assumption that States which have signed a convention are obligated to comply with it. Moreover, as human rights rules have been extending themselves by the decisions of the Inter-American Court on Human Rights, it is important to bear in mind the interpretations of these rulings.

Among the observations submitted at the last session held in February in Mexico, she found that it had been remarked that it was a very descriptive guide without recommendations. Likewise, concerns had been expressed as to whether the report included consultative opinions of the court. She expressed the view that her work speaks only in a general manner of the rulings and decisions, which does not include opinions or pronouncements on their binding effects. Regarding the guidelines themselves, she said it would not be appropriate to consider the language as in the mode of a recommendation by the Committee that states should apply the principle of conventionality. Rather, it should be viewed as a suggestion and that states will choose to incorporate the language however they wish. She noted that it is established in Guideline 3 that judges are the recipients because constitutional control is with the judges, but she is aware that the first recipient is the legislator.

Dr. Espeche invited the Rapporteur to consider the specific characteristics of the opinions of the International Court of Justice within the UN system.

Dr. Hernández acknowledged that this represented work on a very complex topic. He noted that several states are making progress in addressing this matter and that the document will be useful not only for legislators and judges but also in terms of its contributions to doctrine so that many will understand the topic so much better. He had the following specific comments:

- Page 5, para. 2 in which is anticipated the difficulty of applying the principle with respect to the binding of those states that have not accepted jurisdiction of court. He suggested that it should state clearly to which states this applies: those bound by the American Convention without accepting the jurisdiction of the court, and those that have accepted the court's jurisdiction. He explained that he has doubts about the binding nature of decisions of the Court for those States that have not recognized the contentious jurisdiction of the Court, and that even if the decision was based in a source of law stated by Article 38 of the Statute of the

ICJ. He noted that the guide would not be applicable to all Member States and that Dr. Hollis had been clear to stress the non-binding nature. He suggested that it would be very useful to pinpoint the juridical reasons of each State.

- Footnote 8 should be corrected. According to his information, there are currently 20 states parties to the Convention, not 15.
- References to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights should be stated precisely, such as the ones referred on page 6, numbers 3 and 5.

Dr. Mata agreed that this is a complex topic and noted that the principle of conventionality arose from the Inter- American Court on Human Rights. He understands that the document is intended as guidelines for the operators and the Court, therefore, it should be avoided to verify or describe what happens, as is done in certain proposals of the report, whose clauses are descriptive in nature.

Due to the different effects that should be attributed to the judgments of the Court, noted the need for a distinction among the different categories of countries vis-à-vis the Convention. For those states that are parties to a case are bound by the ruling. But those that have not been parties to that process, even when they have recognized the jurisdiction of the Court they may take into account those decisions, but are not obliged to share the judgment since they are not parties of this process. The Court distinguishes between the binding precedent and the principle of conventionality. Furthermore, based on what has been said, it would be worthwhile to differentiate between those parties that recognize the contentious jurisdiction of the Court and those that do not, in spite of having ratified the Convention. It is also suggested to refer to those who have not ratified the Convention.

Dr. Mata then referred to item 4 and considered that this discussion should not delve into constitutional law considering this matter is not of interest under International law. If a State has ratified a convention, it must abide and the Committee should not be concerned with internal matters. As regards item 10, the competence is always subsidiary and it is not only for the control of conventionality, since that local bodies should act first.

Dr. Hernández clarified his views regarding advisory opinions in page 2, para. 2, stating that they are not part of the principle of conventionality. Secondly, he pointed out that the document is a guide, and as such it should not be a single model for 35 Member States but a snapshot to which each state will look to see where it can find itself. Some States, such as his own, will base its determination on the execution of sentences where the court has established obligations pro personae for all three branches of the State. This represents a group of states that have accepted to incorporate all the judgments of the Court through the principle of conventionality, and the report should not be limited to those countries, but integrate all level of incorporation. If possible it should set up five different groups:

- States parties to the American Convention on human rights;
- States that have recognized the contentious jurisdiction of the Court;
- Those that have endorsed the resolutions of the Court both in cases in which they are a party and in those in which they are not a party;
- Those that do not accept the principle of conventionality when they are not a party in a case having accepted contentious jurisdiction
- States that are not party to the Convention.

Dr. Baena Soares offered his congratulations to the Rapporteur on a complex topic. He fully endorsed the comments made by Drs. Mata and Hernández, which he asked the Rapporteur to take into account. The document as currently presented is interesting as a basis but not as a guideline. He said

that the Committee would need to present a guide as it is defined in all aspects, as only a guide and not as an obligation.

The Chair offered thanks to the Rapporteur and wished to address a conceptual difference. First, he understood this principle that the rules of the Inter-American Convention on Human Rights and other conventions in the field have a mandatory nature based on *pacta sunt servanda*. Likewise, he recognized that states that have accepted the mandatory competence of the court are bound by the ruling of the case in which they are involved and that the convention can bind third Party States where this is an expression of customary international law. What he found difficult to accept, however, was that the rulings of the court could be binding for third states. He could not accept that the decisions constitute a precedent in jurisprudence that is mandatory; that, he felt, goes beyond the role of an international court. He considered that it would be necessary to reflect further on this point as a guide to that effect would be difficult for states to accept. Secondly, the President expressed his agreement with the comments of Dr. Mata regarding internal control under constitutional law, which could be included as a footnote but not within the guide itself. He also agreed with comments made on subsidiary competency. For the internal mechanisms to act, it is necessary to exhaust all internal mechanisms. Furthermore, he requested the Rapporteur to take into account the fulfillment of decisions by States which is to be decided by the state itself in accordance with its own domestic law. The application of the principle of *ius cogens* should not be exceeded. Decisions should not be imposed as to constitute mandatory precedent. There is a minimum agreed, but a wide range of differences. Although he would find it difficult to approve of the concept that the jurisprudence of the court is a mandatory precedent for third parties that are not parties to a case. The interpretation of a sentence may be taken into account but it is not a mandatory precedent.

In response to these comments made, the Rapporteur agreed that this is a highly complex topic. She noted that the document is in its third or fourth iteration and is evolutionary. She mentioned that the way the principle is applied by different states had been included in the second version, which had incorporated the responses of states that had replied 14 States to questions about the domestic mechanisms and constitutionality control. Thus, the work mentioned the control that is concentrated and control that is mixed. This query provided results that show the link and states had replied that it is good to control the constitutionality and almost all incorporate the “block of constitutionality.” In previous reports it was shown the application of the controls of constitutionality. If the Committee so desires, the Rapporteur said she would be willing to include the results received and the analysis. She referred to the two modalities of control recognized by the doctrine and the jurisprudence – 1. Domestic judge and 2. Inter-American Court. It is only if the domestic court does not exercise the control that the matter falls under the Inter-American court’s control. She explained that the principle of conventionality, according to the Court, does not imply for those States that are not parties to a judgment to submit to a decision but rather to the scope given by the Court to a norm. And this applies to States that have accepted the jurisdiction of the Court, considering that the non-observance of the criteria for applying the rule of interpretation under the Convention may give rise to the international responsibility of the State. It does not seek to validate the mandatory nature of the precedent, but rather to assert that the Court is an authorized interpreter of the Convention. There is no intention to homologate any principle giving a mandatory nature to the precedent.

The Rapporteur asked members to review the version of the document presented in March 2017, a guide that included 15 points, and as Dr. Mata has now suggested adjusting her work with current version which is more analytical. The Rapporteur said that she understood the concerns that had been expressed and would accept most of the suggestions. She noted however that there is a difference in conceptual positions that would be difficult to harmonize. She requested members to start from the idea that the document is a guide, non-mandatory, that presents all ideas, and that States would adopt what is useful for them.

Dr. Arrighi noted that this topic is acquiring practical importance leaving no doubts about the supremacy of international law over domestic law. However granting the same hierarchy of international norm to courts decisions creates a practical problem. When a court hands down an opinion, it takes into account legal issues and facts particular to a case; therefore a domestic judge who interprets the principle of conventionality should rule on different facts and legal issues. While the idea might work in theory, when both facts and law concur, in practice, when that is not the case, leaving too much discretion to domestic judges could give rise to decisions contrary to the spirit of the decisions of the Inter-American Court. That being so, the Court should, when handing down a judgment, expound principles to guide the domestic judge, with respect to both similar and divergent topics, limiting what is left to his or her discretion.

The Chair noted that interpretation of what the Inter-American Court does or does not do cannot create international responsibility to third parties that have not applied a decision in which they have not been a party. Secondly, regarding the block of constitutionality, he noted that decisions of the Court may serve as a criterion of interpretation, but that this does not mean that the jurisprudence is compulsory. That is where the substantive difference lies. He considered that this conceptual gap, which had been mentioned in various interventions, should be reflected in the guide - different interpretations that exist in the body of the CJI and in the region. We do not have to arrive at a single conclusion.

Dr. Hernández felt that after this exchange it would be much easier to advance. He suggested elaborating a guide as expressed by Dr. Baena Soares. He felt that what was lacking was context explaining all different applications depending upon the legal situation of each State, and also clarify the intention to inform about the content of the principle without forcing a model on them. In the end, who ends up applying the principle is the national court, and this will determine its scope based on its constitution.

The Rapporteur said that it would be necessary to define what the language would be that would be used. With all of these differences, the guide has now changed to be more descriptive than recommendatory.

Dr. Mata agreed that the discussions were bringing the Committee closer to a solution allowing the adoption of a guideline. He noted that the Committee had decided that its work cannot be only from an academic perspective, but to have a utility for the States, therefore a guide provide an orientation about each type of situations.

Dr. Hernández noted three levels of working: one is prescriptive; the other is descriptive; and finally, a third in which some recommendations are made. Here we might decide to maintain a descriptive tone but with some recommendations. He felt that the Rapporteur in the current version had presented a very good basis, but that just needed to be polished a bit – he confirmed that it should not be viewed as an attempt to establish principles for the States.

The Chair agreed and closed the discussion on the topic.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019), the Rapporteur for this topic, Dr. Ruth Correa, explained her approach to it, underscoring that she had been guided by the parameters established by the Inter-American Court of Human Rights (hereinafter “I/A Court H.R.” or “the Court”), which distinguishes between the principle of conventionality and conventionality control. She also noted that it is a topic that meets with resistance from both theorists and judges, and that she, as the Rapporteur, does not intend to adopt a stance. Consequently, the purpose of the work is to explore how States handle the issue and, based on the findings, to draw up a very clear guide to all facets of States’ practices that will facilitate treatment of the subject, of the fifteen replies received from the States, some were in favor of incorporating the principle of conventionality in the constitution, while for others there is no constitutionality block.

Dr. Luis García-Corrochano criticized the Court for overstepping its jurisdiction by claiming that its interpretation is valid in any circumstances and for different actors, when judging situations that are applicable to particular cases. The principle of conventionality must be respected, including by entities in charge of overseeing such compliance. He argued, finally, that the trustworthiness of a Court depends on the work of its members.

Dr. George Galindo warned about the ramifications of this topic for international law, particularly when the Court imposes a duty for the states to apply the conventionality control principle. He believes that this could create confusion over what must be replicated: the decision, the precautionary measures and/or the *obiter dictum* contained in the judgment. Moreover, it raises questions about the principle of “*la competencia de la competencia*” of international courts, because a prerogative of that nature would endow said Court with enormous power. Finally, the *erga omnes* effect with respect to *res judicata* needs to be reviewed, when wishing to impose decisions handed down by the I/A Court H.R. on other States.

Dr. Miguel Espeche-Gil agreed with the members who consider that the I/A Court H.R. has overstepped its sphere of jurisdiction.

Dr. Mariana Salazar noted that the work of the Rapporteur is not intended to impose any position, but rather to explain the principle in question, and asked the Rapporteur to include a comparison with the practices used in countries that accept these principles.

Dr. Íñigo Salvador noted that this issue highlights the dichotomy in the application of international human rights legislation in domestic law, and agreed with Dr. García-Corrochano regarding the attempt to apply judgments to cases other than those that gave rise to a lawsuit. Judgments must be applied only to the parties in a dispute; otherwise, several of the principles mentioned would be contravened, such as the effect of *res judicata*.

Dr. Carlos Mata agreed on the complexity of this current issue regarding the effect of judgments of the I/A Court H.R. The Rapporteur's work refers to discussions within the Court. However, several pending challenges still need to be explained, such as the differences between Roman and Anglo-Saxon law; whether a Court decision on a case is binding for non-parties; and the distinction between the norms themselves and the interpretation of those norms. He suggested not delving deeper into the status of jurisprudence in Europe, given its differences to the inter-American system. Regarding item 10 of the Guide, he asked for details on how I/A Court H.R. authority would be exercised in a subsidiary manner, absent control at the national level.

Dr. Milenko Bertrand asked about the work plan on the subject and urged that a contribution be made to achieving a better grasp of the matter within the judiciary, citing internal conflicts within States when efforts are made to incorporate principles that run counter to national decisions. The work must have a clear focus on providing for better compliance with law in the inter-American human rights system.

The Rapporteur for this topic thanked the members for their opinions and comments, reiterating her reasons for explaining the principle under the I/A Court H.R. parameters. She undertook to incorporate the discussions, including the responses sent by States, which in most cases indicate compliance with the principle and control in the terms established by the I/A Court H.R.. The Guide must clearly describe existing viewpoints, leaving it up to States to opt for one approach or the other. Well aware of the difficulties raised by this issue, she explained that she would present a new document proposing a Guide, for members to comment on.

Dr. José Moreno asked the Rapporteur whether the purpose of her next report was to present the different positions put forward in this session. In response, the Rapporteur explained her intention to eschew mention of positions contrary to the provisions of the I/A Court H.R., so as to avoid any controversy with the work of the Court. Dr. Milenko Bertrand asked whether contrary positions within

the members of the Court should be presented, in order to avoid generating conflicts with the Court. Dr. Carlos Mata proposed making reference to the issue of conventionality with its different meanings, for both judges and legal theorists to clarify the issue. Dr. Jean-Michel Arrighi said there was a pressing need to address the topic of the principles and sources of current inter-American law (resolutions, the Inter-American Democratic Charter, OAS Charter, and so on, given their impact on all the Member States of the OAS.

The Rapporteur said she intended to include the suggestions made by Dr. Milenko Bertrand and Dr. Jean-Michel Arrighi.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July-August 2019), the topic was not considered.

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## 2. Binding and non-binding agreements

### Documents

CJI/doc. 580/19	Binding and Non-Binding Agreements: IV Report (presented by doctor Duncan B. Hollis)
CJI/doc.593/19	Binding and Non-Binding Agreements: V Report (presented by doctor Duncan B. Hollis)

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At the 90<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Duncan B. Hollis expressed his willingness to work on the issue of agreements and the process by which decisions are taken at the domestic level by a State on a binding vs. non-binding instrument. The plenary agreed with the proposal, the topic was added to the agenda, and Dr. Hollis was designated as the Rapporteur.

During the 91<sup>st</sup> Regular Session (Rio de Janeiro, August 2017), the Rapporteur was pleased to present his report, document CJI/doc.542/17 cor.1, which focused on four elements: differentiation, capacity, effects and procedures.

The topic of differentiation involves identifying and distinguishing between three categories of commitments in the international context. On this score, he highlighted three ways of undertaking international commitments and defined each one: treaties, contracts and political agreements. In order to ascertain its nature, it must be determined whether the instrument is binding and, if so, whether it is a treaty or a contract. If the nature of the instrument is not expressly stated, there may be indications of the authors' intent, such as the structure of the texts and the wording used to express consent in undertaking an obligation, the appointment of a trustee, etc. Every case must be analyzed on an individual basis because of the specificity of each instrument.

In the Rapporteur's view, there is a presumption that these documents are best if they are binding. The Rapporteur also expressed his preference for treaties when choosing between them and contracts. As for the topic of capacity to enter into treaties, he explained that even though this is a power of the sovereignty of States, there is no clarity regarding who may represent the State or act as its proxy in entering into treaties. Although it is a practice in the United States and Canada for agencies to obtain authorization of representation, in countries such as Egypt and South Africa government agencies lack such capacity. In this regard, current practice seems to be that recognition of government agencies is based on the internal consent of the State and the external consent of the counterpart. He also posited differences between Federal States, citing the example of Canada, whose distribution of competencies grants the province of Quebec certain powers in the international sphere, which the Argentine Constitution does not grant its provinces. As for municipal agencies, he gave the example of the authorization granted to municipalities in Mexico to undertake obligations.

The Rapporteur underscored the problematic widespread practice of unauthorized agreements between agencies of different countries, and explained that political commitments render limitations on capacity inapplicable in binding agreements. As to the effect of instruments, he cited as the main element respect for the principle of *pacta sunt servanda* and, therefore, overriding effects lie in the terms themselves. In this context, he recognized three main sources: the law of treaties, acts of retorsion and the law of State responsibility. Political agreements, he further explained, are not subject to any particular regime and the law of treaties and the provisions of State responsibility are not applicable to them. However, they may have political effects and, sometimes, though they are not binding, they could indirectly have legal effects. There is variation in domestic procedures to terminate an instrument and the way States authorize binding and non-binding agreements. States almost universally assign the task to the executive branch, assign the approval procedure to the legislative branch and, in some instances, include judicial review. Few countries have no checks in place on the

executive by other branches of government. In the United States, the procedure provides for the Department of State to act as a check on the agency or federal or municipal branch (Circular 175). As for political agreements, it is difficult to obtain information on the full range of procedures, the number of instruments, the type, the subjects and the obligations pursued.

He concluded his presentation by proposing a menu of options with regard to the road map as to what to expect from the report in terms of general principles, responsibilities and best practices. In this context, he proposed drafting queries for the governments by means of questionnaire to learn each State's practice and asked the members their opinion about whether this should be done, mainly because of the lack of information on States' practices.

The Chair regarded as highly important the paper the Rapporteur presented, which had been introduced originally at the meeting of the legal advisors, who should be participating at some point in the discussion on the subject along with the others.

Dr. Hernández noted the shortcomings of Mexico's law on treaty ratification, and explained that international agreements struck at any level in his country can lead to international responsibility of the State and, consequently, in terms of formal requirements, every agreement must be backed by a prior legal opinion to be executed, based on the legal competence of the entity, with the obligation to be included in the government registry.

He also expressed his agreement with the classification presented by the Rapporteur, but suggested that treaties be split into two types: *latu sensu* and *estricto sensu* (State to State agreements that require parliamentary approval). When a classification is required based on the entity executing it, then there must be a distinction drawn between agreements or treaties entered into between executive branches, agreements that are entered into between ministries, and lastly, agreements entered into between subnational units (the practice varies, in some places agreements may only be executed between similar categories of entity). As to the Rapporteur's questions, he asserted that a practical guide should be drafted to establish general principles. As a second component, a catalogue of best practices should be included (requirements for their formalization, coordination mechanisms, etc.). A list of agreements with different characteristics should be provided in light of legal requirements at the domestic level.

Dr. Carlos Mata Prates requested separating the field of international law from the field of domestic rights (which requires resorting to constitutional law) when distinguishing declarations from treaties. As to the classification based on the effects, it would be worthwhile, he said, to frame it to determine whether or not they have legal effects. When a pronouncement is made in favor of a treaty, a link should be established with the domestic law that takes into consideration the application of domestic procedures. In the case of political declarations, there should be clear guidelines without dwelling on determining whether or not it creates legal effects. The task is complex. Accordingly, he proposed to the Rapporteur to flesh out the topic of the effects of instruments instead of the determination of their nature, inasmuch as it can be established based on the actor that participates in it and serves as a point of reference to establish its nature, but in every case, the State is responsible.

Dr. Correa explained that regulation in Colombia is made up of different controls or checks in terms of procedures for the signing of international instruments. She requested the rapporteur to take into account the declarations adopted by legislative and judicial bodies in several forums, which do not necessarily fall under the scope of the mandatory.

Dr. Elizabeth Villalta agreed that a questionnaire should be submitted to all States to find out about the experience of each region, which should include the following questions, in addition to other ones:

- The type or category of instrument that they sign;

- Whether they are parties to the Vienna Convention on the Law of Treaties or whether they enforce it as customary law;
- The way in which political declarations are put on the record.

The report should allow us to draw a conclusion on how States use treaties.

Dr. Juan Cevallos proposed seeking the participation of the States in the drafting of the document.

Dr. José Moreno noted that political commitments should be fleshed out and, in this regard, he suggested devoting some space to the topic of centralized registries. He also concurred on the importance of simple questionnaires.

Dr. Alix Richard concurs with the Committee members about the report presented by the Rapporteur. He cited the existence of agreements between cities of Haiti and other cities of world and urged the Rapporteur to include this arrangement. He explained in broad strokes the domestic system of ratification in Haiti, which requires review of the constitutionality of treaties. Lastly, he mentioned the signing of memoranda of understanding as a recent practice.

Dr. Carlos Mata asked the rapporteur to differentiate the international sphere from domestic spheres, in view of what said distinction means, in particular, to a judge of an international forum. A study of the domestic sphere would involve a complex domestic discussion about the provinces and scopes of the constitutional law of each State, a considerable challenge. Consequently, he suggested that the Rapporteur focus only on the international sphere. He mentioned international courts, in their judgments, regarding domestic acts as unilateral. He also supported the idea of short texts in the questionnaire.

Dr. João Clemente Baena Soares shared that, in his experience, establishing agreements between foreign entities or municipal units with Brazilian ones has not had a positive effect and have had to be neutralized through effective provisions.

The Chair first stressed the importance of differentiating between a non-binding agreement and an international treaty; which can be done by reviewing the practice of the States. We should find out how States address this issue, including learning about the different types of legal provisions that the States apply and their practice.

The topic involves, he said, two areas: agreements between States and agreements between non-State entities. In the first group, he suggested looking at the intent of the parties to see if they are binding or not (he cited the case of maritime delimitation and territorial issues between Qatar and Bahrain). In the second area, he suggested reviewing the status of agreements signed by non-State entities, in terms of domestic law and the practice of States with regard to these instruments. It is something that must be done cautiously. In addition to that, we should try to review the issue of breaches and whether it incurs State responsibility, based on the traditional rules. As to legitimate expectation or *estoppel*, he proposed that they be treated cautiously. He agreed the questionnaire should be brief and concrete, to address crucial issues and encourage the highest number of responses possible. It is also essential, he noted, to hold a meeting of the legal advisors of the region to discuss, among other topics, work on this subject matter.

The Rapporteur explained that his original idea was to be able to present a wide range of options. As to the approach, he thought that the idea is mostly to stick to the sphere of international law, but at the same time certain domestic topics are relevant, particularly with regard to instruments drafted by agencies or subnational or regional governments. Although the way each country regulates its domestic cases is not going to be explained, because of the implications of State responsibility, domestic law has to be taken into account.

He proposed as the next step to review the questionnaire with the support of the Secretariat, and once it is approved by the members, to circulate it among the States. He will also review the situation of the simplified agreements and he noted that it would be unwise to flesh out the topics concerning *estoppel*. The intention therefore is to distinguish treaties from declarations, and determine the status with respect to adoption of agreements by subnational entities, in a non-judgmental way, respecting the sovereignty of each State.

Dr. Joel Hernández requested that the Rapporteur include a section on minimum standard rules in political declarations.

The Chair supported Dr. Hernández's proposal and urged the Rapporteur to include references to overt violations of norms pertaining to the capacity or competence to enter into treaties. That would make it necessary to link international law and domestic law in order to determine the international standards existing in the subject matter with respect to the determination of the nature of the instrument. Lastly, he proposed that the questionnaire be sent out as soon as possible.

At the 92<sup>nd</sup> Regular Session (Mexico City, February 2018), the Rapporteur referred to the distinction made between treaties, non-binding (political) agreements and contracts, and recalled that the CJI approved sending questionnaires to Member States, 10 of whom responded in due course: Argentina, Brazil, Colombia, Ecuador, United States, Jamaica, Mexico, Peru, Dominican Republic and Uruguay. The second report submitted in the present session (document CJI/doc.553/18) is a synthetic analysis of the responses received, and proposes a path forward to prepare a series of practical guidelines on the matter.

He found that most of the Member States who sent in responses to the questionnaire are signatories of the Vienna Convention on the Law of Treaties, underlining that is within the internal definition of international treaties that differences arise. Likewise, he noted that all those who answered coincided that political agreements lack any legal worth, but differ in their perception of the content that such agreements should have in order to be considered non-binding in accordance with the internal legislation of each State. Dr. Hollis also found that the main difference lies in whether the language and context of the juridical act are determinant for us to know if we are dealing with a binding agreement. The Rapporteur emphasized that the figure of institutional agreements presents certain unusual particularities even for most States. This is generally a question of internal law, but the very concept is diffuse, and this is where Member States could benefit from some clarification as to the juridical authority of their agencies and ministries to sign agreements that are binding to international law. In this sense, he detected enormous differences as regards the binding agreements signed between provinces or regions of different countries, and whether they are obligatory only for these provinces or for the entire State. This allowed the Rapporteur to appreciate how opportune the CJI exercise is in respect to preparing guidelines to align both parties of an agreement concerning the nature of same. Dr. Hollis concluded by proposing that a new effort be made to obtain a greater number of responses to the questionnaire, given that despite its importance and usefulness, a mere ten answers represents a minority of the membership of the OAS. On the other hand, he proposed preparing a draft or guidelines for entering into international agreements, rather than some general principles of a practical, political nature to be adopted by Member States, which could prove far less fruitful.

The Chair thanked the Rapporteur and agreed that emphasis should be made in the sphere of institutional agreements, since the CJI's contribution on the issue of treaties would not be substantial, and the Vienna Convention has proved to be sufficient for Member States. He also agreed to renew urging Member States to send their answers to the questionnaire and suggested enhancing the focus of the guidelines to be presented in order to have an outline of these available at the meeting with legal advisors of ministries to be held at the next regular session.

Dr. Mata complimented the Rapporteur on his thorough analysis and pointed out that in the case of the Uruguayan unitary system, foreign affairs are conducted by the Executive, while departmental

governments can sign institutional agreements with prior parliamentary approval and only on certain matters – usually credit – with the central government playing an obligatory subsidiary role. Consequently, a departmental government lacking parliamentary authorization cannot oblige the Uruguayan State to take responsibility for such measures; this is what is called an inter-institutional agreement, because it only obliges institutions, not the entire State. Conversely, in a federal system the States or provinces have other powers with regard to signing treaties and the concept of institutional agreement. Dr. Mata therefore suggested caution not to enter into an analysis of human rights or to repeat what is already regulated by conventional common-law legislation. Here he agreed with the Rapporteur as to the advisability of the guidelines concentrating on those topics that the Vienna Convention treats superficially, as well as on the effect of institutional agreements and political declarations. He added that these guidelines will also be useful to judges and arbiters, which makes such documents a very valuable asset for the CJI.

Dr. Correa congratulated the Rapporteur on his work synthesizing the responses of the States, and went on to point out that the Legislative and Judiciary powers often attend international meetings where they make declarations or assume some commitments besides the formal processes of signing agreements, adopting informal mechanisms in which they make their intentions clear but whose legal effects are often lacking clarity for the parties involved. In her opinion the State is responsible for the agreements that fail to comply with the formalities of a treaty; this is a theme that concerns internal law, which would make it somewhat difficult to prepare guidelines.

Dr. José Moreno also congratulated rapporteur Hollis and expressed his confidence in the usefulness of guidelines that could help the States to drive ahead regulatory changes; he suggested that the guidelines should contain examples in order to give them a pedagogic feature.

Dr. Alix Richard, appreciating the work of the Rapporteur, asked the Chair if he could personally answer the questionnaire on behalf of his country, in collaboration with Haitian experts, or if it was necessary to answer via the official channels. As he saw it, a document of guidelines would be extremely useful for Haitian judges, and disseminating this document would greatly enrich the work of the lawyers in this area.

The Chair clarified that without jeopardizing the official answer, which is the proper way to obtain the position of the State concerning the questionnaire, nothing prevents a member from offering his opinion and in this way making an input contribution. He also remarked that the Vienna Convention is supplementary and does not prevent internal law from allowing instruments the right to sign these agreements, and that in such cases the practice of the American States and comparative law on the world level would constitute a useful tool that could also lend clarity to the guidelines. He concluded that the CJI's most significant contribution would be a document of good practices.

The Rapporteur agreed with the members that the guidelines are an international-law project that is not meant to change internal law, and explained that the purpose of the document is two-fold: i) to clarify which international agreements are binding, so as to prevent some of the parties being surprised when compliance is demanded or if some responsibility is required of them, and ii) to determine who is responsible in the case of institutional agreements, whether the State or only the institution that signs the agreement, this being the area with the most diverse legal opinions among the Member States. Finally, the Rapporteur offered presenting a preliminary draft for a practical guide for the appreciation of the members in July 2018.

The Chair agreed that the guidelines will concentrate on institutional agreements and the analysis of good practices that the region can adopt, and asked for a document to comment on the exchanges with the legal advisors scheduled for the next regular session in August 2018.

During the 93<sup>rd</sup> Regular Session (Rio de Janeiro, August 2018), the Rapporteur Dr. Duncan Hollis presented the third report on the subject of binding and non-binding agreements, (document CJI/doc.563/18). By way of introduction, he spoke of the origin of the theme at the 5<sup>th</sup> Joint Meeting

with Legal Advisors (25-26 August, 2003) before identifying three types of international agreements (treaties, political commitments and contracts) and considering the capacity of States to conform to each of the instruments under analysis. He also referred to the considerations on the juridical effects and procedures at different agreements types. He explained that the Rapporteurship received a total of twelve answers to the questionnaire sent to the Member States and showed the situation regarding five themes relating to international agreements: definition; methods of identification; capacity; effects; and procedures. He closed by commenting on the decision of the Committee to adopt guidelines to differentiate international agreements, as in the project that appears in annex I and the commentary to each provision in annex II of his report. He asked the plenary to submit general comments ahead of the analysis of the guidelines.

Dr. Joel Hernández spoke of the usefulness of the document presented in such a short time. The classification between binding and non-binding agreements and contracts is very pertinent, and therefore an explanation of this division should be included in the introductory section, besides the definitions. He also suggested the importance of including the theme of dispute resolutions, because of the lack of understanding that often happens between parties concerning the intention of adopting an agreement that is binding or not. He closed by recommending using examples to illustrate the concepts mentioned in the topic of best practices, perhaps by including the answers to the questionnaire.

Dr. Carlos Mata Prates also thanked the Rapporteur for his report. In respect to the inter-institutional agreements on page 8, he proposed including a reference to the international character of these agreements.

The Chair of the Committee congratulated the Rapporteur and asked him to change the title so as to show that it deals more broadly with the guidelines of the OAS in the field of international agreements.

The Rapporteur appreciated the proposals received and said he would certainly consider their inclusion in the report. Regarding the relevance of the title, he confirmed that perhaps it would be convenient to use the one it had been used in the previous version of his report. He then proceeded to explain the guidelines. In relation to the difference between the instruments, the Rapporteur provided explanations on the need of defining them and checking their legal status case-by-case: agreements, political commitments and contracts.

In relation to the topic involving definitions, Dr. Carlos Mata Prates asked to bear in mind that the reference to treaties must be broad enough so as to include written and non-written ones. Additionally, we should avoid limiting the definition of treaties to States, including international organizations. Regarding contracts, Dr. Ruth Stella Correa Palacio asked for a greater articulation of the definition of the same. Dr. Joel Hernández agreed to include a definition of agreements in its broad sense. On page 12, he asked for more explanations on the reference to unilateral agreements. As regards treaties, their legal binding aspect should be highlighted. He asked the Rapporteur about the distinction between political commitments and inter-institutional agreements. Regarding contracts, he endorsed Dr. Correa's suggestion and asked for more information regarding progress on the material and spatial spheres of same (a contract between two persons or private international contracts). Dr. José Moreno congratulated Dr. Hollis on the good work. As regards the definition of contracts, there is a perception about contracts governed by a non-national law whose reference appears on page 19 of the Paraguayan Law, and therefore the notion needs some clarification. The President asked to take into account the opinion of authors on the issue, and in that context the treaties reached in writing, notwithstanding the existence of the verbal agreements duly mentioned by the Rapporteur. As regards the area of contracts, he asked to try to find the best way to show that they are governed by national law. He did not deem it necessary to define agreements, as that would be excessive or "too academic". He also asked to restrict political commitments to States, without involving private individuals. Finally, he asked for additional explanations regarding the determination of inter-institutional agreements

mentioned on page 21. Dr. Espeche Gil mentioned the executive agreements among the Ministries of Foreign Affairs and the need to include that sort of arrangement. In this regard, Dr. Hernández was in agreement with the need to include them in the report. An additional category should not be created, though, but this needs to be explained. This proposal was also endorsed by Dr. Mata Prates. Dr. Luis García-Corrochano said that it was essential to keep on using the definitions as originally presented.

The Rapporteur of the theme, Dr. Duncan Hollis, was grateful for the comments received. He expressed his agreement with Dr. Mata on the reference to international organizations, and at the same time he asked for more time to think about the topic involving non-written agreements. He also thanked Drs. Ruth Stella Correa Palacio and José Moreno about their perception regarding the definition of contracts. In response to Dr. Joel Hernández, he explained that his intention when mentioning contracts referred to those cases in which it is evident that an agreement has to be interpreted according to the laws of the country involved or subject to the domestic law applicable. Regarding the differentiation on agreements, he noted that the International Court of Justice has suggested the need for an agreement separate from the question of whether it is binding or not, a point on which the Chair showed his disagreement, as in his opinion the Court does not rule on agreements, but does so regarding treaties. In addition, the President asked for the document to address the three categories, and this view was endorsed by Dr. Joel Hernández (that is, the need to define a treaty, a contract and a political commitment). On page 21, the Rapporteur explained that there are treaties that are not necessarily reciprocal, but that can still be treaties. Furthermore, that the idea of inter-institutional agreements obeys the need to understand that these agreements may be binding or non-binding. Finally, regarding executive agreements, he expressed his intention to include them in a later section of the report on procedures.

Right afterwards, the Rapporteur mentioned the question involving capacity in each case. There is no doubt whatsoever about the capacity of states to enter into treaties. The institutions of the State, in addition, are empowered to adopt treaties, although they are not obliged to do so. In any case, it is important to endeavor to confirm whether the institution enjoy the prerogatives in the area of treaties and the corresponding authorization.

Dr. Joel Hernández suggested emphasizing Article 46 of the Vienna Convention on the Law of Treaties. Regarding item 2.2, he asked the Rapporteur to include a reference to full powers. An illustration of the practice in relation to this topic is Hong-Kong's power to enter into treaties.

Dr. Carlos Mata Prates said that item 2.3 on prerogatives of entities to enter into treaties seemed to impose an obligation on the State to investigate or interpret the domestic law of another country, especially taking into consideration that item 2.2 already establishes the question involving the full powers of the states to adopt treaties, and therefore the topic is fully covered.

The Chair asked to avoid including any additional reference to domestic legislation in adopting political commitments. He understood the explanation given by Dr. Mata Prates on item 2.3, and for that reason he asked to include a reference in item 2.2 regarding the need of the governmental institution to guarantee that it has the legal capacity to act. In fact, transparency has to be a good practice.

The Rapporteur of the theme thanked the commentators in this section. He undertook to make a reference to Article 46 of the Vienna Convention on the Law of Treaties. Regarding the question of transparency, he proposed assigning the non-state entity to demonstrate that it has the prerogatives to reach an agreement and not the opposite. In turn, Dr. Correa made a distinction between the topics involving capacity and representation, and for that reason he thought it would not be necessary to announce the theme of full powers, as they are part of the representation issue not capacity. Dr. García-Corrochano mentioned the competence of certain ministries or offices of the executive power to comply with formal requirements binding the will of the States, regardless of the degree of relevance they enjoy. The Chair was in favor of the argument provided by Dr. Correa in restricting the report to

the issue of capacity and not the issue of representation. However, the Rapporteur deemed it might be convenient to include the issue of representation in the commentary to the guidelines.

Finally, the Rapporteur of the theme mentioned the method used to identify the existence of each one of the types of agreements. From a practical viewpoint, the clauses in the text, the circumstances and the conduct of the parties will determine the nature of the instrument. Therefore, this section is a detailed reference that might well help to determine the type of instrument. In case of contradictory evidence, an approach should be sought that combines both objective and subjective methods.

Dr. Espeche-Gil was of the opinion that the academic exercise was really very broad, and seemed to believe that not in all cases are the States capable of implementing the various hypotheses. He suggested that perhaps the central theme ought to be divided into sub-themes. In this regard, the President explained that background information on the topic, stemming from the meetings of the VI Joint Meeting of Legal Advisors (October 5, 2016), and reflecting the result of dialogue and interaction that the Committee must enjoy with the juridical community, which is regarded as one of the main problems of ministries of foreign affairs. As a result, he reaffirmed its relevance in view of its concrete and practical nature, which allows for highly relevant directives and guidelines.

As regards the report, the Chair suggested eliminating item 3.1 as it deals solely with agreements and their academic nature, and starting the Report directly with item 3.2 and the determination of the type of treaty. Dr. José Moreno asked not to include the doctrine in the footnotes of the final document. Dr. Baena Soares asked for an explanation regarding item 3.4, which omits a reference to conventions and protocols.

In response to the comments made, the Rapporteur of the theme agreed that the report is in fact comprehensive, and that it includes several themes. He expressed some reticence regarding the interpretation of the President on the jurisprudence mentioned in item 3.1. In response to Dr. José Moreno, he suggested presenting the guide to the public without comments/footnotes. Finally, he agreed with Dr. Baena Soares' opinion and proposed to add a section that includes other titles for treaties.

At the conclusion of the debates, the Rapporteur undertook to include the suggestions presented and agreed to submit a new version of the report during the forthcoming session of the Committee.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the Rapporteur for this topic, Dr. Duncan B. Hollis, presented his fourth report (document CJI/doc.580/19), through a video conference since he was unable to travel to meetings of the Committee. In the first part of his oral presentation, he offered a brief explanation of the latest developments in the treatment of this topic within the Committee, describing the three main categories of international agreements – treaties, political commitments, and contracts – as well as the more ambiguous category of “inter-institutional agreements”. In each case, he proposed an analysis of the best criteria for characterizing the type of agreement, the capacities of different State institutions, and the methods for defining each type of agreement. He offered his thanks for the comments received from the States as well as from the representatives of the legal advisers of the Ministries of Foreign Affairs, whose replies confirmed the need for the differentiation proposed by the Rapporteur.

He then explained the reasons prompting him to continue using the word “agreements” as distinct from other concepts:

- Historical grounds in which agreement is recognized as being broader than treaty;
- The concept of agreement covers the three main categories (treaties, political commitments, and contracts) and distinguishes it from other instruments;
- He does not want to limit the word agreement to treaties;
- Any risk of confusion is avoided by using the terms binding and non-binding agreements.

Toward the end of his presentation, the Rapporteur announced his intention to include procedures, effects, capacity-building, and training in Annex I and explained that Annex II currently contains comments on the Guidelines regarding procedures. The procedures are designed to facilitate conditions and communications among the parties to a negotiation and completion of an agreement, in which there is a catalog that helps distinguish political commitments. As regards effects, consideration should be given to defining the type of contract or agreement, including determination of the responsibility of the institution or the State. Finally, capacity-building should be provided for those in charge of the agreements, to ensure that they are familiar with their procedures and effects.

Dr. José Moreno asked the Rapporteur to kindly include non-state rights in item 4.3, so as to provide a more open option allowing involvement of players from the private international law field.

Dr. Jorge Galindo praised the detail and accuracy of the work. As regards use of the term “approval procedures” for political commitments (included in items 4, 4.2, 4.3, 4.4 and 4.7), he explained that countries such as Brazil have no approval procedure for this type of instrument, which is perhaps why this wording would not be appropriate. His second question addressed the explanation of the word “agreements” and the use of the verb “conclude” as in “conclusion of treaties”, whereby he wondered whether that was specifically for treaties only, rather than instruments of a political nature, for example. He also asked for clarification of the phrase “government ministries and sub-national units” mentioned in item 4.4 and asked whether it would not be appropriate to include the “government agencies” referred to in item 6.2, thereby standardizing the wording used. Finally, he suggested merging items 4.6 and 4.7 for practical reasons, particularly when there is no prior legal opinion as to whether an instrument is binding or not.

Dr. Milenko Bertrand asked about the legal consequences of instruments that do not meet the conditions required for a binding treaty, but which may give rise to obligations, such as estoppel.

Dr. Mariana Salazar suggested modifying the Spanish verb tense to “are” (“*son*”) in Item 4.1 of the Guideline. Regarding procedures, she said that the term “would gain” (“*ganarían*”) needed clarifying in item 4.4. In regard to item 4.5 on the topic of publication, she suggested using the phrase “make public” (“*hacer pública*”). Finally, for item 5.8, she suggested the inclusion of a model clause for cases in which the responsibility derived from inter-institutional agreements on this matter needs to be limited.

The Rapporteur thanked the members for their comments and replied to some of them. He agreed to include a reference to “non-state rights”, as suggested by Dr. Moreno, and also to take into account Dr. Galindo’s comment about the use of the word “procedures”. He said he would also review the reference to “conclusion” of agreements and the suggestion about incorporating “agencies.” With regard to including agreements in the report that are not treaties, that would involve asking whether there is a wish to expand the proposal in its current form. In response to comments made by Dr. Salazar, he acknowledged that the use of the conditional was in response to some States that had expressed their disagreement with a document that would be mandatory. He agreed, however, that in the cases she mentioned, the conditional should not be used. Finally, he said that he appreciated the suggestion of including a model inter-institutional agreement.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 – August 9, 2019), the rapporteur for the topic, Dr. Duncan Hollis submitted his fifth report, (document CJI/doc.593/19), which includes a draft guide to facilitate the task of addressing this complex topic for States, based on the following elements: definitions, capacity, methodology, internal procedures, international legal effects, training programs. Among the new features of this version, the rapporteur highlighted the following:

- An introductory text is included to clarify that it is not the intention of the rapporteur to codify or propose rules on the progressive development of international law.

- An effort has been made to define the term "agreements" so as to include the different forms worked on.
- The term "treaty" was also revised—irrespective of the definition it receives domestically—to refer to a binding agreement.
- The definition of "contracts" was revised in response to Dr. Moreno's proposal to include those governed by non-state law.
- The language in relation to capacity and methodology was reformulated to reflect good practice for States and other subjects of international law.
- Illustrations of clause have been included to support the drafting of the document and to facilitate the determination of its nature.
- In relation to the measures to identify a treaty, a set of formulae with linguistic keys have been introduced.
- The legal effects have been organized into guidelines.
- The analysis of good practice in terms of political commitments includes indirect legal effects in specific circumstances.
- For its part, the treatment of interagency agreements refers to the expectation that treaties of this nature will generate State responsibility as a whole.

Regarding the methodology, the Rapporteur urged members to submit their comments in order to enable him to make the necessary revisions. He also suggested sending this document to States, including those that are not members of the OAS but have expressed interest in this work. His intention was that the report be adopted in August next year.

At the end of his presentation, the Rapporteur noted the positive impact of his work outside the inter-American system, having participated in two events organized by the UN: one with legal consultants and the other with treaty experts.

Dr. Mariana Salazar expressed appreciation for the changes made to the report, in particular the precaution over the type of document proposed and the type of language used.

Dr. Carlos Mata welcomed the reference to guidelines and considered that the report covered issues within the scope of both international and domestic law. He also highlighted the developments in relation to agreements between federal states within a particular region and the issue of capacity and applicable law in such agreements. For dissemination purposes, he proposed that the work be brought to the attention of the legal consultants who would meet in Rio de Janeiro next year, and that it be approved in August. Finally, he suggested making modifications in terms of form to facilitate better understanding.

Dr. George Galindo noted the universal nature of the document, which could serve all countries and which responded to the initial request made by the legal consultants. He highlighted some general ideas and asked the rapporteur to explain the use of "normative commitment" (*compromiso normativo*) in the definition of agreement, an expression that could be tautological. He asked about the relevance of referring to the two schools of interpretation (intention and objective) to determine the binding or non-binding nature, which in many cases overlap. He also considered that one of the most important contributions of the document were the elements indicating the binding or non-binding nature of an agreement. He asked that the Spanish document be reviewed, owing to certain inconsistencies in the translation. In relation to the effect, he questioned the usefulness of distinguishing between primary and secondary effects. He also suggested not making a distinction between direct and indirect effects. Finally, he considered that education and training should be extended to other areas, since foreign ministries do not always play a direct role in negotiations.

Dr. José Moreno asked how the text would be disseminated at the UN. He urged that a protocolary act with the legal consultants be carried out in August, and that the document be sent to the consultancies now to obtain their views. He appreciated the reference to contracts as non-State rights, considering among other things that documents of this type were important in the field of arbitration.

The Chair, Dr. Ruth Correa, commended the rapporteur on his work and highlighted the contributions that his work could make in the areas of education and standardization. She expressed concern about the current definition of contract and invited him to use the concept that the CJI had adopted in that regard. She appreciated the clarity of the description in point 4.1 on the development of internal procedures. She requested clarification of the term "displacement" in point 5.2. Finally, she asked for greater precision on the competencies of the State in the description of the situation in Colombia with respect to simplified agreements.

Dr. Espeche-Gil noted the importance of distinguishing between agreements that allow the execution of a prior treaty and executive agreements, based on its own constitutional powers.

Dr. Luis García-Corrochano noted that simplified agreements are a power of the executive to bind the State, and that there was no apparent difference in rank with solemn treaties (requiring the consent of other bodies).

The Rapporteur, Dr. Duncan Hollis, expressed thanks for the comments. In response to Dr. Mariana Salazar, he noted that the Mexican institutional framework makes it possible to limit the responsibility of institutions, and he promised to include a clarification in that regard. With regard to Dr. Carlos Mata's comments, the rapporteur supported the idea of differentiating between the internal and external spheres. In response to Dr. Galindo's suggestion on the subject of behavior, he explained that his original idea was to include references to behavioral expectations (normative commitment). In point 3.2 he indicated that his intention was to take into account cases where a treaty had been concluded, without that necessarily reflecting the intention of the parties. He supported the idea of conducting a review of the Spanish translation of the text. It undertook to simplify references to the primary and secondary nature and to review the issue of direct and indirect character. On the subject of training, he said that it was important to centralize it in an entity such as the Ministry of Foreign Affairs, without prejudice to involving other areas. He asked Dr. Moreno for assistance in better linking contracts to treaties. As a formula for promoting the topic, he advised presenting the document to the UN International Law Commission. Regarding the reference to Colombia, he asked Dr. Ruth Correa for her support in improving the explanation and in clarifying when an agreement would be governed by international or domestic law. Finally, he explained that the term displacement referred to the rule that would apply in the event of of silence.

At the end of the discussion it was decided to wait for comments from members, which were expected by mid-December. At the next session, the Rapporteur would present a new version to be sent to States for comment.

The following documents were presented by the Rapporteur for the topic, Dr. Duncan B. Hollis, in February and August 2019:

## CJI/doc.580/19

**BINDING AND NON-BINDING AGREEMENTS:  
FOURTH REPORT**

(presented by Dr. Duncan B. Hollis)

**INTRODUCTION**

1. At its 89<sup>th</sup> 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.<sup>1</sup> The Committee agreed and appointed the author to serve as Rapporteur at its 90<sup>th</sup> Regular Session.<sup>2</sup>

2. In my preliminary report, I identified three categories of international agreement – treaties, political commitments, and contracts. For each category, I introduced four 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?<sup>3</sup> 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.

3. 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. My second report reviewed the responses received from ten Member States: Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.<sup>4</sup> Panama and Paraguay later provided the Committee with their views as well.<sup>5</sup> These responses provided a useful summary of Member State views on five issues: (i) definitions of the different types of agreement concluded by each State; (ii) methods used to identify each agreement type; (iii) which entities had the capacity or authority to enter into each agreement type; (iv) the international legal effects, if any, of each type of agreement; (v) domestic approval procedures for each type of agreements; and (vi) areas warranting further attention from the Committee. In reviewing this report (and the underlying responses), the Committee endorsed the completion of “*OAS Guidelines for International Agreements*” – a set of best practices for Member States to use in making and applying their various agreements. The aim of the *Guidelines* is to

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<sup>1</sup> 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.

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

<sup>3</sup> See Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, Inter-American Juridical Committee, 91<sup>st</sup> Regular Session, OAS/Ser. Q, CJI/doc.542.17 (August 6-16, 2017) (hereinafter “Preliminary Report”).

<sup>4</sup> 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”).

<sup>5</sup> 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”].

offer a concrete and detailed set of definitions, processes, and methods for identifying and differentiating among three types of international agreements – treaties, political commitments, and contracts – and the various actors who may make them – States, government agencies, and sub-national territorial units. The *Guidelines*, however, do not aspire to legally bind Member States in anyway; they are intended to be entirely voluntarily. And although there are several areas where existing international law is unclear or disputed, the *Guidelines* will leave these issues unresolved. Rather, the project aims to offer a Member State “best practices” to side-step or overcome such challenges via candid and useful advice on the current state of the law and practice and ways to minimize future disagreements or difficulties with other States.

4. In my third Report, I (temporarily) retitled the project *OAS Guidelines for Differentiating International Agreements* and offered initial drafts of guidelines with commentary on the first three key parts of the project:

- (i) definitions of the three main categories of international agreement – treaties, political commitments and contracts—as well as they more ambiguous category of “inter-institutional agreements”;
- (ii) the capacity of different “State institutions” (e.g., government ministries or agencies, sub-national territorial units) to conclude each type of international agreement; and
- (iii) methods for identifying each agreement type, highlighting how different States may not use the same methods and suggesting therefore a need for greater transparency among States as to their own practices in identifying binding and non-binding agreements.<sup>6</sup>

5. At our last Regular Session, Committee members kindly offered detailed feedback on the first three sections of the draft guidelines and accompanying commentary. In addition, the draft was presented during the Committee’s August 15, 2018 meeting with representatives of the Member State’s Foreign Ministry Legal Advisers.<sup>7</sup> Both groups confirmed the value of the project and provided useful—and often detailed—suggestions, comments and critiques. With one exception, however, the current Report does not engage with this feedback. Rather, it provides new draft guidelines and some of the commentary on topics not covered in the first draft: (i) procedures for approving the negotiation and conclusion of binding and non-binding agreements; (ii) the legal effects of binding and non-binding agreements; and (iii) training and education. As such, this report—combined with the Third Report that preceded it—provides a complete but still “tentative” draft of the *Guidelines*.

6. I have, moreover, retitled the project as *OAS Guidelines on Binding and Non-Binding Agreements* in response to comments received both from other CJI members and one representative of a Foreign Ministry’s Legal Adviser. The earlier titles—first *OAS Guidelines for International Agreements*, and then, *OAS Guidelines for Differentiating International Agreements*—were critiqued as being over- and then under-inclusive. The original title could have implied a project akin in scope to the Vienna Convention on the Law of Treaties – i.e., an overview of *all* rules relating to the formation, interpretation, application and termination of all of the different types of international agreements. My next title, in contrast, may have drawn the subject-matter too narrowly, by focusing only on categorization of different international agreement forms, overlooking important questions of effects and procedures. In the current draft, I have adopted a title that matches the CJI’s Agenda itself, namely “Binding and Non-Binding Agreements.”

7. More importantly, I have continued to employ the term “Agreements” in the title and throughout the *Guidelines* to reference the broader concept within which treaties, political commitments, contracts, and inter-institutional agreements all fall. It is true, as one Foreign

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<sup>6</sup> Duncan B. Hollis, *Third Report on Binding and non-Binding Agreements*, OEA/Ser. Q. CJI/doc. 563/18 (15 July 2018) (hereinafter “Third Report”).

<sup>7</sup> See Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018.

Ministry's Legal Adviser's Office advised, that certain States in their practice employ the term "agreement" as a synonym for a "treaty." As such, there is a risk that the use of the term "agreement" in the title and contents of these *Guidelines* may be confusing to States used to thinking of "agreements" only in terms of mutual commitments governed by international law.

8. I appreciate the concerns expressed about using "agreements" in this project to refer to the broader concept of a shared commitment. Nonetheless, I have continued to do so for five reasons. First, as a historical matter, at least since the International Law Commission's seminal work, treaties have been recognized *not* as a synonym for agreement, but as a sub-category of that broader concept.<sup>8</sup>

9. Second, and relatedly, the term "agreement" captures an essential criterion that unites treaties, political commitments, and contracts, and distinguishes them from other international texts (e.g., unilateral declarations, texts lacking normative commitments).<sup>9</sup> I have not been able to identify an alternative (or synonymous) phrase that would do so as well. Although some might suggest the *Guidelines* focus on "instruments" rather than "agreements," that approach is problematic. Instruments may be formal documents, but they can also lack *both* the mutuality and commitment (*consensus ad idem*) criteria that are essential components of all treaties, political commitments and contracts. One state can produce an "instrument" just as multiple states can sign an instrument without undertaking any normative commitments. Such, recasting this project in terms of instruments would simply replace one potential source of confusion with another, shrouding *the* common element that unites treaties, political commitments and contracts and differentiates them from other international documents. Similar problems arise with respect to other phrasings. Trying to focus on "commitments", for example, leaves out the concept of mutuality.<sup>10</sup> Other potential synonyms like "accords" or "contracts" are either too obscure or already operate as terms of art in international relations, making them ill-suited substitutes.

10. Third, while State practice may often reserve the term "agreement" to label or otherwise identify a treaty, I believe it would be a mistake to have these *Guidelines* tie the usage of that term exclusively to the treaty-context. As currently drafted, the *Guidelines*' central message counsels against any best practice of using (or expecting) "magic words" to dictate a text's legal

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<sup>8</sup> The idea that all treaties are agreements but not all agreements are treaties was a regular refrain in the International Law Commission's work on the law of treaties. Henry Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, 1; [1965] YBILC, vol I, 10, 10 (Briggs); J.L. Brierly, *First Report on the Law of Treaties*, [1950] YBILC, vol II, 227 (19-20). The 1969 Vienna Convention on the Law of Treaties that emerged from their work is also widely understood to use the term "agreement" in a conceptual sense, rather than by reference to a particular instrument such as a treaty. 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."); *see also* J.L. Weinstein, *Exchange of Notes*, 29 BRITISH Y.B.K. 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").

<sup>9</sup> Thus, the topic of unilateral declarations forms a distinct subject of study (and practice) in international law. *See, e.g.*, ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, [2006] YBILC, vol. II, Pt. II, 369. Moreover, although agreements can be one-sided—agreements do not require an exchange of commitments or what the common law calls "consideration"—they do require some normative commitment in terms of a shared expectation of future behavior by at least one of the agreement participants. *See, e.g.* Duncan B. Hollis and Joshua J. Newcomer, "*Political*" *Commitments and the Constitution*, 49 VIRGINIA J. INT'L L. 507, 522 (2009); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT'L L. 581, 584-85 (2005); JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 51-53 (1996).

<sup>10</sup> The opposite risk arises with alternative synonyms such as "arrangements" which fail to convey the normative expectations of future behavior inherent in the agreement concept itself.

status. Certain terms may be indicative as to which category a text belongs. And I would include “agreement” as doing so with respect to treaties. Nonetheless, whatever the practice of some States, it is also possible that other States (or an international tribunal) might regard a text labeled as an “agreement” to qualify as a contract or political commitment rather than a treaty where other indicia suggest these are the more appropriate categorization.

11. Fourth, I am hesitant to let the potential confusion over what criteria to employ in identifying a treaty override the arguably more important conceptual categorization on which such identification rests. It is just as important that States understand the *concept* of an agreement and when they are (or are not) reaching an agreement as it is to know what type of agreement they are concluding.

12. Fifth, and finally, I believe that any risk of confusion caused by focusing this project on international “agreements” can be mitigated by suitable qualifications in the *Guidelines* and the accompanying commentary. By explaining or signaling to States the different ways in which the term “agreement” can be employed, it may allow for its usage both as a broad-overarching concept *and* as a particular indicator of a treaty in practice. My next—and hopefully complete—draft of the *Guidelines (with Commentary)* will thus do more to highlight and explain these issues.

13. For now, I have opted to retile the project in terms of “binding and non-binding agreements.” Doing so backs away from the term “international agreement,” which several States employ in their domestic and international practice as a short-hand for agreements governed by international law. By qualifying at least some agreements as “non-binding,” moreover, my new title will illustrate from the outset that not all agreements are governed by law, whether international or domestic. As the draft commentary in my Third Report explained, agreements—like political commitments—may derive their normative force from sources outside the law such as morality or politics. Thus, by recasting the end goal as a set of “*OAS Guidelines on Binding and non-Binding Agreements*,” I aim to mitigate—if not avoid entirely—the problems of differentiating the *concept* of an “agreement” from its *usage* as a term in various legal and non-legal texts.

14. Aside from retitling this project, I have attached to this report at Annex I a draft of the remaining guidelines that I am proposing. They are divided into three parts:

- i. **Procedures:** These guidelines confirm the freedom evidenced in State practice by which States often have a plurality of internal procedures for approving the negotiation and conclusion of treaties, as that term is used in international law, and in contracts. With respect to those States willing to authorize their institutions to conclude treaties or contracts, I propose that States put in place procedures not only for conferring such authority but also for communicating it to other States with whose institutions such agreements might be concluded. For non-binding agreements, I endorse two best practices in particular: (i) that States develop and implement policies and procedures for authorizing the negotiation and conclusion of political commitments by the State, its ministries, or sub-national territorial units for which it is responsible; and, (ii) that each State consider having a national registry or database for cataloging its political commitments.
- ii. **Effects:** These guidelines summarize the different legal effects, if any, that State practice suggests treaties, political commitments, and contracts may generate. In addition, I am proposing as a best practice that States contemplate what effects, if any, they want to generate as one way to determine what type of agreement to pursue. Separately, I propose another best practice for inter-institutional agreements where the concluding institutions or the States who are responsible for them delineate to whom legal responsibility is owed under an agreement (whether by having both States agree that they are each legally responsible for the performance of the inter-institutional agreement, *or* by having both States or the institutions involved agree to limit any responsibility to the concluding institutions themselves).
- iii. **Training and Education:** This section proposes a set of concrete 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 make international agreements.

Annex II provides Commentary for the *Guidelines* on Procedures. I will prepare Commentary for the remaining Guidelines on effects and training/education for the next Regular Session of the Committee. I also hope to respond to comments and questions posed concerning the first three parts of my earlier draft *Guidelines (with Commentary)* that I introduced in my Third Report. .

15. As always, 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? More importantly, if these *Guidelines* were actually used, would they alleviate the confusion (and potential for inter-State disputes) that currently exists? Finally, are there additional guidelines or topics that this project should incorporate in any ensuing draft of the *Guidelines*?

## ANNEX I

### DRAFT OAS GUIDELINES FOR BINDING AND NON-BINDING AGREEMENTS

#### 4. PROCEDURES FOR MAKING BINDING AND NON-BINDING AGREEMENTS

**4.1 Different Domestic Approval Procedures for Treaties.** *Every State should remain free to develop and maintain one or multiple processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic approval procedures for the same treaty.*

**4.2 Developing Domestic Approval Procedures for Political Commitments.** *States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. Although non-binding agreements, political commitments would benefit from procedures by which a State can (a) confirm a commitment's non-binding status, (b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement, and (c) notification to—and coordination with—relevant State institutions, including the State's Foreign Ministry.*

**4.3 Developing Domestic Approval Procedures for Inter-State Contracts.** *For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. Ideally, these procedures would include (a) information on how the State will identify the governing domestic law of the contract, and (b) mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.*

**4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements.** *States should have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State's own domestic law or the domestic law of another State. Ideally, these procedures would (a) identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and (b) mechanisms for confirming that the other institution concurs as to the type and legally binding status of the inter-institutional agreement.*

**4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.** *States should publicize which, if any, of its institutions may be authorized to conclude treaties, whether on behalf of the State as a whole or in its own name. States should also publicize which, if any, of its institutions may be authorized to conclude contracts, whether on behalf of the State as a whole, or*

*in its own name. States may undertake this publicity generally, such as by posting its procedures on-line, or specifically by communicating with other States or State institutions as to its institutions' capacities and the relevant procedures under which they operate.*

**4.6 Publicizing National Registries of Binding Agreements.** *States should create and maintain public registries for all binding agreements of the State and State institutions.*

**4.7 A National Registry of Political Commitments.** *States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.*

## **5. LEGAL EFFECTS OF BINDING AND NON-BINDING AGREEMENTS**

**5.1 The Primary International Legal Effect of Treaty-Making: Pacta Sunt Servanda.** *The existence of a treaty obligates parties to perform it in good faith.*

**5.2 Secondary International Legal Effects of Treaty-Making.** *In addition to adhering to a treaty's contents, the existence of a treaty engenders the application of certain secondary international legal regimes. The law of treaties governs all treaties while other sub-fields of international law (e.g., international human rights) apply to treaties within their ambit. Depending on the circumstances, other secondary legal effects may follow from the existence of treaty, such as international dispute settlement proceedings or the law of State responsibility.*

**5.3 Domestic Legal Effects of Treaty-Making.** *Each State's own domestic constitutional structure should determine if (and when) that State will accord domestic legal effect to its treaties. State practice suggests that some States accord certain treaties legal effect directly within their domestic legal order while other treaties may only have domestic effect indirectly, such as through the enactment of implementing legislation.*

**5.4 The legal effects of contracts.** *The legal effects of a contract include the obligation to perform its contents and a capacity to enforce such performance within a domestic legal order. Contracts may also have the legal effect of displacing other, default rules of domestic law that exist in the absence of agreement. The nature and extent of a contract's legal effects depends on the domestic law of the State whose law governs the contract, including any relevant conflicts of law rules.*

**5.5 The Effects of Political Commitments.** *A political commitment will not directly produce any legal effects under international or domestic law. Whether due to their moral force or the political context, participants in a political commitment may nonetheless expect performance of its terms. A political commitment may also indirectly garner legal effects if it is encapsulated in other law-making processes such as new domestic law-making or binding international organization decision-making.*

**5.6 Legal Effects of an Inter-Institutional Agreement.** *The legal effects of an inter-institutional agreement will track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.*

**5.7 Choosing Among Binding and Non-Binding Agreements.** *In deciding whether to employ a treaty, contract, or political commitment for an inter-State or inter-institutional agreement, States and their institutions should contemplate what legal effects, if any, they want to generate.*

**5.8 Agreeing to Limit Responsibility under Inter-Institutional Agreements.** *Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it.*

## 6. TRAINING AND EDUCATION CONCERNING BINDING AND NON-BINDING AGREEMENTS

**6.1 Training and Education relating to Binding and Non-Binding Agreements by States.** States should undertake efforts to train and educate relevant officials within a Foreign Ministry to ensure that they are capable of

- i. identifying and differentiating among the various types of binding and non-binding agreements;
- ii. understanding who within the State has the capacity to negotiate and conclude which agreements;
- iii. following any and all domestic procedures involved in such agreement making; and
- iv. appreciating the legal and non-legal consequences that can flow from different types of international agreements.

**6.2 Training and Education relating to Inter-Institutional Agreements.** Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate those officials of a government agency or sub-national territorial unit to ensure that they are capable of

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal consequences that can flow from different types of international agreements.

## ANNEX II

### DRAFT OAS GUIDELINES FOR BINDING AND NON BINDING AGREEMENTS (WITH COMMENTARY)

## 4. PROCEDURES FOR MAKING BINDING AND NON-BINDING AGREEMENTS

**4.1 Different Domestic Approval Procedures for Treaties.** Every State should remain free to develop and maintain one or multiple processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic approval procedures for the same treaty.

**Commentary:** States have extensive—and often different—domestic approval procedures relating to treaty-making derived from each State's legal, historical, political, and cultural traditions. Despite their differences, these procedures serve similar functions. First, and foremost, they can confirm that the proposed agreement will constitute a treaty for the State (in the international law sense of that term employed in the *Guidelines*' definition above). Second, they confirm that the treaty is consistent with the State's domestic legal order, ensuring, for example, that the treaty's terms do not run afoul of any constitutional or statutory prohibitions or requirements. Third, they ensure appropriate coordination regarding the treaty's contents and/or its performance both within a State's executive branch and across the other branches of government.<sup>1</sup>

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<sup>1</sup> See, e.g., 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* ("Colombia Response") ("depending on the subject matter of the legal instrument to be negotiated . . . the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself" are involved in authorizing it).

The domestic approval procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State's constitution.<sup>2</sup> Others may be a product of national law.<sup>3</sup> In some cases, the procedures have no formal legal basis, but depend on a national practice or policy. In Canada, for example, although the Prime Minister has unilateral authority to make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted.<sup>4</sup> As a result, States may have different levels of legal commitment to their treaty-making procedures; some States' procedure will be non-derogable, while others may have more flexibility, capable of accommodating variations if the circumstances warrant.

In terms of the contents of these domestic treaty-making procedures, there is some uniformity in where the power to negotiate a treaty lies. Most treaty-making procedures assign the power to negotiate and conclude treaties to a State's executive, whether the Head of State (e.g., the Monarch), the Head of Government (e.g., the Prime Minister), or both (e.g., the President). Often, the power is further delegated from the Head of State to the Head of Government and from the Head of Government to the Foreign Minister. There is also uniformity in States' commitment to having the legislature authorize the State's consent to at least some treaties.

But there is extensive variation in both the breadth and depth of the required legislative role.<sup>5</sup> For some States, like the Dominican Republic, all treaties require legislative approval.<sup>6</sup>

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<sup>2</sup> See, e.g., Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (hereinafter "Argentina Response") (citing Article 99(11) of the Constitution for the President's authority to conclude treaties and Article 75(22) for the legislature's authority "[t]o approve or reject treaties concluded with other nations and with international organizations ..."); Colombia Response, *supra* ("treaties require adoption by the Congress of the Republic and a declaration of enforceability by the Constitutional Court, in fulfillment of the provisions of Articles 156 and 241 of the 1991 Political Constitution, respectively."); Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 ("Dominican Republic Response") (citing Art. 184 requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* ("Ecuador Response") (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response") (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); United States, *Inter-American Juridical Report: Questionnaire for the Member States* ("U.S. Response") (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

<sup>3</sup> Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (hereinafter "Brazil Response") (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017).

<sup>4</sup> See Maurice Copithorne, *National Treaty Law & Practice: Canada*, in NATIONAL TREATY LAW & PRACTICE 95-96 (D.B. Hollis et al, eds., 2005).

<sup>5</sup> The level of legislative approval may vary. Some states require the entire legislature to approve a treaty. Others have both chambers of a legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of two legislative chambers give its approval. Finally, some States affiliated with the Commonwealth do not grant their legislatures any role in approving a treaty, but they also disavow any domestic implementation without legislative authorization, which occurs via normal parliamentary procedures. See Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW AND PRACTICE 36 (DB Hollis et al, eds., 2005) (surveying the treaty law and practice of nineteen representative States).

Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.<sup>7</sup> Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive legislative approval, Colombian law and practice also recognizes "simplified procedure agreements." These agreements either (i) fall within the exclusive authorities of the Colombian President as director of international affairs under Article 189.2 of the Colombian Constitution, or (ii) they are concluded to develop a prior agreement (which did receive the assent of the national legislature).<sup>8</sup> For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those "sole" powers possessed exclusively by the Executive; and (4) where it is authorized by an earlier treaty that received Senate advice and consent.<sup>9</sup> In addition to legislative involvement, several States have a judicial review requirement, where the Constitutional Court reviews the constitutionality of a proposed treaty. Thus, in the Dominican Republic and Ecuador, the Constitutional Court must review all treaties before they can proceed through other domestic approval procedures.<sup>10</sup>

States may also impose notification requirements for treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the executive branch, including by government agencies. The "Circular 175" (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding treaties (in the international law sense of that term employed in the *Guidelines* definition) unless they have first consulted with the U.S. Secretary of State.<sup>11</sup> In 2013, Peru's Ministry of Foreign

<sup>6</sup> Dominican Republic Response, *supra* (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive").

<sup>7</sup> Ecuador Response, *supra* (National Assembly required to give prior approval to ratification of treaties involving territorial or border delimitation matters, political or military alliances, commitments to enact, amend or repeal a law, rights and guarantees provided for in the Constitution, the state's economic policies, integration and trade agreements, delegation of powers to an international or supranational organization, a compromise of the country's natural heritage and especially its water, biodiversity, and genetic assets).

<sup>8</sup> Colombia Response, *supra* (noting that for agreements developing a prior agreement, that prior agreement must be consistent with all constitutional requirements and that the implementing agreement itself must be consistent with—and cannot exceed—those in the framework treaty that serves as its basis).

<sup>9</sup> As a result, the United States domestically uses different terminology to refer to treaties (in the international law sense of that term) that proceed along these different paths. In U.S. law, the term "treaties" only refers to those agreements receiving Senate advice and consent; "congressional-executive agreements" are agreements approved by a federal statute; and "sole executive agreements" are agreements done under the President's executive authorities. Other States employ their own domestic lexicons to differentiate their treaties according to the different domestic approval procedures employed.

<sup>10</sup> *See, e.g.*, Dominican Republic Response, *supra* (pursuant to Article 55 of Organic Law No. 137-11, the President must submit signed international treaties to the Constitutional Court for it to rule on their constitutionality); Ecuador Response, *supra* (citing Art. 110.1 of Ecuador's Organic Law on Judicial Guarantees and Constitutional Oversight – "International treaties requiring legislative approval will be automatically put to constitutional review before ratification, prior to the start of any legislative approval process.").

<sup>11</sup> The Case-Zablocki Act, 1 U.S.C. §112b(c) ("Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States

Affairs issued two Directives that “establish guidelines for the administration of treaties, including their negotiation, signature, adoption (domestic adoption and/or ratification), and procedures for the formulation of possible declarations, reservations, and objections to reservations, and registration . . .”<sup>12</sup>

The breadth and diversity of States’ domestic treaty-making procedures counsels against any efforts at harmonization. On the contrary, *Guideline 4.1* adopts a best practice of “freedom” – accepting and supporting the autonomy of each State to decide for itself how to authorize treaty-making. States may vest their treaty-making procedures in constitutional or other legal terms. Or, they may develop them through more informal, practical processes. A State may, moreover, adopt a single process for all its treaties under international law, or it may opt to develop several different approval procedures for different treaty types. States should, moreover, be aware that the choice(s) they make to have a particular treaty proceed through one process, such as legislative approval, may not be followed by its treaty partners. In other words, States should not assume that simply because their own national procedures require a particular treaty receive legislative approval (or, conversely, that no such approval is required), its potential treaty partners will adopt a similar approach.

**4.2 Developing Domestic Approval Procedures for Political Commitments.** *States should develop and maintain procedures for authorizing the conclusion of either all [or their most significant] political commitments by the State or its institutions. Although non-binding agreements, political commitments would benefit from a practice where States have procedures that*

- (a) confirm a commitment’s non-binding status;
- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement, and
- (c) notification to—and coordination with—relevant State institutions, including the State’s Foreign Ministry.

**Commentary:** Political commitments, including many titled as MOUs, have become an increasing vehicle for inter-State and inter-institutional agreements. At least part of their appeal derives from the general absence of domestic approval procedures for their conclusion.<sup>13</sup> That has allowed these instruments to develop a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or amendments), and *exit* (in terms of termination or withdrawal) than treaties.<sup>14</sup> Such benefits suggest that it would be a mistake to extend the same approval procedures for treaties to political commitments.

But it does not follow that States should have *no* procedures for authorizing these agreements simply because they are ill-suited for treaty-making procedures. Without some prior review or authorization, it is difficult to know if a purported political commitment is actually non-

without prior consultation with the Secretary of State.”). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

<sup>12</sup> Peru Ministry of Foreign Affairs, *General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 001-DGT/RE-2013 (covering the Ministry of Foreign Affairs itself); Peru Ministry of Foreign Affairs, *General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 002-DGT/RE-2013 (covering all Peruvian governmental entities).

<sup>13</sup> See Charles Lipson, *Why are Some International Agreements Informal?* 45 INT’L ORG. 495, 508 (1991); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT’L L. 581, 592 (2005).

<sup>14</sup> Preliminary Report on Binding and Non-Binding Agreements, *supra*, 15.

binding. Similarly, without some review or approval processes, political commitments might be concluded that do not comport with the State's laws or policies. In the inter-institutional context, it is even possible that one institution might conclude a political commitment that runs counter to—or conflicts outright—with other State institutional interests or agreements.

Such concerns help explain why some States have devised informal review mechanisms for their political commitments. Colombia, for example, limits the capacity to sign non-binding agreements to those with legal capacity to represent the entity and subject to verification by the relevant legal office that the commitments assumed would not exceed the functions and authorities granted to that entity by the Constitution or laws.<sup>15</sup> In Peru, non-binding political commitments by the State are coordinated with all the governmental entities within whose purview its contents fall. The legal office of the Ministry of Foreign Affairs is charged with deciding whether to issue approval for their signature. But where the nonbinding agreement is at the inter-institutional level, the negotiations are conducted by the institution concerned, and “[a]lthough under Peruvian legislation, there is no mandate to submit the draft instrument to the Ministry of Foreign Affairs for its consideration, many governmental entities do so.”<sup>16</sup>

Mexico and the United States recount similar efforts to review proposed non-binding agreements to confirm that they have such a status and otherwise comport with their own treaty practice.<sup>17</sup> What is less clear, however, is how regularly this review occurs. Mexico's response indicates that it occurs “at the request of the signing Mexican entity” (although the relevant Mexican authority sends copies of the instrument once it “has been formalized). In the United States, although it reports no “formal procedures governing the conclusion of non-legally binding instruments, ... such instruments are reviewed both [with] respect to their content and drafting, including to ensure that they appropriately reflect the intention that the instrument not be governed by, or give rise to rights or obligations under, domestic or international law.”

*Guideline 4.2* encourages States as a best practice to formalize and regularize their review of political commitments. Doing so would remove the *ad hoc* quality of existing informal review mechanism, where it is unclear exactly how often and in what circumstances a State's internal procedures generate a review of a political commitment before its conclusion. As the *Guideline* suggests these procedures could be designed to confirm the non-binding nature of the agreements under review and their consistency with the State's laws and foreign policies. These procedures would also alleviate concerns that a particular institution within a State (whether a government ministry or a sub-national territorial unit) concludes a political commitment where the State's government or other institutions are unaware of its existence, let alone its contents.

The *Guidelines* do not, however, attempt to elaborate any best practice with respect to the contents of the approval procedures themselves. States will most likely want to avoid imposing overly restrictive or onerous approval processes as that would deprive the political commitment of the speed and flexibility benefits on which their current popularity rests. At the same time, however, by formalizing some procedural review of a State's political commitments, the government can ensure that the executive branch is not concluding treaties under the guise of their being political commitments or otherwise attempting to circumvent the domestic approval procedures required for treaty-making. States should all have an interest in making sure that political commitments are used only in appropriate circumstances and not as a way to bypass the legislative or judicial role required for the State's conclusion of binding agreements. Having at

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<sup>15</sup> Colombia Response, *supra*. 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, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

<sup>16</sup> Peru Response, *supra* (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ...”).

<sup>17</sup> Mexico Response, *supra*; U.S. Response, *supra*.

least *some* procedures for approving inter-State and inter-institutional political commitments would help mitigate that risk.

**4.3 Developing Domestic Approval Procedures for Inter-State Contracts.** *For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. Ideally, these procedures would include (a) information on how the State will identify the governing domestic law of the contract and (b) mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.*

**Commentary:** Some—but not all—States have a practice of entering into contracts with other States. Of these, several States have developed procedures for reviewing or approving the conclusion of such contracts. Ecuador has a government procurement law that, while prioritizing the terms of any inter-state contract, regulates such agreements where they involve “international public enterprises” including other states’ public enterprises.<sup>18</sup> The United States has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.<sup>19</sup> Mexico’s Constitution (Art. 134) requires certain public tenders for certain types of behavior (e.g., procurement, leasing of assets, and public services) which, in turn, require “contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal).”<sup>20</sup>

*Guideline 4.3* proposes as a best practice that *all* States with a practice of inter-State contracting should have procedures for authorizing the conclusion of such binding agreements. Having procedures for inter-State contracting would allow States to confirm the contractual status of the agreements proposed, and thus avoid inadvertent characterization of a treaty or political commitment as a contract. Moreover, these procedures could help alleviate questions that may arise with respect to the contract’s governing law. States should have procedures indicating whether and when they would (i) insist on their own national law as the governing law, (ii) permit the other contracting State’s law to do so, or (iii) authorize the employment of a third State’s contract law instead. Furthermore, States could have procedures that require communication on these governing law questions with the other contracting party. Doing so would help avoid problems where the contracting parties disagree on what national legal system governs the contract concluded.

**4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements.** *States should have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law or the domestic law of another State. Ideally, these procedures would (a) identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and (b) mechanisms for confirming that the other institution concurs as to the type and legally binding status of the inter-institutional agreement.*

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<sup>18</sup> See, e.g., Ecuador Response, *supra* (citing Article 100 of the General Regulations of the Organic Law on the National Government Procurement System which authorizes contracts with “international public enterprises” and provides for the application of domestic articles “in the event no specific contracting regime is provided for” in the terms and conditions of any relevant agreements); *id* (citing Organic Law on the National Government Procurement System, Art. 3, which requires compliance with the terms of the agreements and “[a]nything not provided for in those agreements shall be governed by the provisions of this Law”).

<sup>19</sup> See U.S. Foreign Military Sales program, available at <http://www.dsca.mil/programs/foreign-military-sales-fms>.

<sup>20</sup> Mexico Response, *supra*.

**Commentary:** Consistent with *Guideline 4.1*, States should decide for themselves whether and which sorts of binding agreements to authorize their institutions to conclude.<sup>21</sup> States may, moreover, authorize certain institutions to conclude treaties or contracts, but not others. A State, for example, may allow a government agency to conclude a treaty in its own name but not a sub-national entity, or vice versa. Article 124 of the Argentina Constitution, for example, authorizes subnational units to conclude treaties—which it calls “international agreements”—with the “knowledge of Congress” and “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.” At the same time, Argentina denies its national ministries a capacity to make treaties in their own name.<sup>22</sup>

Several states already have regulations or approval procedures in place for their institutions’ agreements. Some States simply extend their existing procedures for the State’s agreements to their institutions. The United States, for example, requires the same consultation and approval by the U.S. Department of State for inter-agency agreements as it does for treaties concluded in the U.S. name. Other States have devised procedures focused on one or more type of institution. Jamaica reports a practice of the relevant Ministry, Department or Agency seeking Cabinet approval to negotiate a binding agreement and subsequently seeking further approval to sign it. Copies of signed inter-institutional agreements are then kept on file by the Foreign Ministry Legal Office. Mexico’s 1992 Law on the Conclusion of Treaties regulates both the subject-matter and functional limits on inter-institutional agreements involving Mexican federal government ministries or its state or regional governments.<sup>23</sup> Mexican institutions can only conclude binding agreements (i) on subjects within the exclusive purview of the area or entity making the agreement; (ii) the agreement can only affect the concluding entity; (iii) the entity’s regular budget must be sufficient to cover the agreement’s financial obligations; (iv) the legal rights of individuals cannot be affected; and (v) existing legislation cannot be modified. In addition, Article 7 of the Law on the Conclusion of Treaties requires Mexican institutions to inform the Secretariat of Foreign Affairs of any binding inter-institutional agreement they are seeking to conclude, with a requirement that the Legal Department of the Secretariat of Foreign Affairs report on the lawfulness of signing such an agreement.<sup>24</sup>

States have sought further guidance regarding inter-institutional agreements for three reasons. First, it is not always clear whether an institution can enter into *any* agreements. Second, even if the institution may have some agreement-making capacity, it does not follow that it can make all three types of agreements considered here (that is, treaties, political commitments, and contracts). Third, in individual cases, it is often unclear what legal status a specific, concluded inter-institutional agreement has.

*Guideline 4.4* endorses a best practice that addresses all three issues by calling on States that permit inter-institutional agreements to have procedures that ensure appropriate review or approval of such agreements. The *Guidelines* leave it to States whether such procedures should have a legal basis or exist as a matter of policy. Similarly, States should be free to decide whether to have procedures that authorize certain inter-institutional agreements generally or to devise a case-by-case system of notice or approval.

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<sup>21</sup> Thus, States like Brazil, Colombia, the Dominican Republic, and Peru do not authorize *any* binding agreements by their government agencies, ministries or institutions. *See, e.g.*, Peru Response, *supra* (“Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)”).

<sup>22</sup> Argentina Response, *supra*.

<sup>23</sup> *Law Regarding the Making of Treaties*, reprinted in 31 ILM 390 (1992), CDLX *Diario Oficial de la Federación* 2 (Jan. 2, 1992).

<sup>24</sup> Mexico Response, *supra*.

Moreover, *Guideline 4.4* suggests that States may include in their procedures mechanisms for differentiating among the institutions' binding agreements. This might include, for example, a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status. Or, a States' procedures might lay out a default presumption when two or more State institutions conclude a binding agreement, i.e., establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties. Ideally, States might even include procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (a) the agreement is binding (or not); and (b) what type of binding agreement will be concluded, be it a treaty or a contract.

**4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.** *States should publicize which, if any, of its institutions may be authorized to conclude treaties, whether on behalf of the State as a whole or in its own name. States should also publicize which, if any, of its institutions may be authorized to conclude contracts, whether on behalf of the State as a whole, or in its own name. States may undertake this publicity generally, such as by posting its procedures on-line, or specifically by communicating with other States or State institutions specifically as to its institutions' capacities and the relevant procedures under which they operate.*

**Commentary:** *Guideline 4.4* focuses on encouraging States to devise procedures to ensure that the State has sufficient self-awareness of whether and what types of binding agreements its institutions may conclude. *Guideline 4.5* promotes inter-State communication of the conclusions reached and procedures used by a State to approve or monitor inter-institutional agreement-making. Other States may benefit from learning (i) which State institutions may conclude binding (or non-binding agreements) with foreign institutions; (ii) what types of agreements may be authorized; and (iii) what the processes are for doing so. This information may assist another State or its institutions in deciding whether to conclude an agreement with a State's institutions and what form it should take. Furthermore, the information shared may be useful in specific instances to reduce confusion (or even conflicting views) as to what type of inter-institutional agreement has been concluded. Finally, publicizing procedures may offer useful models or examples of processes on which States with less experience with inter-institutional agreements may rely.

**4.6 Publicizing National Registries of Binding Agreements.** *States should create and maintain public registries for all binding agreements of the State and State institutions.*

**Commentary:** All States are required to register their treaties with the United Nations under Article 102 of the UN Charter. Most States already have and maintain lists and archives with respect to their treaties and government contracts. In many cases, States make their treaty lists—or the agreements themselves—public, whether through publication in an Official Gazette, Bulletin, or a treaty-specific series. States may, however, limit which treaties they choose to publish, leaving out treaties dealing with matters deemed of less significance, or conversely, those containing commitments implicating classified information or programs. There is, moreover, much less publicity surrounding inter-State or inter-institutional contracts.

*Guideline 4.6* suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement's existence, but its contents as well. Publicizing binding agreements by the State or its institutions comports with the rule of law and democratic values, affording the public a window into a key area of State behavior. Public registries might be beneficial to a State internally as well. Government-wide knowledge of a States' binding agreements can help ensure interested government agencies are aware of all binding agreements. That information should ensure more regular tracking of what binding agreements exist and better intra-governmental coordination in their formation. Public registries of treaties and contracts would also have external benefits. These registries would provide a regular information channel for other States, conveying the publicizing States' views on the existence and legal status of its binding agreements. This could lead to quicker (and hopefully easier) recognition of potential differences on the existence of an agreement and its status as a treaty or a contract. Such public registries may even create space for

differences of opinion to be resolved in advance rather than in response to a concrete problem or crisis.

**4.7 A National Registry of Political Commitments.** *States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.*

**Commentary:** At present, States suffer from an information deficit with respect to the number and contents of their political commitments, whether labeled as MOUs or otherwise. Whatever informal procedures might exist to review or even approve political commitments, most States do not count or collect them.<sup>25</sup> Thus, there is a real dearth of information available on the number and types of non-binding agreements reached by States and their institutions.

*Guideline 4.7* aims to rectify this information gap by calling on States to accept a best practice by which they establish a centralized point of contact within the government where political commitments may be collected and retained. As with existing treaty registries, a political commitment registry would have valuable internal and external benefits. It would alert other actors within a State, such as the legislature or non-participating institutions, as to the existence of a political commitment. It might thus check incentives to use political commitments merely as a means to avoid domestic approval procedures assigned to binding agreements. Externally, it would inform other States about the content and assumed non-binding legal status of the commitments listed, creating space for further inquiries or communications about such political commitments as these other States deem appropriate. It would, moreover, alert a State's public of *all* agreements a State has concluded, not just those that may generate legal effects. The public has a clear interest in learning more about agreements that may generate significant consequences for their State, even if those consequences will take a political (rather than legal) form.

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<sup>25</sup> Ecuador may be a singular exception—it reports a practice of practice of recording with the Directorate for Legal Advice on Public International Law “non-binding political agreements (joint declarations and communiqués)” while noting in some cases these commitments generated a “legal opinion from the Foreign Ministry’s General Legal Coordination Office.” Ecuador Response, *supra*.

## CJI/593/19

**BINDING AND NON-BINDING AGREEMENTS:  
FIFTH REPORT**

(presented by Dr. Duncan B. Hollis)

**INTRODUCTION**

1. This is my fifth report on binding and non-binding agreements. This project seeks to explain and assist States (and other stakeholders) in making, implementing, and interpreting international agreements. It rests on a fundamental premise; international agreements may be divided into (i) those that are “binding” in the sense of being governed by law—whether international law (i.e., “treaties”) or domestic law (i.e., contracts)—and (ii) those that are not binding (i.e., “political commitments”) in the sense that law provides none of the normative force for the agreement’s formation or operation. Thus, the rule of law governs the first set of agreements, while the second is a matter of international politics or even morality.

2. My first, preliminary report responded to a request from Member State Foreign Ministry Legal Advisers to explore the topic and identify the issues in need of attention.<sup>1</sup> My second report reviewed responses to a questionnaire on the subject sent by the Committee to Member States.<sup>2</sup> Specifically, it assessed responses received from Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.<sup>3</sup> Since then, Panama and Paraguay provided responses that are reflected in subsequent reports, including this one.<sup>4</sup>

3. My third report offered initial draft text for a set of OAS Guidelines on Binding and Non-Binding agreements. Specifically, it laid out guidelines and commentary on (a) definitions for different forms of international agreement; (b) which entities have the capacity to conclude each agreement type; and (c) methods for identifying each agreement type.<sup>5</sup> My fourth report continued

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<sup>1</sup> See Duncan B. Hollis, *Preliminary Report on Binding and non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17 (24 July 2017) (“Preliminary Report”).

<sup>2</sup> See Duncan B. Hollis, *Second Report on Binding and non-Binding Agreements*, OEA/Ser.Q, CJI/doc.553/18 (6 February 2018) (“Second Report”).

<sup>3</sup> See Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”); Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Brazil Response”); 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* (“Colombia Response”); Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (“Dominican Republic Response”); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”); 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 (“Jamaica Response”); Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Mexico Response”); 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* (“Peru Response”); Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“Uruguay Response”); United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“U.S. Response”).

<sup>4</sup> 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 (“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) (“Paraguay Response”).

<sup>5</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Third Report*, OEA/Ser. Q, CJI/doc.563/18 (15 July 2018) (“Third Report”).

that effort with additional guidelines on (d) domestic procedures for concluding binding and non-binding agreements; (e) the international legal effects, if any, of concluding different types of international agreements; and (f) training and education programs relating to binding and non-binding agreements.<sup>6</sup> The report also responded to various issues raised regarding this project during the IAJC's second meeting with Foreign Ministry Legal Advisers.<sup>7</sup>

4. This fifth report completes a first draft of *The OAS Guidelines for Binding and Non-Binding Agreements*, with Commentary ("*Draft Guidelines*").<sup>8</sup> It includes new commentary for the issues of effects and training/education. It also provides a revised text of the other guidelines and commentary. The current draft, therefore includes extensive revisions and adjustments in light of the many helpful comments and suggestions that I have received to date from the Committee and OAS Foreign Ministry Legal Advisers.<sup>9</sup> It also reflects input received from two presentations I have made on this project at the United Nations: (i) to the 29<sup>th</sup> Informal Meeting of Legal Advisers held on 23 October 2018 and (ii) to an informal working group of treaty experts and practitioners hosted by the governments of Canada and Colombia in concert with UNGA events marking the 50<sup>th</sup> Anniversary of the conclusion of the Vienna Convention on the Law of Treaties. Both events confirmed that the issues associated with binding and non-binding agreements extend beyond Member States.

5. Globally, the increasing prevalence of non-binding agreements generally—and ministry-level and sub-national level binding and non-binding agreements specifically—affords States and entities for which they are responsible an increasing number of ways to coordinate and cooperate. At the same time, the added complexity of manifold agreement types generates possibilities for inconsistent understandings, expectations, or disputes. In this environment, these *Draft Guidelines* offer a concrete and detailed set of definitions, processes, and methods for identifying and differentiating among the three basic types of international agreements – treaties, political commitments, and contracts – and the various actors who may make them – States, government agencies, and sub-national territorial units.

6. These *Draft Guidelines* do not aspire to codify international law or State practice on these subjects. Indeed, although they note several areas where existing international law is unclear or disputed, the *Guidelines* leaves these issues unresolved. Instead, they provide a set of voluntary understandings and practices that Member States may employ to improve knowledge in these areas and reduce the risk of future disagreements or difficulties with other States in the region or beyond.

7. For the most part the *Draft Guidelines* and accompanying *Commentary* should be self-explanatory. However, I highlight here briefly some of the most important changes and ideas that have evolved from previous versions:

- *A new chapeau*: At least one Member State expressed concern that the *Guidelines* might be read as more than a set of working definitions, understandings, and best practices; they might be read as an effort to codify existing international law or progressively develop it in some way. To avoid such misimpressions, the *Draft Guidelines* now open with an explanation of their nature and scope.
- *A revised definition of 'Agreement'*: In my fourth report, I explained at some length why I chose to employ the term 'agreement' to reference the concept under which the treaties, political commitments, contracts, and inter-institutional agreements addressed in these

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<sup>6</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fourth Report*, OEA/Ser. Q, CJI/doc. 580/19 (11 February 2019) ("Fourth Report").

<sup>7</sup> See Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018 (IAJC-Legal Advisers 2018 Joint Meeting).

<sup>8</sup> For an explanation of the choice of title for these guidelines, see Fourth Report, *supra* note 6, ¶7.

<sup>9</sup> For the records of these questions and comments, see, e.g., *Id*; *Summarized Minute*, 91st Regular Session of the Inter-American Juridical Committee, 9 Aug. 2017; *Summarized Minute*, 92nd Regular Session of the Inter-American Juridical Committee, 27 Feb. 2018; *Summarized Minute*, 93rd Regular Session of the Inter-American Juridical Committee, 9, 15-16 Aug. 2018; *Summarized Minute*, 94th Regular Session of the Inter-American Juridical Committee, 20 Feb. 2019.

*Draft Guidelines* fall.<sup>10</sup> Nonetheless, I recognized the risk that this might confuse some States who use the term “agreement” only in their treaty practice, avoiding the term in their political commitments. To accommodate this concern, I revised the *Draft Guidelines*’ title and have added in this Report a new, working definition of agreement while flagging the issue expressly in the accompanying *Commentary*.

- *A revised definition of “Treaty”*: I responded to recommendations and altered the definition to specifically identify it as a form of a “binding” agreement. I also added a qualifier making clear that agreements qualify as treaties under international law independent of the domestic approval procedures used to authorize them. Thus, the fact that an international agreement governed by international law is called a “treaty” or “executive agreement” within a domestic context is not determinative of its status as a treaty in the international context. Finally, I adjusted the discussion of treaty registration in light of the ICJ’s recent *Somalia v. Kenya* decision.
- *A revised definition of “Contract”*: In response to several recommendations from Committee members I elaborated the definition of a contract to include those agreements governed by non-State law, the term adopted by the recently approved CJI *Guide on the Law Applicable to International Commercial Contracts*.
- *Treaty-Making Capacities*: At the recommendation of several Committee Members (as well as several foreign Ministry Legal Advisers), I have reframed the *Guidelines* on capacity in terms of best practices – delineating what States and other institutions *should* do given the existing law and practice surrounding who can make treaties. In addition, Guidelines 2.2 and 2.3 have been clarified to suggest best practices for authorizing States and their institutions (Guideline 2.2) and their potential treaty partners (Guideline 2.3) to increase transparency as to which entities may conclude treaties and on what subjects.
- *Methods for Identifying Agreements* – I reframed the description of how to identify the existence of any agreement (binding or non-binding) as well as the two tests for sorting among international agreements so that both would read as a set of best practices that States and other subjects of international law might follow.
- *Specifying the Type of Agreement* – At the recommendation of several Committee Members (as well as several foreign Ministry Legal Advisers), I included sample clauses that Member States (or others) may use in an instrument to specify whether it is a treaty, a political commitment, or a contract.
- *Evidence Indicative of an Agreement’s Status as Binding or Non-Binding* – I received lots of suggestions (unfortunately, not all of them consistent) on what were sections 3.4 and 3.5 in my Third Report. For this draft, I have combined them into a single guideline and constructed a table that includes examples of linguistic and other textual evidence indicative of an agreement’s status.
- *Evidence Indicative of an Agreement’s Status as a Contract* – I have added a suggestion that as a best practice, States should presume inter-State binding agreements are treaties rather than contracts. I did not, however, opt to assume the opposite presumption for inter-institutional agreements (although I would welcome input on whether I should consider doing so).

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<sup>10</sup> See Fourth Report, *supra* note 6, ¶¶ 7-13 (noting five arguments in favor of scoping the *Draft Guidelines* in terms of binding and non-binding “agreements”—(i) the ILC and others never viewed treaties as synonymous with agreements, but rather as a sub-set of the broader agreement category; (ii) the criterion of an agreement unites treaties, political commitments, and contracts *and* distinguishes them from alternatives (e.g., unilateral declarations) in ways that alternative labels like “instruments” cannot); (iii) State practice counsels against using ‘magic words’ to define or identify treaties; using the term “agreement” in a text cannot guarantee its status as a treaty; (iv) to overcome current confusion it is important that States become more aware of the *concept* of agreement independent of its usage; and (v) any risk of confusion over the use of the term may be mitigated if the *Draft Guidelines* and accompanying *Commentary* adopt a transparent approach to the issue and the risks of confusion they might pose).

- *Different Domestic Procedures* – I removed the qualifier that suggested these procedures must involve “approval” since not all States would characterize their procedures this way.
- *Legal Effects of Treaties* – In my fourth report, I had covered the legal effects of treaties in three separate guidelines. I combined them into a single guideline in this draft.
- *Legal effects of contracts* – I streamlined this guideline and made sure to accommodate the possibility of non-State law as the governing law of a contract.
- *Effects of Political Commitments* – I added a guideline that suggests a best practice where States honor their political commitments (while recognizing they have no legal obligation to do so). I also included a more nuanced set of guidelines (and commentary) on the indirect legal effects political commitments may have (especially as a vehicle for interpreting other, binding agreements). I added some helpful clarifications of the role of estoppel for non-binding agreements from the *Chagos Arbitration* as well.
- *Legal Effects of Inter-Institutional Agreements* – I streamlined the previous drafts into a single guideline, adding some additional best practices, including an expectation that inter-institutional treaties will trigger the responsibility of the State as a whole. That said, I have endeavored to make States aware there is some division of views on the possibility of limiting inter-institutional treaty responsibility to the institution itself and have crafted a couple of consensual fixes to bridge such divisions if they occur in practice. Lastly, I added a new proposed best practice that States exercise any discretion they may have to avoid giving legal effects to unauthorized inter-institutional agreements.
- *Choosing among Binding and Non-Binding Agreements* – I removed this guideline (which had suggested States should contemplate desired legal effects in selecting a particular type of international agreement). States have numerous factors to weigh in deciding which type of international agreement to pursue in any given context, including but not limited to potential legal effects. It seemed to me that these *Draft Guidelines* should not privilege legal effects above other factors (which may be too numerous to catalog for purposes of these guidelines).

8. In addition to substantially revising and updating the previously drafted sections of the *Guidelines*, I have also produced new draft *Commentary* on the international legal effects of binding and non-binding agreements as well as on training and education best practices that may improve knowledge and reduce confusion and conflicts on these topics.

9. Annex I contains a first, complete draft of *OAS Guidelines for Binding and Non-Binding Agreements*. Annex II provides *Commentary* for each of the Draft Guidelines.

10. 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 working definitions, understandings, and best practices I propose sensible? Will they help ease the current confusion and potential for disagreement in current international law and practice? Are there additional guidelines I might offer (or layers of detail or explanation that could improve the *Commentary*)? I will endeavor to incorporate further feedback into a draft that the Committee could share with the OAS General Assembly, and eventually Member States, for further input and counsel.

## ANNEX I

### DRAFT OAS GUIDELINES FOR BINDING AND NON-BINDING AGREEMENTS

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are “binding” and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding (“political commitments”) and for which law provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors' interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This has generated substantial confusion among States' representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded where State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face. At the same time, these guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

## **1. Definitions for Binding and Non-Binding Agreements**

**1.1 Agreement** – although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a normative commitment.

**1.2 Treaty** – a binding 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, registration, or the domestic legal procedures States employ to consent to be bound by it.

**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** – A binding agreement governed by national law or non-State 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, the surrounding circumstances, and subsequent conduct, 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:** States have the capacity to conclude treaties and should do so in accordance with the treaty's terms and whatever domestic laws and procedures regulate their ability to 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 should be able to make political commitments to the extent political circumstances allow.

**2.5 Inter-State Contracting Capacity:** A State should conclude contracts with other willing States in accordance with the contract's governing law.

**2.6 Inter-Institutional Contracting Capacity:** A State Institution should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract's governing law.

### **3. Methods for Identifying Binding and Non-Binding Agreements**

**3.1 Identifying Agreements:** States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:

**3.1.1** States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).

**3.1.2** When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).

**3.1.3** A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile any such differences.

**3.2 Identifying the type of agreement concluded:** The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.

- First, some actors employ an “intent test”, a subjective analysis where the authors’ manifest intentions determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).
- Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, their different analytical objectives may lead the two tests to generate different conclusions in certain cases. Different results may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

**3.2.1** If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.

**3.2.2** A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.

**3.2.3** States should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test for identifying binding and non-binding agreements. They should thus conclude—and apply—their international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions.

**3.3 Specifying the Type of Agreement Concluded:** To avoid inconsistent views on the binding status 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. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement’s status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.

Table 1: Specifying the Type of Agreement Concluded	
Type of Agreement	Sample Text
Treaty	<i>This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.</i>
Political Commitment	<i>“This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants.”</i>
	<i>“This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations.”</i>
Contract	<i>“This agreement shall be governed by the law of [list State] [and/or list non-State source of law].”</i>

**3.4 Evidence Indicative of an Agreement’s Status as Binding or Non-Binding:** Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:

- (a) the actual language employed;
- (b) the inclusion of certain final clauses;
- (c) the circumstances surrounding the agreement’s conclusion; and
- (d) the subsequent conduct of agreement participants.

Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
Titles	Treaty Convention Agreement Covenant Protocol	Understanding Arrangement Declaration
Authors	parties	participants
Terms	articles obligations undertakings rights	commitments expectations principles paragraphs understandings
Language of Commitment	shall agree must undertake	should seek promote intend expect

(verbs)	Done at [place] this [date]	carry out understand accept
<b>Language of Commitment (adjectives)</b>	binding authentic authoritative	political voluntary effective equally valid
<b>Clauses</b>	Consent to be Bound Entry into Force Depositary Amendment Termination Compulsory Dispute Settlement	Coming into Effect (or Coming into Operation) Differences Modifications

**3.5 Evidence indicative of a contract:** Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.

**3.6 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. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of its agreement(s).

#### **4. Procedures for Making Binding and Non-Binding Agreements**

**4.1 Different Domestic Procedures for Treaties.** Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.

**4.2 Developing Domestic Procedures for Political Commitments.** States should develop and maintain procedures for authorizing the conclusion of either all [or their most significant] political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:

- (a) a commitment's non-binding status;
- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement; and
- (c) notification to—and coordination with—relevant State institutions, including the State's Foreign Ministry.

**4.3 Developing Domestic Approval Procedures for Inter-State Contracts.** For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include:

- (a) information on how the State will identify the governing law of the contract, and
- (b) mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.

**4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements.** States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units,

or both) to conclude a contract, whether under that State's own domestic law or the domestic law of another State.

**4.4.1** Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and

**4.4.2** Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.

**4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.**

**4.5.1** States should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.

**4.5.2** States should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.

**4.5.3** States may make this information public generally, such as by posting its procedures on-line, or specifically, by communicating with other States or State institutions as to its institutions' capacities and the relevant procedures under which they operate.

**4.6 Publicizing Registries of Binding and Non-Binding Agreements**

**4.6.1** *National Registries of Binding Agreements.* States should create and maintain public registries for all binding agreements of the State and State institutions.

**4.6.2** *National Registries of Political Commitments.* States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.

**5. Legal Effects of Binding and Non-Binding Agreements**

**5.1 The Legal Effects of State treaty-making:** States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:

**5.1.1** *Primary International Legal Effects* – Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.

**5.1.2** *Secondary International Legal Effects* – the existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, state responsibility, and any other specific regimes tied to the treaty's subject-matter.

**5.1.3** *Domestic Legal Effects* – A State's domestic legal order may, but is not required to, accord domestic legal effects to the State's treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.

**5.2 The Legal Effects of Contracts.** States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract's governing law, including issues of performance, displacement, and enforcement.

**5.3 The Effects of Political Commitments.** States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.

**5.3.1** States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State's political commitment whether due to their moral force or the political context in which they were made.

**5.3.2** States and their institutions should be aware that a political commitment may still have legal relevance to a State indirectly. For example, political commitments may be:

- (i) incorporated into other international legal acts such as treaties or decisions of international organizations;
- (ii) incorporated into domestic legal acts such as statutes or other regulations; or
- (iii) the basis for interpretation or guidance of other legally binding agreements.

**5.4 Legal Effects of an Inter-Institutional Agreement.** States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.

**5.4.1** States should expect that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.

**5.4.2** Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.

**5.4.3** Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it.

**5.4.4** States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.

## **6. Training and Education Concerning Binding and Non-Binding Agreements**

**6.1 Training and Education relating to Binding and Non-Binding Agreements by States.** States should undertake efforts to train and educate relevant officials within a Foreign Ministry to ensure that they are capable of:

- i. identifying and differentiating among the various types of binding and non-binding agreements;
- ii. understanding who within the State has the capacity to negotiate and conclude which agreements;
- iii. following any and all domestic procedures involved in such agreement making; and
- iv. appreciating the legal and non-legal effects that can flow from different types of international agreements.

**6.2 Training and Education relating to Inter-Institutional Agreements.** Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.

## **ANNEX II**

### **DRAFT OAS GUIDELINES FOR BINDING AND NON-BINDING AGREEMENTS (WITH COMMENTARY)**

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are “binding” and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding (“political commitments”) and for which law

provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors' interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This has generated substantial confusion among States' representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded where State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face. At the same time, these guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

## 1. Definitions for Binding and Non-Binding Agreements

**1.1 Agreement** – *although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by 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 (VCLT), the International Law Commission (ILC) gave the idea little attention even as they used it regularly throughout their discussions.<sup>1</sup> 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.”<sup>2</sup> Agreements thus do not

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<sup>1</sup> Although they used the term “agreement” throughout their work, none of the four ILC Special Rapporteurs offered a specific definition for the term. 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; Humphrey Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol II, 31 (art. 1(a)).

<sup>2</sup> Brierly, *supra* note 1, at 227, ¶¶19-20. International law has come to treat certain unilateral declarations as a form of international legal commitment. In the *Nuclear Tests* case, the ICJ found that France was bound under international law by public statements of its President and Foreign and Defense Ministers to cease nuclear tests in the South Pacific, obviating the need for the Court to rule on the case at hand. *Nuclear Tests (Australia/New Zealand v France)* [1974] I.C.J. Rep. 267-8, ¶¶43-50. Based on this ruling, in 2006, the ILC articulated a basic *Guiding Principle*—“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.” ILC, *Guiding Principles applicable to unilateral declarations of States capable*

arise *sua sponte* from a single actor, but are the product of a mutual interchange or communication.<sup>3</sup> 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.”<sup>4</sup> By linking agreement to a “consensus,” the concept is thus tied to having a “meeting of the minds” or *consensus ad idem*.<sup>5</sup>

Beyond mutuality, 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.<sup>6</sup> 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 common law calls “consideration”); a single commitment by one participant to another participant (or participants) can suffice.<sup>7</sup>

**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, registration, or the domestic legal procedures States employ to consent to be bound by it.*

**Commentary:** The *Guidelines’* definition of a treaty derives from the one employed in VCLT Article 2(1)(a):

For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law,

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*of creating legal obligations, with commentaries thereto* (2006) 58th Session, U.N. Doc. A/61/10, Guiding Principle 1. Examples of unilateral declarations include Egypt’s 1957 Declaration on the Suez Canal, Jordan’s 1988 waiver of claims to the West Bank, U.S. representations before the WTO Dispute Settlement Body in the 1974 *Trade Act* case, and (at least potentially) Cuba’s 2002 declarations about the supply of vaccines to Uruguay. VR Cedeño, ‘Eighth Report on Unilateral Acts of States’ (26 May 2005) U.N. Doc. A/CN.4/557; *United States—Sections 301–310 of the Trade Act of 1974* (Report of the Panel) (1999) WT/DS152/R [7.118]–[7.123].

Sources are divided, however, on whether unilateral declarations depend on the intent of the declaring State or a principle of estoppel in cases of good faith, reasonable reliance by the statement’s intended audience. *Compare Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] I.C.J. Rep. 573–4, ¶39; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) (1 Oct 2018), General List 153, 47, ¶148 (existence of a binding unilateral declaration ‘all depends on the intention of the State in question’); with ILC, *Report of the Working Group on Unilateral Acts of States* (20 July 2006) U.N. Doc. A/CN.4/L.703, Introductory note, Preamble (noting intent and estoppel as two competing theories of the source of obligation for unilateral declarations).

<sup>3</sup> 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).

<sup>4</sup> [1950] *YBILC*, vol. II, 227, ¶19-20.

<sup>5</sup> *See, e.g.*, 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”); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 77 (2009) (same); Kelvin Widdows, *What is an Agreement in International Law?*, 50 *BRITISH YBK INT’L L.* 117, 119 (1979) (same).

<sup>6</sup> *See, e.g.*, Hollis and Newcomer, *supra* note 3, at 522; KLABBERS, *supra* note 3, at 51-53; Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT’L L.* 581, 584–85 (2005).

<sup>7</sup> *See* Duncan B. Hollis, *Defining Treaties*, in *THE OXFORD GUIDE TO TREATIES* 20 (Duncan B. Hollis, ed., 2012).

whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>8</sup>

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law.<sup>9</sup> Most States endorse it.<sup>10</sup> And scholars regularly cite it when defining the treaty concept.<sup>11</sup>

At the same time, the VCLT treaty definition is widely recognized as incomplete. It fails to include agreements by other subjects of international law. And yet, no one seriously disputes that agreements with or among international organizations qualify as treaties.<sup>12</sup> 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.<sup>13</sup> Treaties can exist in a single instrument or two or more related instruments.<sup>14</sup>

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: (i) an international agreement; (ii) concluded; (iii) among States, State institutions or other appropriate subjects; (iv) that is recorded in writing; (v) governed by international law; and without regard to (vi) its designation; (vii) registration; or (viii) the domestic legal procedures States employ to consent to be bound by it.

- (i) *An international agreement.* A treaty constitutes a specific type of agreement: *all treaties are agreements, but not all agreements qualify as treaties.*<sup>15</sup> 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 cabining who can conclude one (i.e., those actors with international legal personality) or the international legal basis for the obligations that result.<sup>16</sup>

<sup>8</sup> 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).

<sup>9</sup> See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgement) [2017] ICJ Rep. 3, 21, ¶42; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* [2002] I.C.J. Rep. 249, ¶263. Other international tribunals take a similar position. See, e.g., *Texaco v. Libyan Arab Republic*, 53 INT’L L. REP. 389, 474 (1977).

<sup>10</sup> Duncan B. Hollis, *Second Report on Binding and non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) ¶8 (“Hollis, Second Report”) (9 of 10 OAS Member States responding accept 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).

<sup>11</sup> 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 3, at 40.

<sup>12</sup> 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.”).

<sup>13</sup> 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 5, at 200.

<sup>14</sup> VCLT Art. 2(1)(a).

<sup>15</sup> See VILLIGER, *supra* note 5, at 77. This point was repeated throughout the ILC’s preparatory work. See Brierly, *First Report*, *supra* note 1, at 227, ¶19; Humphrey Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, ¶1; [1965] YBILC, vol. I, 10, ¶10 (Briggs).

<sup>16</sup> This follows from Waldock’s earlier understanding. Waldock, *First Report*, *supra* note 1, at 31 (Art. 1(a)); see also VILLIGER, *supra* note 5, at 78.

- (ii) ... *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."<sup>17</sup> 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.<sup>18</sup> 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).<sup>19</sup> Conclusion and entry into force are not synonymous.<sup>20</sup> 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).<sup>21</sup>
- (iii)... *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).<sup>22</sup> At the same time, the VCLT recognizes that "other subjects of international law" may also conclude treaties.<sup>23</sup> This category encompasses entities such as international organizations, which form the subject of the 1986 Vienna Convention.<sup>24</sup> In addition, other subjects of international law may have sufficient legal personality to conclude treaties on certain subjects (i.e., insurgent groups can conclude treaties regarding the conduct of hostilities).<sup>25</sup> These *Guidelines* employ the label "appropriate subjects" to acknowledge that not all entities that aspire to be subjects of international law may qualify as such. Some States claim that a State institution (e.g., overseas territory, regional government) can be treated as an "other subject" of international law, that is, capable of concluding a treaty directly, in their own name. That position is, however, disputed and these *Guidelines* do not purport to resolve that dispute.<sup>26</sup> Thus, the treaty definition 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.
- (iv)... *that is recorded in writing* ... The VCLT requires all treaties to be in writing – with permanent and readable evidence of the agreement. But it does not impose any

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<sup>17</sup> Waldock adopted the latter view. Waldock, *First Report*, *supra* note 1, 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 5, at 78-9.

<sup>18</sup> 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 (2<sup>nd</sup> ed., 2015); AUST, *supra* note 11, at 86.

<sup>19</sup> Unperfected treaties—those that do not enter into force—are thus still considered treaties. *See, e.g.*, 1986 VCLT, *supra* note 12 (not yet in force).

<sup>20</sup> AUST, *supra* note 11, at 86; VILLIGER, *supra* note 5, at 79.

<sup>21</sup> *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).

<sup>22</sup> *See, e.g.*, Hollis, *Second Report*, *supra* note 10, at 8, ¶24 (United States and Jamaica report support for agency-level agreements as treaties); *id.* at ¶26 (Mexican law permits federal entities to conclude inter-institutional agreements governed by international law).

<sup>23</sup> *See* VCLT Art. 3 (VCLT's treaty definition does not preclude the legal force of agreements concluded by States with other subjects of international law or among such subjects); Waldock, *First Report*, *supra* note 1, at 30.

<sup>24</sup> 1986 VCLT, *supra* note 12.

<sup>25</sup> *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).

<sup>26</sup> Hollis, *Second Report*, *supra* note 10, at 8, ¶25 (Argentina denies government ministries can conclude treaties since they do not qualify as subjects of international law).

particular requirements of form.<sup>27</sup> There is, for example, no requirement that treaties be signed.<sup>28</sup> Nor must they be published.<sup>29</sup> 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.<sup>30</sup>

The VCLT excludes oral agreements from its ambit (primarily for practical reasons).<sup>31</sup> Today, many—but not all—States understand customary international law to allow for oral treaties.<sup>32</sup> U.S. domestic law, for example, provides that oral international agreements, once made, must be committed to writing.<sup>33</sup> By providing that a treaty be “recorded in writing,” these *Guidelines* avoid endorsing the oral treaty concept specifically. At the same time, however, the definition may include any oral treaties once they are subsequently recorded in written form.

(v) ... *and governed by international law*, ... This is the essential criterion of the treaty definition. Simply put, *if an international agreement is governed by international law, it is a treaty*. The challenge, however, lies in understanding what this phrase means. Using the “governed by international law” qualifier clearly distinguishes treaties from two other categories of international agreement: contracts (agreements governed by national law) and political commitments (agreements not governed by law at all).<sup>34</sup> 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 consequence of treaty-making rather than a constitutive element of the concept.<sup>35</sup> 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

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<sup>27</sup> AUST, *supra* note 11, at 16.

<sup>28</sup> *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”); Gautier, *supra* note 13, at 38; AUST, *supra* note 11, at 20-21.

<sup>29</sup> FITZMAURICE AND ELIAS, *supra* note 11, at 23-24; KLABBERS, *supra* note 3, at 85-86.

<sup>30</sup> AUST, *supra* note 11, at 16 (supporting the idea that a treaty could be concluded via e-mail).

<sup>31</sup> 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.

<sup>32</sup> See, e.g., Hollis, *A Comparative Approach*, *supra* note 10, 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); 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 et al., eds., 2005) 583 (neither South African law nor practice makes any provision for oral agreements and they lack official sanction).

<sup>33</sup> See 1 U.S.C. §112b.

<sup>34</sup> 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.

<sup>35</sup> That perspective was clearly at work in the ILC’s origination of the phrase. See [1959] YBILC, vol. II, 95, ¶3.

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, therefore, applying this treaty criterion evidences an "oscillation between subjective and objective approaches."<sup>36</sup>

- (vi)... *regardless of its designation* ... International law has not imposed any requirements of form or formalities for concluding treaties.<sup>37</sup> 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.<sup>38</sup> More recently, in the *Pulp Mills* case, the Court concluded that a press release constituted a binding agreement for the parties.<sup>39</sup>

At most, an agreement's title may provide some indication of its status. It may, for example, indicate its authors' intentions. 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.<sup>40</sup>

- (vii) ... *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."<sup>41</sup> Does this mean all unregistered agreements are not treaties? The answer is clearly in the negative.<sup>42</sup> 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

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<sup>36</sup> Martti Koskenniemi, *Theory: implications for the practitioner*, in *THEORY AND INTERNATIONAL LAW: AN INTRODUCTION* 19-20 (Philip Allott et al., eds., 1991).

<sup>37</sup> 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 ("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. 319, 331 ("terminology is not a determinant factor as to the character of an international agreement").

<sup>38</sup> *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] I.C.J. Rep. 112, ¶21-30.

<sup>39</sup> *Pulp Mills*, *supra* note <sup>28</sup>, at 138.

<sup>40</sup> 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. The United States considered them treaties, while its partners (Australia, Canada, and the United Kingdom) regarded them as non-binding, political commitments. See J. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 821 (1994).

<sup>41</sup> 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 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.

<sup>42</sup> Accord AUST, *supra* note 11, at 302-03; FITZMAURICE AND ELIAS, *supra* note 11, at 23; KLABBERS, *supra* note 3, 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).

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.”<sup>43</sup> Similarly, a failure to register will generally not deny an agreement 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.”<sup>44</sup> In short, registration is not a required criterion for defining treaties.

Even if it is not determinative, the fact of registration may be indicative of a treaty’s existence. Like the title, registration indicates an intent (albeit of only the registering party) that the agreement will be a treaty. But since States do not regularly monitor treaty registrations, registration often says little, if anything, about the other State(s)’ intentions. Nonetheless, the ICJ recently signaled in *Somalia v. Kenya* that registration is among the factors it considers in identifying treaties, particularly where the other party did not subsequently object to registration.<sup>45</sup>

(viii) ... or the domestic legal procedures States employ to consent to be bound by it. The definition of a “treaty” may vary depending on the context in which is used. For purposes of these *Guidelines*, it is important to differentiate how Member States may define treaties for purposes of their domestic law and how international law and practice define the concept. As a matter of domestic law, some States limit the definition of a treaty within their domestic legal order to agreements authorized through specific domestic procedures, most often legislative approval.<sup>46</sup> International agreements that do not require or receive legislative approval will not be defined as treaties for domestic law purposes, but rather comprise a discrete category. Many States refer to these as “executive agreements”.<sup>47</sup> Other States, particularly those belonging to the Commonwealth, use the term “treaty” to refer to their international agreements even though they do not require any advance legislative authorization.<sup>48</sup> Thus, the fact that a State mandates a particular set of domestic procedures for an international agreement

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<sup>43</sup> 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.

<sup>44</sup> *Qatar v. Bahrain*, *supra* note 38, ¶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.

<sup>45</sup> See *Somalia v. Kenya*, *supra* note 9, 21, ¶42 (citing Kenya’s registration and the lack of any Somali objection for five years as among the reasons the MOU qualified as a treaty).

<sup>46</sup> Which agreements require legislative approval—if any—varies from State to State. See, e.g., Hollis, *A Comparative Approach*, *supra* note 10 (surveying how nineteen states address a legislative role in treaty-making). Some States (e.g., Dominican Republic) require legislative approval for all their international agreements; other States like Canada do not require legislative approval to conclude any international agreement (legislation may, however, be required to implement certain agreements domestically). Other States adopt different domestic procedures for international agreements on different subjects or in light of other domestic authorities. See, e.g., Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (citing Art. 93 of the 2015 Constitution) (“Dominican Republic Response”); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”) (legislative approval required for certain international agreements on topics involving, for example, territorial or border delimitations, alliances, and trade agreements).

<sup>47</sup> In the United States, for example, only agreements that receive “advice and consent” from a two thirds majority of the upper chamber of its legislature (the Senate) are called treaties; agreements approved by a simple majority of both chambers are called “congressional-executive agreements” while those done under the President’s own constitutional powers are titled “sole executive agreements.”

<sup>48</sup> See Global Affairs Canada, *Policy on Tabling of Treaties in Parliament*, at <https://treaty-accord.gc.ca/procedures.aspx?lang=eng> (adopting a treaty definition that applies to “any type of instrument governed by public international law”) (“Canada Treaty Policy”).

will not accurately predict its status as a binding agreement under international law. Hence, these *Guidelines* adhere to the broader formulation where a treaty encompasses *all* binding agreements governed by international law independent of how States decide to authorize their consent to it.

**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 non-binding 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.<sup>49</sup> The “political commitment” label captures all of these variations and corresponds to the category of non-binding international agreements generally.

Today, States clearly support the practice of concluding mutual commitments whose normative force lies outside of any sense of legal obligation.<sup>50</sup> Political commitments are thus, by definition, non-binding. 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. Political commitments stand in contrast to binding 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:

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.<sup>51</sup>

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, however, 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 existing along a spectrum of different

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<sup>49</sup> See KLABBERS, *supra* note 3, at 18; *see also* Hollis and Newcomer, *supra* note 3, 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); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements* 71 AM. J. INT’L L. 296 (1977).

<sup>50</sup> *See, e.g.*, AUST, *supra* note 11, at 28-29, 35-39; MCNAIR, *supra* note 12, at 6; Bothe, *supra* note 49, at 66 (using empirical approach to reveal political commitment practice); PAUL REUTER, AN INTRODUCTION TO THE LAW OF TREATIES ¶74 (J. Mico and P. Haggemacher, trans., 1989). Debates continue from a jurisprudential view as to whether States can choose to form non-binding agreements. *See* KLABBERS, *supra* note 3, at 119 (“[I]f states wish to become bound, they have no choice but to become legally bound.”); Ian Sinclair, *Book Review—The Concept of Treaty in International Law*, 81 AM. J. INT’L L. 748 (1997) (disputing Klabbbers’s views).

<sup>51</sup> 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).

degrees of bindingness or enforceability ranging from soft to hard.<sup>52</sup> 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.<sup>53</sup> Political commitments involve agreements on norms of the first, but not the second, type.

Moreover, as elaborated in Part 2 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.<sup>54</sup> 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.<sup>55</sup>

Thus, the *Guidelines*' 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 multi-stakeholder framework. For a recent example, see the 550 plus signatories of the Paris Call for Trust and Security in Cyberspace, including States, firms, academic institutions, and various representatives of civil society.<sup>56</sup>

#### **1.4 Contract:** *A binding agreement governed by national or non-State law.*

**Commentary:** Like treaties (and unlike political commitments), contracts generate legally binding obligations. Instead of international law, however, a national legal system usually governs the formation, interpretation, and operation of the contract.<sup>57</sup> Alternatively, in a number of commercial contexts, parties may select non-State law (e.g., customs, usages and practices, principles and *lex mercatoria*) to govern their contracts in lieu of—or in addition to—a national legal system.<sup>58</sup>

Contracts are usually defined as agreements by private actors (firms or individuals) that are governed by the relevant national legal system.<sup>59</sup> But as the ILC acknowledged, States may choose

<sup>52</sup> 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).

<sup>53</sup> 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 n3 (Dinah Shelton ed., 2000).

<sup>54</sup> 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”).

<sup>55</sup> See Hollis & Newcomer, *supra* note 3, at 521.

<sup>56</sup> See Paris Call for Trust and Security in Cyberspace (12 November 2018) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

<sup>57</sup> Widdows, *supra* note 5, 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.

<sup>58</sup> See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

<sup>59</sup> 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

to use laws other than international law to govern their agreements.<sup>60</sup> 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 and how to choose which law governs them.<sup>61</sup> Thus, there is a possibility that States could desire to create a contract that is invalid under the selected (or otherwise applicable) governing law. In such cases, there is an open question whether international law would step in to govern the agreement.<sup>62</sup>

**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, the surrounding circumstances, and subsequent conduct, 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 international agreements concluded among 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 ...”<sup>63</sup> 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.”<sup>64</sup>

The concept of inter-institutional agreements has received relatively little attention from international law. Practice, moreover, appears quite diverse in terms of whether these agreements are viewed as binding or non-binding. Some States like Mexico classify inter-institutional agreements as “governed by public international law,” making them binding treaties as that term is defined in these *Guidelines*.<sup>65</sup> Ecuador, in contrast, indicates that its “lower-level state institutions usually sign with their counterparts or with international organizations *non-binding* understandings

agreement. In such cases, conflict of law rules dictate which legal system takes priority in cases of conflict.

<sup>60</sup> [1966] YBILC, vol. II, 189, ¶6.

<sup>61</sup> 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) (“Paraguay Response”). The Inter-American Juridical Committee has recently concluded a *Guide on the Law Applicable to International Commercial Contracts* that extensively addresses international contracting.

Although it focuses on commercial contracts (rather than those involving States and State institutions with which these *Guidelines* deal), it contains extensive guidance of general utility for all international contracts. See INTERNATIONAL COMMERCIAL CONTRACTS GUIDE, *supra* note 58.

<sup>62</sup> Lauterpacht was of this view, as was the ILC, at least initially. Lauterpacht, *First Report*, *supra* note 1, 100; [1959] YBILC, vol. II, 95.

<sup>63</sup> 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).

<sup>64</sup> 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* (“Peru Response”); see also Hollis, *Second Report*, *supra* note 10, at ¶14.

<sup>65</sup> 1992 Mexican Law Regarding the Making of Treaties, *supra* note 63. Labeling inter-institutional agreements as treaties may not accord with the label they have within a domestic legal order. 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, these *Guidelines* 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 bear such a label.

known as inter-institutional instruments.”<sup>66</sup> Other States take a hybrid approach. Uruguay provides that inter-institutional agreements may be *either* binding or non-binding.<sup>67</sup> 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.<sup>68</sup> 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 ...”<sup>69</sup> 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.<sup>70</sup>

The diversity of State practice suggests that the category of inter-institutional agreements cannot be exclusively associated with any single category of binding (or non-binding) agreements. Simply put, an inter-institutional agreement may be a binding treaty or a binding contract, or it may be a non-binding political commitment. Its 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 (i.e., the text, the surrounding circumstances, and subsequent conduct).

## 2. The Capacity to Conclude International Agreements

**2.1 The Treaty-Making Capacity of States:** *States have the capacity to conclude treaties and should do so in accordance with the treaty’s terms and whatever domestic laws and procedures regulate their ability to consent to be bound.*

**Commentary:** By virtue of their sovereignty, all States have the capacity to enter into treaties.<sup>71</sup> Through both the VCLT and custom, international law has devised a robust set of default rules on the treaty-making capacities of States. VCLT Article 7, for example, indicates who can

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<sup>66</sup> Ecuador Response, *supra* note 46 (emphasis added); Hollis, *Second Report*, *supra* note 10, at ¶13.

<sup>67</sup> See Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“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”).

<sup>68</sup> Peru Response *supra* note 64 (citing Article 6 of Supreme Decree No. 031-2007-RE). Peru notes “‘nonbinding’ agreements ... coming into increasing use ... at the interinstitutional 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.*

<sup>69</sup> 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 (“Jamaica Response”) (emphasis added).

<sup>70</sup> See United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“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. U.S. states are denied a treaty-making capacity under the U.S. Constitution but can conclude agreements or compacts with foreign counterparts where authorized by its Congress. *Id.* In contrast, Argentina allows its sub-national territorial units to conclude some “partial” treaties but denies that capacity to its national ministries or agencies. Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”).

<sup>71</sup> See, e.g., *Case of the SS Wimbledon (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”).

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,<sup>72</sup> or only to States engaged in a specific activity.<sup>73</sup> States only have the capacity to join treaties where the treaty's terms allow them to do so.<sup>74</sup>

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. To date, VCLT Article 46 has not provided legal grounds for a State to walk back its consent to be bound to a treaty (even in the face of allegations of significant breaches of domestic law or procedures).<sup>75</sup> That said, a State should—as a best practice—only exercise its capacity to join treaties that have been approved through its domestic laws and procedures. In other words, if a 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 or 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 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.*

**Commentary:** Unlike questions surrounding the treaty-making capacity of international organizations, international law has devoted little attention to treaty-making by a State's institutions.<sup>76</sup> Nonetheless, State institutions – whether national ministries or sub-national territorial units – clearly do conclude instruments that at least some States (including those States of which these institutions form a part) regard as treaties (that is, agreements governed by

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<sup>72</sup> 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).

<sup>73</sup> See Constitution of the Association of Natural Rubber Producing Countries (1968) 1045 U.N.T.S. 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”).

<sup>74</sup> A 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.

<sup>75</sup> 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 Article 46 in practice have not proved terribly successful. See *Somalia v. Kenya*, *supra* note 9, 21 ¶¶48-50. (rejecting Somalia's arguments that the MOU's failure to receive approvals required under its domestic law allowed it to invoke VCLT Article 46 or otherwise deny its consent to be bound); *accord Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, [2002] I.C.J. Rep. ¶¶265-67; KLABBERS, *supra* note 3, 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.”)

<sup>76</sup> Compare 1986 VCLT, *supra* note 12.

international law).<sup>77</sup> 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 counterparts 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, States appear to endorse two additional conditions: (1) the State responsible for the institution should consent to it making a treaty on matters within the institution's competence; and (2) the potential treaty partners should be willing to enter into that treaty with the institution.<sup>78</sup>

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.<sup>79</sup> In such cases, the institution should 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.<sup>80</sup> 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) report authorizing 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.<sup>81</sup> Meanwhile, States like Argentina authorize their sub-national territorial units to conclude certain types of "partial" treaties, but deny their ministries can do so.<sup>82</sup> Other Member States, in contrast, have not authorized sub-national territorial units to engage in any treaty-making.<sup>83</sup>

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 certain State institutions to make treaties with respect to matters falling within their

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<sup>77</sup> See, *e.g.*, Grant, *supra* note 25, at 127-131; 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).

<sup>78</sup> 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 25, at 131.

<sup>79</sup> See *Paraguay Response*, *supra* note 61 ("Under domestic law, the Ministry of Foreign Affairs is the only agency with the capacity to conclude treaties governed by international law").

<sup>80</sup> See *supra* note 63, and accompanying text.

<sup>81</sup> Hollis, *Second Report*, *supra* note 10, at ¶¶24-25; See also *Panama Response*, *supra* note 67.

<sup>82</sup> See *Argentina Response*, *supra* note 70 (suggesting that since Argentina's ministries are not subjects of international law, they cannot conclude treaties while noting that under Article 12[5] 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"); see also Argentina Constitution of 1853, Reinstated in 1983, with Amendments through 1994, Arts. 125-26, *English translation available at* [www.constituteproject.org](http://www.constituteproject.org).

<sup>83</sup> See, *e.g.*, Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* ("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* ("Colombia Response") (domestic Colombian legislation does not authorize "sub-national territorial units" (*e.g.*, Colombian departments, districts, municipalities and indigenous territories) to conclude treaties governed by international law.).

exclusive competence.<sup>84</sup> Others, like Mexico, have used a statute to lay out procedures 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.<sup>85</sup> And in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.<sup>86</sup>

Second, in addition to having the "internal" consent from the State of which it forms a part, an institution's capacity to make treaties should 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 should 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). To avoid unaligned expectations, a State authorizing its own institution to conclude treaties should ensure that it or its institution obtains the consent of other treaty parties that the State's institution will join such treaties (rather than the State itself doing so).

In addition to inter-institutional agreements, States may conclude bilateral treaties with a foreign State institution. Hong Kong, for example, has a number of treaties with OAS Member States.<sup>87</sup> In the multilateral treaty context, such authorizations are 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.<sup>88</sup> And the Agreement Establishing the

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<sup>84</sup> See, e.g., Austria Constitution 1920 (reinst. 1945, rev. 2013), B-VG Art. 16 (Eng. trans. from [www.constituteproject.org](http://www.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 1831 (rev. 2014), Art. 167(3) (Eng. trans. from [www.constituteproject.org](http://www.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 [www.constituteproject.org](http://www.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 [www.constituteproject.org](http://www.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.*, Yaroslavl, 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).

<sup>85</sup> 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 includes in its official 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.

<sup>86</sup> *Self-Governing and Non-Self-Governing Territories*, 1981-1988 CUMULATIVE DIGEST, vol. 1, § 5, at 436, 438-40 (July 17, 1986 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). Subsequently, Puerto Rico withdrew from the Bank.

<sup>87</sup> See Agreement between the Government of Canada and the Government of Hong Kong for the surrender of fugitive offenders. Hong Kong, 7 September 1993, 2313 U.N.T.S. 415.

<sup>88</sup> 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 ("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" ... and (3) "territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence"). The same approach was followed in the U.N. Fish

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.”<sup>89</sup>

**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.<sup>90</sup> 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 *Guideline 2.2* suggests, some of this transparency may flow from actions of the authorizing State or its institution. A State contemplating authorizing its institution to conclude a treaty should inquire (or have its institution inquire whether the potential agreement partner shares the view that the agreement will constitute a treaty). But treaty partners need not just be passive recipients awaiting requests from foreign States or their institutions. The current guideline proposes a separate best practice where treaty partners (be they States or State institutions) should engage in their own due diligence; *i.e.*, States faced with the prospect of an inter-institutional agreement should affirmatively verify what capacities are accorded to the foreign institution(s) involved.

Such verifications could 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 such treaties.<sup>91</sup>

What happens if the potential partner cannot confirm the foreign institution’s treaty-making capacity? A State (or its institution) has several options. It could opt not to conclude the treaty at all. Or, it could revise the treaty to make it with the foreign State responsible for the institution in question. For example, 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.<sup>92</sup> And when the United States and Canada discovered that the city of Seattle and the

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.

<sup>89</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. XII, 1867 U.N.T.S. 3, 162.

<sup>90</sup> *See supra* notes 65-70, and accompanying text. This confusion likely extends beyond wholly inter-institutional agreements to those between a State and a foreign State’s institution. *See supra* notes 87-89 and accompanying text.

<sup>91</sup> *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).

<sup>92</sup> *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.

Province of British Columbia 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.<sup>93</sup>

Can a State institution authorized to conclude a treaty with a foreign institution enter into that treaty if it cannot confirm the foreign institution’s capacity to do so? Unfortunately, there is substantial evidence of inter-institutional agreements arising without clear authorization from one or more responsible State(s).<sup>94</sup> Many of these agreements may be best regarded as political commitments or contracts. At least some of them, however, bear the markers of a treaty. For example, in 2000, the U.S. State of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba where they agreed to jointly cooperate in opposing certain inter-basin water transfer projects contemplated by U.S. federal law.<sup>95</sup> Other States have experienced similar problems. By the end of the twentieth century, for example, the Canadian province of Quebec had reportedly concluded some 230 unauthorized “ententes” with foreign governments, nearly 60% of which were with foreign states.<sup>96</sup> At present, it does not seem a good practice to regard such agreements as treaties, especially if it later becomes clear one or more of the institution’s involved had no capacity to conclude treaties in its own name. Nonetheless, it is an area worthy of further State attention and discussions.

**2.4 The Capacity to Make Political Commitments:** *States or State institutions should be able to 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 such commitments.<sup>97</sup> 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 experience with regulating the capacity to make non-binding 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 where these instruments are regarded as non-binding (and even then, only after the instrument has undergone a legal review).<sup>98</sup> 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 that limit the capacity to enter into a non-binding political commitment. 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

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<sup>93</sup> 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.

<sup>94</sup> See Hollis, *Unpacking the Compact Clause*, *supra* note 54 (identifying 340 binding and non-binding agreements concluded by U.S. states with foreign powers).

<sup>95</sup> 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.

<sup>96</sup> Nikraves, *supra* note 84, at 239. France, moreover, reportedly regards its ententes with Quebec as instruments governed by international law. See *id.* at 242.

<sup>97</sup> 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 since the category, by definition, only covers agreements lacking legal force.

<sup>98</sup> Colombia Response, *supra* note 83. 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.*

just a legally binding one) to Congress for review and an opportunity for disapproval.<sup>99</sup> President Obama submitted the JCPOA as required under the Act, although Congress eventually declined to approve or disapprove of that instrument.<sup>100</sup> 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.<sup>101</sup>

**2.5 Inter-State Contracting Capacity:** *A State should conclude contracts with other willing States in accordance with the contract's governing law.*

**Commentary:** Consistent with the earlier views of the ILC, some States in the region assert a capacity to enter into contracts with other States.<sup>102</sup> At the same time, other States indicate that they do not engage in inter-State contracting.<sup>103</sup> Thus, it appears that nothing in international law precludes a State from having a practice of concluding contracts with a foreign State likewise willing to conclude such contracts. A State's own legal system could, in theory, limit its capacity 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 a single governing domestic law may, as a practical matter, limit the frequency of such contracts since it requires at least one (if not both) contracting States to agree to a governing domestic law other than their own.<sup>104</sup> Contracting capacity is, moreover, a function of the law of the contract. Domestic legal systems (and certain non-State laws) 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 should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract's governing 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.<sup>105</sup> 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 contents 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

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<sup>99</sup> 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 gave notice of U.S. withdrawal from the JCPOA on May 8, 2018.

<sup>100</sup> 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.).

<sup>101</sup> Peru Response, *supra* note 64 (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 46.

<sup>102</sup> See [1966] YBILC, vol. II, 189, ¶6. In responding to the OAS Questionnaire, Ecuador, Jamaica, Mexico and the United States all acknowledged the possibility of inter-State contracting. See Hollis, *Second Report*, *supra* note 10, ¶15.

<sup>103</sup> Hollis, *Second Report*, *supra* note 10, ¶15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay report no practice of concluding contracts governed by domestic law for binding agreements among States.).

<sup>104</sup> Selecting non-State law to govern such contracts, however, could (at least in theory) sidestep such difficulties. See note 58 and accompanying text.

<sup>105</sup> See Hollis, *Second Report*, *supra* note 10, ¶30 (Argentina, Colombia and Peru, each of which declined any practice of inter-state contracting, reported significant experience with inter-institutional contracting).

the capacity to enter into contracts” but does so “subject to the authorities those entities are accorded under the Constitution and by law.”<sup>106</sup>

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).”<sup>107</sup> States like Peru and Ecuador have procurement laws that provide similar authorizations and conditions for contracts by State institutions.<sup>108</sup>

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. That said, an inter-institutional agreement may be concluded that selects one State’s governing law over the others. 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 ...”<sup>109</sup> 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). Similarly, inter-institutional agreements might select non-State law to govern the contract in addition to—or in lieu of—a national legal system.

### 3. Methods for Identifying Binding and Non-Binding Agreements

**3.1 Identifying Agreements:** *States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:*

**3.1.1.** *States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).*

**3.1.2** *When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).*

**3.1.3** *A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile any such differences.*

**Commentary:** How can States and others determine whether any particular text will (or already) 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?

Guideline 3.1 offers best practices for the first step – identifying agreements generally. In some cases, the participants make it easy and jointly concede an agreement’s 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.<sup>110</sup> Similarly, in the *Iron Rhine (“Ijzeren Rijn”) Railway* arbitration, both Belgium and the Netherlands acknowledged that

<sup>106</sup> *Id.* at ¶30.

<sup>107</sup> See Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Mexico Response”) (discussing Mexico Constitution 1917 (rev. 2015) Art. 134).

<sup>108</sup> Hollis, *Second Report*, *supra* note 10, ¶¶15, 30.

<sup>109</sup> An excerpt of the contract, including Article 9, is reprinted in BARRY CARTER ET AL, *INTERNATIONAL LAW* 86-87 (7<sup>th</sup> ed., 2018).

<sup>110</sup> See *Pulp Mills*, *supra* note 28, at ¶¶132-33.

they had reached an agreement in a Memorandum of Understanding (MOU) *and* that the MOU was not a “binding instrument.”<sup>111</sup>

In many cases, however, there will not be any “agreement to agree”. In these circumstances States should follow the ICJ’s lead from the *Aegean Sea* case and examine any proposed or existing statement with “regard above all to *its actual terms and to the particular circumstances* in which it was drawn up.”<sup>112</sup> 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, Greece and Turkey disputed both the existence of an agreement and its particular type. To resolve the issue, 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.<sup>113</sup> 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.”<sup>114</sup> The ICJ continued this approach in the *Case 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.”<sup>115</sup>

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.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup>

Of course, there may be cases where the text and surrounding circumstances are ambiguous as to whether a particular proposed statement or instrument will comprise an agreement. In such cases, this guideline advocates a direct approach – encouraging States to confer and convey to each other their respective understandings as to whether or not an agreement exists (or will result). Such discussions may confirm that there is an agreement or that none will (or does) exist. In some cases, however, these discussions may reveal a divergence of views with one side viewing a statement or instrument as constituting an agreement while the other denies it has such status. In such cases, it is best for all involved to take a step back and refrain from further relevant activity until further discussions can seek some reconciliation of views. Doing so will reduce the risk of unaligned

<sup>111</sup> *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.

<sup>112</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, [1978] I.C.J. Rep. 3, ¶95 (emphasis added).

<sup>113</sup> *Id.* at ¶107.

<sup>114</sup> *Qatar v. Bahrain*, *supra* note 38, at ¶24.

<sup>115</sup> *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, [1999] I.C.J. Rep. 1045, ¶63.

<sup>116</sup> *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.”).

<sup>117</sup> See “*Hoshinmaru*” (*Japan v. Russian Federation*) (Prompt Release, Judgment) 2007 ITLOS Rep. 18 (Aug. 6), ¶¶85-87.

<sup>118</sup> *Salini Costruttori 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.

expectations or disputes among those involved (or others) that risk escalation, implicate third party dispute resolution mechanisms, or otherwise complicate international relations.

**3.2 Identifying the type of agreement concluded:** *The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.*

- *First, some actors employ an “intent test”, a subjective analysis where the authors’ manifest intentions determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).*
- *Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.*

*The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, their different analytical objectives may lead the two tests to generate different conclusions in certain cases. Different results may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:*

**3.2.1** *If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.*

**3.2.2** *A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.*

**3.2.3** *States should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test for identifying binding and non-binding agreements. They should thus conclude—and apply—their international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions.*

**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.”<sup>119</sup> The Vienna Conference delegates agreed.<sup>120</sup> Today, a large number of States, scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties.<sup>121</sup> In the *South China Seas* arbitration, for example, the Tribunal

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<sup>119</sup> [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 1, at 223 with Lauterpacht, *First Report*, *supra* note 1, 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 1, at 117.

<sup>120</sup> 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”).

<sup>121</sup> *South China Sea Arbitration*, *supra* note 37, at ¶213; *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 11, at 20-21 (“It is the negotiating states which decide whether they will conclude a treaty, or something else”); KLABBERS, *supra* note 3, at 68 (“Notwithstanding its awkwardness, there is virtual unanimity

emphasized ‘[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties’.<sup>122</sup> Several OAS Member States have affiliated themselves with this approach as well.<sup>123</sup> Under this view, if the parties intend an agreement to be a treaty, it is a treaty. Similarly, if they do not intend their agreement to be binding, it will be a non-binding political commitment.

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 vs. 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.<sup>124</sup> 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.”<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> The Court’s more recent cases – *e.g.*, *Pulp Mills* and *Maritime Delimitation in the Indian Ocean* – have reinforced this objective approach.<sup>128</sup> The Court’s opinion in *Maritime Delimitation in the Indian Ocean*, for example, reasoned that the “inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character” without any mention of the parties’ intentions.<sup>129</sup>

The objective test is not, however, merely an ICJ formulation. The *Chagos Arbitration* Tribunal emphasize the need for an “objective determination” in sorting binding and non-binding

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among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations”); Widdows, *supra* note 5, at 120-39.

<sup>122</sup> *South China Seas Arbitration*, *supra* note 37, at ¶213.

<sup>123</sup> See Hollis, *Second Report*, *supra* note 10, ¶16 (Five Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked “intent” as the deciding criterion for identifying a treaty); see Brazil Response, *supra* note 83 (relies “on the intention of the parties”); Colombia Response, *supra* note 83 (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 107 (“‘Non-binding’ instruments, use words emphasizing the intent of the participants involved”); Peru Response, *supra* note 64 (describing efforts to ensure the agreement records “the common intent of the parties”); U.S. Response, *supra* note 70 (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”).

<sup>124</sup> *Qatar v. Bahrain*, *supra* note 38, at ¶27.

<sup>125</sup> *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).

<sup>126</sup> AUST, *supra* note 11, at 51-52; *Accord Widdows*, *supra* note 5, 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”).

<sup>127</sup> See Chinkin, *supra* note 52, at 236-37; KLABBERS, *supra* note 3, at 212-216.

<sup>128</sup> See, *e.g.*, *Pulp Mills*, *supra* note 28, at ¶128, *Somalia v. Kenya*, *supra* note 9, ¶42.

<sup>129</sup> *Somalia v. Kenya*, *supra* note 9, ¶42.

agreements.<sup>130</sup> Meanwhile, a number of OAS Member States have likewise emphasized the structure and language used in a text as determinative of its legal (or non-legal) status.<sup>131</sup>

The purpose 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, these guidelines aim to advise States and others on how to create and differentiate among binding and non-binding international agreements in a world where different methods may be employed to do so. To that end, this guideline highlights how, in many respects, the intent and objective tests 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.<sup>132</sup> 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.<sup>133</sup> 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.”<sup>134</sup> 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 préparatoires* or other statements by States of their intentions.<sup>135</sup>

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-measures are an available option in cases of breach.<sup>136</sup> Domestic laws can also require certain

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<sup>130</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case 2011-03 (18 March 2015) at 168, ¶426 (“Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law *must be clearly expressed or is otherwise a matter for objective determination*” (emphasis added)).

<sup>131</sup> See, e.g., Jamaica Response, *supra* note 69 (“The language used in an agreement characterizes the type of agreement”). The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty's status as such. Dominican Republic Response, *supra* note 46.

<sup>132</sup> See, e.g., Brazil Response, *supra* note 83 (“language used in an instrument is key”); Colombia Response, *supra* note 83 (“treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties”); Mexico Response, *supra* note 107 (noting verbs and words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 64 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); U.S. Response, *supra* note 70.

<sup>133</sup> *South China Sea Arbitration*, *supra* note 37, at ¶216.

<sup>134</sup> *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.

<sup>135</sup> See *Qatar v. Bahrain*, *supra* note 38, 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.”).

<sup>136</sup> 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), U.N. Doc A/56/10 55 [3], Art. 22 [‘ASR’].

agreements to take a treaty form, creating difficulties when other participants do not regard them as such.<sup>137</sup> 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.

States may take several steps to alleviate such difficulties. For starters, this guideline proposes that Member States consciously adopt one test or the other and be transparent and consistent in doing so. Consistent application of a test will help settle other actors' expectations and allow more predictable interactions among them. Where a State knows that another State uses the same test for identifying binding and non-binding agreements, it will have greater certainty that its expectations as to the agreements status as a treaty (or a political commitment, or a contract) will hold.<sup>138</sup> And where a State knows in advance that another State identifies its binding and non-binding agreements using a different test, a State will know that it may need to take specific steps or use particular text to ensure it can produce the type of agreement it desires.

Whatever their view on the appropriate method for identifying international agreements, States should thus be sensitive to the possibility that others (including international courts and tribunals) may not share their view. Whenever possible, States (and their 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 status 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. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement's status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.*

<b>Table 1: Specifying the Type of Agreement Concluded</b>	
<b>Type of Agreement</b>	<b>Sample Text</b>
<b>Treaty</b>	<i>This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.</i>
<b>Political Commitment</b>	<i>"This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants."</i>
	<i>"This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations."</i>
<b>Contract</b>	<i>"This agreement shall be governed by the law of [list State] [and/or list non-State source of law]."</i>

**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 is any doubt among the 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.

<sup>137</sup> See *supra* note 40 (discussing disagreement between the United States and its allies on the binding status of certain MOUs).

<sup>138</sup> That certainty may not be complete if third party dispute settlement is possible; a tribunal could, in theory, override both States' approach to identification in favor of its own.

States and State institutions can, moreover, employ text in the agreement itself to specify its status. Treaty texts have rarely done so to date, but this guideline offers a sample formulation that might be used in future cases. It is a variation on Gerald Fitzmaurice's earlier treaty definition, which attempted to fuse intentional and objective approaches.<sup>139</sup> Thus, it could be employed by adherents of both the intent and objective tests. I included a "shall" to provide further objective evidence of the agreement's binding status as well as a qualifier "according to its terms" to have the text be the reference point for interpreting what rights and obligations the treaty conveys.

States and State institutions more 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*.<sup>140</sup> 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."<sup>141</sup> In other cases, participants specify the political character of their commitments, affirmatively describing it as "politically binding" or a "political commitment."<sup>142</sup> 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.<sup>143</sup> States in the region may wish to adopt such practices to make clear when they understand their agreements to be non-binding. Thus, this guideline provides two sample clauses for signaling a non-binding agreement, the first negatively and the second affirmatively. Neither sample clause specifies the title of the instrument, recognizing that these clauses could be employed for documents titled anything from "Memorandum of Understanding" to "Declaration" to "Code of Conduct."

Finally, this guideline offers a choice of law clause to specify when a binding agreement constitutes a contract. It includes a possibility of referencing either a specific State's national laws or some non-State law sources, such as UNIDROIT principles or *lex mercatoria* (however defined).

Explicit, shared, and transparent indications of the participants' understanding of the type of agreement being concluded may go far to alleviating the confusion and conflicts that have occupied State practice recently. Nonetheless, it is important to recognize that an agreement's authors may not always have complete control over what type of agreement they conclude. If the participants lack a treaty-making capacity, for example, they cannot create a treaty even if they use the sample clause included here or otherwise claim 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*.<sup>144</sup> 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

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<sup>139</sup> See note 119.

<sup>140</sup> 31 ILM 882 (1992) (emphasis added).

<sup>141</sup> 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).

<sup>142</sup> See, e.g., Founding Act on Mutual Relations, Cooperation and Security (NATO-Russia) 36 ILM 1006, ¶1 (1996) (describing the declaration as an "enduring political commitment undertaken at the highest political level"); CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe, 26 ILM 190, ¶101 (1986) ("The measures adopted in this document are politically binding ...").

<sup>143</sup> Final Act of the Conference on Security & Co-operation in Europe, 14 ILM 1293 (1975).

<sup>144</sup> See, e.g., VCLT, Art. 52 (coercion) and Art. 53 (*jus cogens*).

questions about whether certain subjects require the treaty form, the parties' views notwithstanding.<sup>145</sup>

**3.4 Evidence Indicative of an Agreement's Status as Binding or Non-Binding:** *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:*

- (a) *the actual language employed;*
- (b) *the inclusion of certain final clauses;*
- (c) *the circumstances surrounding the agreement's conclusion; and*
- (d) *the subsequent conduct of agreement participants.*

*Table 1 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.*

<b>Table 2: Identifying Binding and Non-Binding Agreements</b>		
<b>Agreement Features</b>	<b>Evidence Indicative of a Treaty</b>	<b>Evidence Indicative of a Political Commitment</b>
<b>Titles</b>	Treaty Convention Agreement Covenant Protocol	Understanding Arrangement Declaration
<b>Authors</b>	parties	participants
<b>Terms</b>	articles obligations undertakings rights	commitments expectations principles paragraphs  understandings
<b>Language of Commitment (verbs)</b>	shall agree must undertake Done at [place] this [date]	Should seek promote intend  expect carry out understand accept
<b>Language of Commitment (adjectives)</b>	binding authentic authoritative	political voluntary effective equally valid
<b>Clauses</b>	Consent to be Bound Entry into Force Depositary Amendment	Coming into Effect (or Coming into Operation)  Differences

<sup>145</sup> 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.

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
	Termination Compulsory Dispute Settlement	Modifications

**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.<sup>146</sup>

At the same time, State practice has developed a set of linguistic markers that are associated with non-binding agreements. In contrast to language of commitment like “shall,” political commitments often contain the more precatory “should.”<sup>147</sup> 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.” *Guideline 3.4* thus offer a non-exhaustive list of the sort of language often used in treaties and political commitments in Table 1.

It is important to emphasize, however, that there are no “magic words” that guarantee an agreement the status of either a treaty or a political commitment. For starters, there is the divide between the intentional and objective methods discussed in *Guideline 3.3* above. Those who favor the intentional test 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, 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 decision-makers should be careful not to rely on any one single piece of evidence to reach their conclusion.

*Clauses.* 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.

<sup>146</sup> Hollis, *Second Report*, *supra* note 10, at ¶18.

<sup>147</sup> It is possible for a treaty to contain a clause with precatory language; doing so limits the legal rights or obligations that a particular clause imposes on parties. But, assuming the agreement otherwise was intended to constitute a treaty (or has sufficient markers to so qualify) it will remain a treaty.

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.<sup>148</sup>

Other "final" clauses are regularly used in treaties and this guideline offers an illustrative list of those whose existence may be indicative of a treaty. Treaties often precede the parties' signatures with standard phrasing (*i.e.*, "Done at [place], this [date]..."). The use of a clause on "entry into force" is another well-recognized marker of a treaty. In the *Somalia v. Kenya* 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."<sup>149</sup> Treaties, moreover, regularly incorporate notice requirements for termination or withdrawal (for example, requiring six or twelve months advance written notice).

In contrast, 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. Instead of clauses on amendments or termination, a political commitment will (if it addresses the issue at all) sometimes use the term "modifications."

Not all States employ the same linguistic markers, titles, or clauses to differentiate a treaty from a political commitment. As such, no single clause should guarantee an agreement treaty status (or the status of a political commitment). The VCLT, for example, acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.<sup>150</sup> As such, all of these clauses are better viewed as indicative, rather than determinative. Countervailing evidence, whether in the agreement or outside of it, may point to the existence of a political commitment rather than to a treaty (or vice versa). 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. Yet, the same sentence also clarified that the "measures adopted in this document are politically binding."<sup>151</sup>

*Surrounding Circumstances.* The effort to identify and differentiate binding and non-binding agreements is not limited to their text. Both the intentional and objective tests view similar external evidence – namely the surrounding circumstances and the participants' subsequent conduct – in identifying agreements as treaties and political commitments. As noted, under the intentional test, the search for intention is a holistic one and thus includes the *travaux préparatoires* 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 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.<sup>152</sup>

At the same time, even as the objective test prioritizes text, it does not exclude analysis of external evidence, especially where the actual text is ambiguous or contradictory. Thus, the ICJ's

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<sup>148</sup> AUST, *supra* note 11, at 425, 427; *see also* HOLLIS, THE OXFORD GUIDE TO TREATIES, *supra* note 7, at 678-79; HANS BLIX AND JIRINIA H. EMERSON, THE TREATY-MAKER'S HANDBOOK 80 (1973).

<sup>149</sup> *Somalia v. Kenya*, *supra* note 9, at ¶42.

<sup>150</sup> *See* VCLT, Art. 56.

<sup>151</sup> CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe (1986), 26 ILM 190, ¶101 (1987).

<sup>152</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 116, at ¶93; *Accord Aegean Sea* case, *supra* note 112, 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 37, at ¶216.

more objective analysis in *Qatar vs. Bahrain* was expressly contingent on considering the circumstances surrounding an agreement's conclusion.<sup>153</sup>

*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.<sup>154</sup> The failure to submit an agreement to the domestic procedures required for treaties may also signal the parties' intentions to conclude a political commitment.<sup>155</sup> 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 – indicative of a binding commitment.<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup> 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 Evidence indicative of a contract:** *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.*

**Commentary:** 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? 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. See *Guideline 2.1-2.2* and the accompanying *Commentary* for how to identify which entities may have a treaty-making capacity.

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).<sup>159</sup> Care should be taken, however, not to conclude that

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<sup>153</sup> *Qatar v. Bahrain*, *supra* note 38, at ¶23 (In order to ascertain whether an agreement of that kind has been concluded, "the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up").

<sup>154</sup> *South China Sea Arbitration*, *supra* note 37, at ¶218.

<sup>155</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 116, 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."). On the other hand, the ICJ has suggested that a failure to follow domestic treaty-making procedures will not deny an agreement that otherwise looks like a treaty that status. *Somalia v. Kenya*, *supra* note 9, at 23-24, ¶¶48-50.

<sup>156</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra* note 75, 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).

<sup>157</sup> *Qatar v. Bahrain*, *supra* note 38, at ¶¶28-29.

<sup>158</sup> *Somalia v. Kenya*, *supra* note 9, at ¶19.

<sup>159</sup> See, e.g., *supra* note 109 (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 ...").

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.

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.<sup>160</sup> Thus, States should assume binding inter-State agreements will 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.<sup>161</sup> As yet, however, there is insufficient State practice to support this as a new agreement form.

**3.6 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. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of its agreement(s).*

**Commentary:** 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" in and associate it with non-binding agreement texts. 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.

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 provisions on future meetings and reporting.<sup>162</sup> In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility

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<sup>160</sup> Professor Jan Klabbbers devoted an entire book to establishing this presumption. See KLABBERS, *supra* note 3. 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 5, at 142; Hersch 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 Schachter, *supra* note 49, at 297; JES Fawcett, *The Legal Character of International Agreements*, 30 BRIT. YBK INT'L L. 381, 400 (1953).

<sup>161</sup> 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.

<sup>162</sup> 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.

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 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.

#### 4. Procedures for Making Binding and Non-Binding Agreements

**4.1 Different Domestic Procedures for Treaties.** *Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.*

**Commentary:** States have extensive—and often different—domestic procedures for authorizing treaty-making derived from each State's legal, historical, political, and cultural traditions. Despite their differences, these procedures serve similar functions. First, and foremost, they can confirm that the proposed agreement will constitute a treaty for the State (in the international law sense of that term employed in the *Guideline 1.2* definition above). Second, they confirm that the treaty is consistent with the State's domestic legal order, ensuring, for example, that the treaty's terms do not run afoul of any constitutional or statutory prohibitions or requirements. Third, they ensure appropriate coordination regarding the treaty's contents and/or its performance both within a State's executive branch and across the other branches of government.<sup>163</sup>

The domestic procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State's constitution.<sup>164</sup> Others may be a product of national law.<sup>165</sup> In some cases, the procedures have no formal legal basis, but depend on a national practice or policy. In Canada, for example, although the Prime Minister has unilateral authority to make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted.<sup>166</sup> As a result, States may have different levels of legal commitment to their treaty-making procedures; some States' procedure will be non-derogable; others may have more flexibility, capable of accommodating variations if the circumstances warrant.

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<sup>163</sup> See, e.g., Colombia Response, *supra* note 83 (“depending on the subject matter of the legal instrument to be negotiated ... the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself” are involved in authorizing it).

<sup>164</sup> See, e.g., Argentina Response, *supra* note 70 (citing Article 99(11) of the Constitution for the President's authority to conclude treaties and Article 75(22) for the legislature's authority “[t]o approve or reject treaties concluded with other nations and with international organizations ...”); Colombia Response, *supra* note 83 (“treaties require adoption by the Congress of the Republic and a declaration of enforceability by the Constitutional Court, in fulfillment of the provisions of Articles 156 and 241 of the 1991 Political Constitution, respectively.”); Dominican Republic Response, *supra* note 46 (citing Art. 184 of the Constitution requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Ecuador Response, *supra* note 46 (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Mexico Response, *supra* note 107 (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); U.S. Response, *supra* note 70 (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

<sup>165</sup> Brazil Response, *supra* note 83 (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017).

<sup>166</sup> See Maurice Copithorne, *National Treaty Law & Practice: Canada*, in NATIONAL TREATY LAW & PRACTICE 95-96 (D.B. Hollis et al, eds., 2005).

In terms of the contents of these domestic treaty-making procedures, there is some uniformity in where the power to negotiate a treaty lies. Most treaty-making procedures assign the power to negotiate and conclude treaties to a State's executive, whether the Head of State (*e.g.*, the Monarch), the Head of Government (*e.g.*, the Prime Minister), or both (*e.g.*, the President). Often, the power is further delegated from the Head of State to the Head of Government and from the Head of Government to the Foreign Minister. There is also uniformity in States' commitment to having the legislature authorize the State's consent to at least some treaties.

But there is extensive variation in both the breadth and depth of the required legislative role.<sup>167</sup> For some States, like the Dominican Republic, all treaties require legislative approval.<sup>168</sup> Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.<sup>169</sup> Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive legislative approval, Colombian law and practice also recognizes "simplified procedure agreements." These agreements either (i) fall within the exclusive authorities of the Colombian President as director of international affairs under Article 189.2 of the Colombian Constitution, or (ii) they are concluded to develop a prior agreement (which did receive the assent of the national legislature).<sup>170</sup> For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those "sole" powers possessed exclusively by the Executive; and (4) where it is authorized by an earlier treaty that received Senate advice and consent.<sup>171</sup> In addition to legislative involvement, several Member States have a judicial review requirement, where the Constitutional Court reviews the constitutionality of a proposed treaty. Thus, in the Dominican Republic and Ecuador, the Constitutional Court must review all treaties before they can proceed through other domestic procedures.<sup>172</sup>

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<sup>167</sup> The level of legislative approval may vary. Some states require the entire legislature to approve a treaty. Others have both chambers of a legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of two legislative chambers give its approval. Finally, some States affiliated with the Commonwealth do not grant their legislatures any role in approving a treaty, but they also disavow any domestic implementation without legislative authorization, which occurs via normal parliamentary procedures. See Hollis, *A Comparative Approach*, *supra* note 10, at 32-35 (surveying the treaty law and practice of nineteen representative States).

<sup>168</sup> Dominican Republic Response, *supra* note 46 (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive").

<sup>169</sup> Ecuador Response, *supra* note 46 (National Assembly required to give prior approval to ratification of treaties involving territorial or border delimitation matters, political or military alliances, commitments to enact, amend or repeal a law, rights and guarantees provided for in the Constitution, the state's economic policies, integration and trade agreements, delegation of powers to an international or supranational organization, a compromise of the country's natural heritage and especially its water, biodiversity, and genetic assets).

<sup>170</sup> Colombia Response, *supra* note 83 (noting that for agreements developing a prior agreement, that prior agreement must be consistent with all constitutional requirements and that the implementing agreement itself must be consistent with—and cannot exceed—those in the framework treaty that serves as its basis).

<sup>171</sup> As a result, the United States domestically uses different terminology to refer to treaties (in the international law sense of that term) that proceed along these different paths. In U.S. law, the term "treaties" only refers to those agreements receiving Senate advice and consent; "congressional-executive agreements" are agreements approved by a federal statute; and "sole executive agreements" are agreements done under the President's executive authorities. Other States employ their own domestic lexicons to differentiate their treaties according to the different domestic procedures employed. See note 47 and accompanying text.

<sup>172</sup> See, *e.g.*, Dominican Republic Response, *supra* note 46 (pursuant to Article 55 of Organic Law No. 137-11, the President must submit signed international treaties to the Constitutional Court for

States may also impose notification requirements for treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the executive branch, including by government agencies. The “Circular 175” (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding treaties (in the international law sense of that term employed in these guidelines) unless they have first consulted with the U.S. Secretary of State.<sup>173</sup> In 2013, Peru’s Ministry of Foreign Affairs issued two Directives that “establish guidelines for the administration of treaties, including their negotiation, signature, adoption (domestic adoption and/or ratification), and procedures for the formulation of possible declarations, reservations, and objections to reservations, and registration ...”<sup>174</sup>

The breadth and diversity of States’ domestic treaty-making procedures counsels against any efforts at harmonization. On the contrary, *Guideline 4.1* adopts a best practice of “freedom” – accepting and supporting the autonomy of each State to decide for itself how to authorize treaty-making. States may vest their treaty-making procedures in constitutional or other legal terms. Or, they may develop them through more informal, practical processes. A State may, moreover, adopt a single process for all its treaties under international law, or it may opt to develop several different approval procedures for different treaty types.

States should, moreover, be aware that the choice(s) they make to have a particular treaty proceed through one process, such as legislative approval, may not be followed by their treaty partners. In other words, States should not assume that simply because their own national procedures require a particular treaty receive legislative approval (or, conversely, that no such approval is required), its potential treaty partners will adopt a similar approach.

**4.2 Developing Domestic Procedures for Political Commitments.** *States should develop and maintain procedures for authorizing the conclusion of either all [or their most significant] political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:*

- (a) a commitment’s non-binding status;
- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as when time constraints or uncertainty counsel against locking a State into a legal agreement; and
- (c) notification to—and coordination with—relevant State institutions, including the State’s Foreign Ministry.

**Commentary:** Political commitments, including many titled as MOUs, have become an increasing vehicle for inter-State and inter-institutional agreements. At least part of their appeal derives from the general absence of domestic procedures for their conclusion.<sup>175</sup> That has allowed

it to rule on their constitutionality); Ecuador Response, *supra* note 46 (citing Art. 110.1 of Ecuador’s Organic Law on Judicial Guarantees and Constitutional Oversight – “International treaties requiring legislative approval will be automatically put to constitutional review before ratification, prior to the start of any legislative approval process.”).

<sup>173</sup> The Case-Zablocki Act, 1 U.S.C. §112b(c) (“Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.”). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

<sup>174</sup> Peru Ministry of Foreign Affairs, *General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 001-DGT/RE-2013 (covering the Ministry of Foreign Affairs itself); Peru Ministry of Foreign Affairs, *General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 002-DGT/RE-2013 (covering all Peruvian governmental entities).

<sup>175</sup> See Charles Lipson, *Why are Some International Agreements Informal?* 45 INT’L ORG. 495, 508 (1991); Raustiala, *supra* note 6, at 592.

these instruments to develop a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or modifications), and *exit* (in terms of bringing the commitment to an end) than treaties.<sup>176</sup> Such benefits suggest that it would be a mistake to extend the same approval procedures for treaties to political commitments.

But it does not follow that States should have *no* procedures for authorizing these agreements simply because they are ill-suited for treaty-making procedures. Without some prior review or authorization, it is difficult to know if a purported political commitment is actually non-binding. Similarly, without some review or approval processes, political commitments might be concluded that do not comport with the State's laws or policies. In the inter-institutional context, it is even possible that one institution within a State might conclude a political commitment that runs counter to—or conflicts outright—with institutional interests or agreements elsewhere in the same State.

Such concerns help explain why some States have devised review mechanisms for their political commitments. Canada's published treaty policy, for example, includes a section mandating policy approvals of "non-legally binding instruments" by the national government or its institutions.<sup>177</sup> Colombia limits the capacity to sign non-binding agreements to those with legal capacity to represent the entity and subject to verification by the relevant legal office that the commitments assumed would not exceed the functions and authorities granted to that entity by the Constitution or laws.<sup>178</sup> In Peru, non-binding political commitments by the State are coordinated with all the governmental entities within whose purview its contents fall. The legal office of the Ministry of Foreign Affairs is charged with deciding whether to issue approval for their signature. But where the nonbinding agreement is at the inter-institutional level, the negotiations are conducted by the institution concerned, and "[a]lthough under Peruvian legislation, there is no mandate to submit the draft instrument to the Ministry of Foreign Affairs for its consideration, many governmental entities do so."<sup>179</sup>

Mexico and the United States recount similar efforts to review proposed non-binding agreements to confirm that they have such a status and otherwise comport with their own treaty practice.<sup>180</sup> What is less clear, however, is how regularly this review occurs. Mexico's response indicates that it occurs "at the request of the signing Mexican entity" (although the relevant Mexican authority sends copies of the instrument once it "has been formalized"). In the United States, although it reports no "formal procedures governing the conclusion of non-legally binding instruments, ... such instruments are reviewed both [with] respect to their content and drafting, including to ensure that they appropriately reflect the intention that the instrument not be governed by, or give rise to rights or obligations under, domestic or international law."

*Guideline 4.2* encourages States as a best practice to formalize and regularize their review of political commitments. Doing so would remove the *ad hoc* quality of existing review mechanism, many of which are informal. At present, it is often unclear exactly how often and in what circumstances a State's internal procedures generate a review of a political commitment before its conclusion. As the *Guideline* suggests these procedures could be designed to confirm the non-binding nature of the agreements under review and their consistency with the State's laws and foreign policies. These procedures would also alleviate concerns that a particular institution within

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<sup>176</sup> Duncan B. Hollis, *Preliminary Report on Binding and non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17, ¶15 (24 July 2017) ("Preliminary Report").

<sup>177</sup> Canada Treaty Policy, *supra* note 48, Pt. 8 and Annex C (requiring policy approval, including from Cabinet for a "non-legally binding instrument that would result in a major shift in Canadian policy" and archiving of all non-legally binding instruments with the Canadian Treaty Section).

<sup>178</sup> Colombia Response, *supra* note 83. 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, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

<sup>179</sup> Peru Response, *supra* note 64 (assessment of political commitments "made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ...").

<sup>180</sup> Mexico Response, *supra* note 107; U.S. Response, *supra* note 70.

a State (whether a government ministry or a sub-national territorial unit) could conclude a political commitment where the State's government or other institutions are unaware of its existence, let alone its contents.

The *Guidelines* do not, however, attempt to elaborate any best practice with respect to the contents of the approval procedures themselves. States will most likely want to avoid imposing overly restrictive or onerous processes as that would deprive the political commitment of the speed and flexibility benefits on which their current popularity rests.

At the same time, however, by formalizing at least some procedural review of a State's political commitments, the government can ensure that the executive branch is not concluding treaties under the guise of their being political commitments or otherwise attempting to circumvent domestic procedures required for treaty-making. States should all have an interest in making sure that political commitments are used only in appropriate circumstances and not as a way to bypass the legislative or judicial role required for the State's conclusion of binding agreements. Having at least *some* procedures for approving inter-State and inter-institutional political commitments would help mitigate that risk.

**4.3 Developing Domestic Approval Procedures for Inter-State Contracts.** *For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include*

- (a) *information on how the State will identify the governing law of the contract, and*
- (b) *mechanisms for confirming that governing law with the other contracting State(s) to void future conflicts.*

**Commentary:** Some—but not all—States have a practice of entering into contracts with other States. *See Guideline 2.5* and accompanying *Commentary*. Of these, several States have developed procedures for reviewing or approving the conclusion of such contracts. Ecuador has a government procurement law that, while prioritizing the terms of any inter-state contract, regulates such agreements where they involve “international public enterprises” including other states’ public enterprises.<sup>181</sup> The United States has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.<sup>182</sup> Mexico’s Constitution (Art. 134) requires certain public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) which, in turn, require “contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal).”<sup>183</sup>

*Guideline 4.3* proposes as a best practice that *all* States with a practice of inter-State contracting should have procedures for authorizing the conclusion of such binding agreements. Having procedures for inter-State contracting would allow States to confirm the contractual status of the agreements proposed, and thus avoid inadvertent characterization of a treaty or political commitment as a contract.

Moreover, these procedures could help alleviate questions that may arise with respect to the contract’s governing law. States should have procedures indicating whether and when they would (i) insist on their own national law as the governing law, (ii) permit the other contracting State’s law to do so, or (iii) authorize the employment of a third State’s contract law or non-State law instead. Furthermore, States could have procedures that require communication on these governing law questions with the other contracting party. Doing so would help avoid problems where the contracting parties disagree on what domestic or non-State law governs the contract concluded.

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<sup>181</sup> *See, e.g.*, Ecuador Response, *supra* note 46 (citing Article 100 of the General Regulations of the Organic Law on the National Government Procurement System which authorizes contracts with “international public enterprises” and provides for the application of domestic articles “in the event no specific contracting regime is provided for” in the terms and conditions of any relevant agreements); *id* (citing Organic Law on the National Government Procurement System, Art. 3, which requires compliance with the terms of the agreements and “[a]nything not provided for in those agreements shall be governed by the provisions of this Law”).

<sup>182</sup> *See* U.S. Foreign Military Sales program, available at <http://www.dsca.mil/programs/foreign-military-sales-fms>.

<sup>183</sup> Mexico Response, *supra* note 107.

**4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements.** *States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law or the domestic law of another State.*

**4.4.1** *Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and*

**4.4.2** *Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.*

**Commentary:** Consistent with *Guideline 4.1*, States should decide for themselves whether and which sorts of binding agreements to authorize their institutions to conclude.<sup>184</sup> States may, moreover, authorize certain institutions to conclude treaties or contracts, but not others. A State, for example, may allow a government agency to conclude a treaty in its own name but not a sub-national entity, or vice versa. Article 125 of the Argentina Constitution, for example, authorizes subnational units to conclude “partial treaties”—which the government calls “international agreements”—with the “knowledge of Congress” and “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.” At the same time, Argentina denies its national ministries a capacity to make treaties in their own name.<sup>185</sup>

Several states already have regulations or approval procedures in place for their institutions’ agreements. Some States simply extend their existing procedures for the State’s agreements to their institutions. The United States, for example, requires the same consultation and approval by the U.S. Department of State for inter-agency agreements as it does for treaties concluded in the U.S. name.<sup>186</sup> Other States have devised procedures focused on one type of institution. Jamaica reports a practice of the relevant Ministry, Department, or Agency seeking Cabinet approval to negotiate a binding agreement and subsequently seeking further approval to sign it. Copies of signed inter-institutional agreements are then kept on file by the Foreign Ministry Legal Office. Mexico’s 1992 Law on the Conclusion of Treaties regulates both the subject-matter and functional limits on inter-institutional agreements involving Mexican federal government ministries or its state or regional governments.<sup>187</sup> Mexican institutions can only conclude binding agreements (i) on subjects within the exclusive purview of the area or entity making the agreement; (ii) the agreement can only affect the concluding entity; (iii) the entity’s regular budget must be sufficient to cover the agreement’s financial obligations; (iv) the legal rights of individuals cannot be affected; and (v) existing legislation cannot be modified. In addition, Article 7 of the Law on the Conclusion of Treaties requires Mexican institutions to inform the Secretariat of Foreign Affairs of any binding inter-institutional agreement they are seeking to conclude, with a requirement that the Legal Department of the Secretariat of Foreign Affairs report on the lawfulness of signing such an agreement.<sup>188</sup>

States have sought further guidance regarding their inter-institutional agreements for three reasons.

- First, it is not always clear whether an institution can enter into *any* agreements.

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<sup>184</sup> Thus, States like Brazil, Colombia, the Dominican Republic, and Peru do not authorize *any* binding agreements by their government agencies, ministries or institutions. *See, e.g.,* Peru Response, *supra* note 64 (“Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)”).

<sup>185</sup> *See supra* note 82.

<sup>186</sup> U.S. Response, *supra* note 70.

<sup>187</sup> *Law Regarding the Making of Treaties, reprinted in* 31 ILM 390 (1992), CDLX *Diario Oficial de la Federación* 2 (Jan. 2, 1992).

<sup>188</sup> Mexico Response, *supra* note 107.

- Second, even if the institution may have some agreement-making capacity, it does not follow that it can make all three types of agreements considered here (treaties, political commitments, and contracts).
- Third, in individual cases, it is often unclear what legal status an existing inter-institutional agreement currently has.

*Guideline 4.4* endorses a best practice that addresses all three issues by calling on States that permit inter-institutional agreements to have procedures that ensure appropriate review or approval of such agreements. The *Guidelines* leave it to States whether such procedures should have a legal basis or exist as a matter of policy. Similarly, States should be free to decide whether to have procedures that authorize certain inter-institutional agreements generally or to devise a case-by-case system of notice or approval.

Moreover, *Guideline 4.4* suggests that States may include in their procedures mechanisms for differentiating among the institutions' binding agreements. Some possible mechanisms to mitigate existing confusion and the risk of future misunderstandings or disagreements would include:

- a) a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status.
- b) a default presumption when two or more State institutions conclude a binding agreement, *i.e.*, establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties.
- c) procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (a) the agreement is binding (or not); and (b) what type of binding agreement will be concluded, be it a treaty or a contract.

#### **4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.**

**4.5.1** *States should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.*

**4.5.2** *States should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.*

**4.5.3** *States may make this information public generally, such as by posting its procedures on-line, or specifically, by communicating with other States or State institutions as to its institutions' capacities and the relevant procedures under which they operate.*

**Commentary:** *Guideline 4.4* focuses on encouraging States to devise procedures to ensure that the State has sufficient self-awareness of whether and what types of binding agreements its institutions may conclude. *Guideline 4.5* promotes inter-State communication of the conclusions reached and procedures used by a State to approve or monitor inter-institutional agreement-making. Other States may benefit from learning:

- (i) which State institutions may conclude binding (or non-binding agreements) with foreign institutions;
- (ii) what types of binding and non-binding agreements may be authorized; and
- (iii) what the processes are for doing so.

This information may assist another State or its institutions in deciding whether to conclude an agreement with a State's institutions and what form that agreement should take.

Sharing information among States concerning their inter-institutional agreement authorities and practices should also pay off in existing cases to reduce confusion (or even conflicting views) as to what type of inter-institutional agreement has been concluded. Finally, publicizing procedures may offer useful models or examples of processes on which States with less experience with inter-institutional agreements may rely.

#### 4.6 Publicizing Registries of Binding and Non-Binding Agreements

**4.6.1** *National Registries of Binding Agreements: States should create and maintain public registries for all binding agreements of the State and State institutions.*

**4.6.2** *National Registries of Political Commitments: States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.*

**Commentary:** All States are required to register their treaties with the United Nations under Article 102 of the UN Charter. Most States already have and maintain lists and archives with respect to their treaties and government contracts. In many cases, States make their treaty lists—or the agreements themselves—public, whether through publication in an Official Gazette, Bulletin, or a treaty-specific series. States may, however, limit which treaties they choose to publish, leaving out treaties dealing with matters deemed of less significance, or conversely, those containing commitments implicating classified information or programs. There is, moreover, much less publicity surrounding inter-State or inter-institutional contracts.

*Guideline 4.6.1* suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement's existence, but its contents as well. Doing so would have several benefits:

- (i) Publicizing binding agreements by the State or its institutions comports with the rule of law and democratic values, affording the public a window into a key area of State behavior.
- (ii) Public registries might be beneficial to a State internally. Government-wide knowledge of a States' binding agreements can help ensure interested government agencies are aware of all binding agreements. That information should ensure more regular tracking of what binding agreements exist and better intra-governmental coordination in their formation.
- (iii) Public registries of treaties and contracts would also have external benefits. These registries would provide a regular information channel for other States, conveying the publicizing States' views on the existence and legal status of its binding agreements. This could lead to quicker (and hopefully easier) recognition of potential differences on the existence of an agreement and its status as a treaty or a contract.
- (iv) Such public registries may even create space for differences of opinion to be resolved in advance rather than in response to a concrete problem or crisis.

When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State's political commitments, whether labeled as MOUs or otherwise, are often unclear. And there is even greater ambiguity surrounding inter-institutional political commitments. Whatever informal procedures might exist to review or even approve political commitments, most States do not count or collect them.<sup>189</sup> Thus, there is a real dearth of information available on the number and types of non-binding agreements reached by States and their institutions.

*Guideline 4.6.2* aims to rectify this information gap by calling on States to accept a best practice by which they establish a centralized point of contact within the government where political commitments may be collected and retained. As with existing treaty registries, a political commitment registry would have valuable internal and external benefits.

- a) It would alert other actors within a State, such as the legislature or non-participating institutions, as to the existence of a political commitment. It might thus check incentives to use political commitments merely as a means to avoid domestic approval procedures assigned to binding agreements.

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<sup>189</sup> Canada and Ecuador are notable exceptions. See Canada Treaty Policy, *supra* note 48; Ecuador Response, *supra* note 46 (noting practice of recording “non-binding political agreements (joint declarations and communiqués)” with the Directorate for Legal Advice on Public International Law, some of which are accompanied by a “legal opinion from the Foreign Ministry’s General Legal Coordination Office.”).

- b) Externally, it would inform other States about the content and assumed non-binding legal status of the commitments listed, creating space for further inquiries or communications about such political commitments as these other States deem appropriate.
- c) It would, moreover, alert a State's public of *all* agreements a State has concluded, not just those that may generate legal effects. The public has a clear interest in learning more about agreements that may generate significant consequences for their State, even if those consequences will take a political (rather than legal) form.

## 5. Legal Effects of Binding and Non-Binding Agreements

**5.1 The Legal Effects of State treaty-making:** *States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:*

**5.1.1 Primary International Legal Effects – Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.**

**5.1.2 Secondary International Legal Effects – the existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, state responsibility, and any other specific regimes tied to the treaty's subject-matter.**

**5.1.3 Domestic Legal Effects – A State's domestic legal order may, but is not required to, accord domestic legal effects to the State's treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.**

**Commentary:** One of a treaty's defining features is that is *binding* under international law. Treaties trigger the foundational international legal principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>190</sup> Thus, a treaty's primary legal effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own enforcement—e.g., the American Convention on Human Rights—States are obligated to accept these as well.<sup>191</sup> Thus, Jamaica and Peru both acknowledge that each State must comply with obligations assumed in their binding agreements while Colombia sources its compliance obligation to VCLT Article 26 and *pacta sunt servanda*.<sup>192</sup>

Beyond a treaty's primary international legal effects, the existence of a treaty may also trigger a series of secondary international legal rules and regimes. Chief among these is the law of treaties itself. The VCLT (or customary international law more generally) will regulate the validity, interpretation, application, breach, and termination of all a State's treaties. For example, VCLT Article 29 provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." This provision creates room, *if* all the parties agree, for treaties to contain "federal" or "territorial" clauses that allow a State to designate to which sub-national territorial units a treaty does (or does not) apply.<sup>193</sup> On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire

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<sup>190</sup> VCLT, Art. 26. Some of a treaty's clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

<sup>191</sup> American Convention on Human Rights, adopted 22 November 1969, 1144 U.N.T.S. 123, Chs. VI-IX (constituting the Inter-American Commission and Court of Human Rights).

<sup>192</sup> *See, e.g.*, Dominican Republic Response, *supra* note 46; Jamaica Response, *supra* note 69; Colombia Response, *supra* note 83 ("Article 26 of the 1969 Vienna Convention, imposes an obligation on the parties to comply with the treaties they ratify, and to do so in good faith.").

<sup>193</sup> *See, e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG), adopted 11 April 1980, 1489 U.N.T.S. 3, Art. 93(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 56(1); Constitution of the International Labour Organization, adopted 9 October 1946, 15 U.N.T.S. 35, Art. 19(7).

territory.<sup>194</sup> The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party's "material breach."<sup>195</sup>

The secondary legal effects of a treaty are not, however, limited to the law of treaties. State responsibility, for example, may also attach to "internationally wrongful acts," which include treaty violations. As detailed in the 2001 Articles on State Responsibility ("ASR"), the law of state responsibility affords States the right to engage in "countermeasures"—unlawful acts that are justified (*i.e.*, lawful) because that State was negatively impacted by a prior internationally wrongful act.<sup>196</sup> By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for other forms of binding agreement (contracts) let alone non-binding ones (political commitments).

The existence of treaties on specific topics (*e.g.*, human rights, the environment) may also trigger a range of specialized rules and principles that have emerged to regulate that particular sub-field of international law.<sup>197</sup> Finally, the availability of certain dispute resolution procedures may depend on the existence of a treaty (either to establish the court or tribunal's jurisdiction or to give the court material on which to resolve disputes). For example, under the heading of "international conventions", treaties are specifically listed among the sources of law on which the ICJ can reach an opinion.<sup>198</sup>

States should, moreover, recognize that the legal effects of a treaty may not be limited to the international sphere. A State's domestic legal order can (but is not required to) accord domestic legal effects to the State's treaties. Thus, some States' domestic laws may supplement *pacta sunt servanda* by imposing their own obligation of treaty compliance. Under the Dominican Republic's Constitution, for example, there is "an obligation, once the constitutional ratification procedure is concluded, to comply with a valid treaty or agreement."<sup>199</sup> In Peru, this obligation is specifically imposed on those governmental departments under whose purview the treaty falls.<sup>200</sup>

Some States (*e.g.*, Canada) do not accord their treaties any domestic legal status, and thus, the treaty's existence will have little direct domestic impact.<sup>201</sup> Other States' domestic legal orders may accord treaty texts the same legal effects as a statute, or even in some cases, a constitutional provision (assuming the treaty otherwise comports with any domestic conditions regarding its formation or validity).<sup>202</sup> In some States, different treaty categories generate different domestic

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<sup>194</sup> See, *e.g.*, International Covenant on Civil and Political Rights ('ICCPR'), adopted 16 December 1966, 999 U.N.T.S. 171, Art. 50; American Convention on Human Rights, *supra* note 191, Art. 28(2).

<sup>195</sup> VCLT Art. 60. In addition, States always remain free to engage in acts of *retorsion* — unfriendly, but intrinsically lawful behavior that a State might perform to incentive a breaching State back into treaty compliance (say, for example, by halting the provision of financial assistance that a State otherwise has no obligation to provide). Since acts of retorsion may occur without any prior treaty breach, however, they do not technically fall under the banner of a treaty's legal effects. See ASR, *supra* note 136, at 128, ¶5.

<sup>196</sup> ASR, *supra* note 136, Ch. II. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

<sup>197</sup> Human Rights treaties, for example, are subject to specialized interpretative rules. See, *e.g.*, Başak Çalı, *Specialized Rules of Treaty Interpretation: Human Rights* in *The Oxford Guide to Treaties* 525 (D Hollis, ed., 2012).

<sup>198</sup> ICJ Statute, Article 38(1)(a).

<sup>199</sup> Dominican Republic Response, *supra* note 46.

<sup>200</sup> Peru Response, *supra* note 64.

<sup>201</sup> See *supra* note 46.

<sup>202</sup> See, *e.g.*, Argentina Constitution, *supra* note 82, Art. 31 ("[T]reaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain . . ."); *id.*, Art. 75(22) (giving treaties on human rights "standing on the same level as the Constitution"); Constitution of Peru, Art. 55, *English translation available at*

legal effects, whether based on the treaty's subject matter or the procedures used to authorize it. In Ecuador, for example, its human rights treaties that provide "rights that are more favorable than those enshrined in the Constitution" prevail over "any other legal regulatory system or act of public authorities."<sup>203</sup> Other treaties have significant weight within Ecuador's domestic legal order, with the Constitution listing treaties in the "order of precedence for the application of the regulations" above other organic laws and other forms of domestic regulation.<sup>204</sup>

In addition, just as a treaty may trigger the law of treaties internationally, a treaty's existence in domestic law may trigger various other domestic legal doctrines or regimes. Looking at Ecuador again, its Constitution assigns various domestic legal doctrines (*e.g.*, direct applicability) to "treaties and other instruments for human rights."<sup>205</sup> States can also use their domestic legal system to afford treaties judicial enforcement.<sup>206</sup>

These *Guidelines* take existing legal effects as it finds them; there are, for example, no proposals of best practices on what domestic legal effects States should accord some—or all—treaties. There is too much diversity in existing practice, and the reasons States have chosen their own path are often so unique as to counsel against harmonization.

Nonetheless, there is value in having States pay closer attention to the legal effects that follow from treaty-making under both international and domestic law. For example, a State contemplating a new treaty-relationship may have different positions on the treaty's contents depending on what—if any—domestic legal effects follow the treaty's conclusion not just in its own legal system, but that of its potential treaty partner(s) as well. A State might be content with a straightforward treaty provision where it and its potential partner give treaties direct domestic legal effect—*e.g.*, "the Parties shall not allow X to occur." That same State might, however, prefer a different formulation with States that do not give treaties direct effect—*e.g.*, "the Parties agree to legislate to not allow X to occur."

**5.2 The Legal Effects of Contracts.** *States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract's governing law, including issues of performance, displacement, and enforcement.*

**Commentary:** As with questions of validity and capacity, the primary effects of a contract will depend on the relevant governing law, which may be a State's national law or, if the parties select it, non-State law.<sup>207</sup> The governing law will establish whether and how contracts will operate as well as the available remedies for breach, including judicial means. In the case of non-State law, enforcement may occur through some international forum (*e.g.*, UNIDROIT, ICSID).

Among their legal effects, contracts may also have the legal effect of displacing other, default rules of domestic law that exist in the absence of agreement. Ultimately, therefore, the

[https://www.constituteproject.org/constitution/Peru\\_2009#s202](https://www.constituteproject.org/constitution/Peru_2009#s202) ("Treaties formalized by the State and in force are part of national law.").

<sup>203</sup> *Id.* (citing the Ecuador Constitution, Art. 424).

<sup>204</sup> *Id.* (citing the Ecuador Constitution, Art. 425: "The order of precedence for the application of the regulations shall be as follows: The Constitution; international treaties and conventions; organic laws; regular laws; regional rules and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.").

<sup>205</sup> Ecuador Response, *supra* note 46 (Article 417 of the Constitution: "The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied").

<sup>206</sup> See David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 367 (D. Hollis, ed., 2012); Joost Pauwelyn, 'Is it International Law or Not and Does it Even Matter?' in *INFORMAL INTERNATIONAL LAWMAKING* 145-46 (J. Pauwelyn, J. Wessel and J. Wouters, eds., 2012).

<sup>207</sup> U.S. Response, *supra* note 70 ("The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.").

nature and extent of a contract's legal effects depends on the governing law, including any relevant conflicts of law rules.

Although a contract's legal effects will flow from the governing law, contracts could generate legal effects in the international arena. One contracting State could undertake behavior in reliance on the other contracting State continuing to perform its obligations. Given the binding nature of the contract, that reliance might be sufficiently reasonable to estop the other State from ceasing performance.<sup>208</sup>

Alternatively, it might be possible for a contract governed by, say, national law to become elevated into a binding agreement governed by international law. In the *Chagos Arbitration*, for example, the Tribunal reasoned that a 1965 Agreement between the British Government and Mauritius (a non-self-governing territory) as at "most ... a contract binding upon the Parties under domestic law."<sup>209</sup> It found, however, that Mauritius' independence, had "the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement" governed by international law.<sup>210</sup> Although the Tribunal did not say so explicitly, one way to explain this result would be on the idea that Mauritius independence implicitly shifted the governing law of the "contract" from UK law to international law, which by definition, converted the agreement into a treaty.

**5.3 The Effects of Political Commitments.** *States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.*

**5.3.1** *States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State's political commitment whether due to their moral force or the political context in which they were made.*

**5.3.2** *States and their institutions should be aware that a political commitment may still have legal relevance to a State indirectly. For example, political commitments may be:*

- (i) *incorporated into other international legal acts such as treaties or decisions of international organizations;*
- (ii) *incorporated into domestic legal acts such as statutes or other regulations; or*
- (iii) *the basis for interpretation or guidance of other legally binding agreements.*

**Commentary:** By definition, political commitments are not binding; they are incapable of producing any legal effects on their own. States and their institutions should adjust their expectations accordingly. As a matter of international law, political commitments will not trigger *pacta sunt servanda* nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, state responsibility, specialized regimes).<sup>211</sup>

But it would be a mistake for States to assume this means that political commitments have no effects. Even if they are not themselves binding, political commitments still contain commitments and those commitments are often made in a State's name (or those of its institutions). Other States can—and often will—expect continued performance of their terms (even as they are aware that they will be incapable of invoking international legal tools in cases of non-

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<sup>208</sup> On estoppel in international law, see Thomas Cottier, Jörg Paul Müller, *Estoppel* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2007); *Chagos Arbitration*, *supra* note 130, at 174, ¶438 ("estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.").

<sup>209</sup> *Chagos Arbitration*, *supra* note 130, at 167, ¶424 (quoting Hendry and Dickson).

<sup>210</sup> *Id.* at 167-68, ¶¶425, 428.

<sup>211</sup> *See, e.g.*, Peru Response, *supra* note 64 ("Since "nonbinding" agreements concluded by Peruvian governmental entities with foreign counterparts do not seek to create a legal relationship, the *pacta sunt servanda* principle does not apply; only the good faith principle.").

performance).<sup>212</sup> Political commitments thus trigger the honor and reputation of the States and the State institutions that make them. State practice shows, moreover, that political commitments can have significant effects on State behavior, as for example, in implementing the commitments of the Financial Action Task Force to combat terrorist financing.<sup>213</sup>

As a best practice, therefore, these *Guidelines* recommend that States should honor their political commitments. They are, of course, not legally bound to do so. Still, by performing its political commitments, a State fulfils the behavioral expectations of other political commitment participants. Where a State encounters difficulties in performance, dialogue and communication with other participants are likely to be more productive than ignoring agreed terms. And just because a State that ceases to perform its political commitments will not be subject to international legal remedies (*e.g.*, treaty termination or counter-measures) does not mean that non-performance will be costless. Other States may respond with unfriendly—albeit still lawful—acts, including those that are labeled as retorsion by international law.<sup>214</sup> Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.<sup>215</sup>

Several Member States appear to view political commitments as incapable of generating *any* legal effects.<sup>216</sup> That view may, however, depend on how one defines “legal effects”. Practice suggests that political commitments may have *legal* relevance and, in certain cases, may even generate *indirect* legal effects in certain discrete ways:

- In terms of indirect international legal effects, States may eventually convert a political commitment into a treaty. The prior informed consent procedure at the heart of the Rotterdam Convention existed prior to that treaty’s conclusion via political commitments done under UNEP and FAO auspices.<sup>217</sup> Alternatively, an international organization may incorporate a political commitment into an internationally legally binding form. In Resolution 2231, for example, the United Nations Security Council endorsed the so-called “Iran Deal” on nuclear non-proliferation, making certain of its terms obligatory via its Chapter VII authorities.<sup>218</sup>

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<sup>212</sup> See *supra* note 51 and accompanying text.

<sup>213</sup> See, *e.g.*, The Financial Action Task Force (FATF), at [http://www.fatf-gafi.org/pages/0,3417,en\\_32250379\\_32235720\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html) (FATF issues “recommendations” that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

<sup>214</sup> See *supra* note 195.

<sup>215</sup> Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFFAIRS (Mar./Apr. 2001).

<sup>216</sup> See, *e.g.*, Colombia Response, *supra* note 83 (Non-binding agreements have “no legal implication for the Republic of Colombia as a subject of international law.”); Mexico Response, *supra* note 107 (“[N]on-binding’ instruments are eminently political in nature since they set forth the will and intent of the signing authorities, and therefore they DO NOT have legal implications.”); U.S. Response, *supra* note 70 (“As non-legally binding instruments are neither governed by, nor give rise to rights or obligations under, domestic or international law, there are no legal effects associated with them.”).

<sup>217</sup> Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, done 11 September 1998, 2244 U.N.T.S. 337 (“Rotterdam Convention”); see also Rotterdam Convention, “History of the Negotiation of the Rotterdam Convention,” at <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>.

<sup>218</sup> See UNSC Res. 2231 (July 2015).

- In terms of indirect domestic legal effects, some political commitments—e.g., the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law.<sup>219</sup>
- Political commitments may also be employed as vehicles for interpreting other legally binding agreements. The ILC, for example, has concluded that subsequent agreements or subsequent practice used for purposes of treaty interpretation under VCLT Article 31(3) “require[] a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account... ”<sup>220</sup>
- Similarly, international courts and tribunals have shown a willingness to have political commitments set relevant standards of behavior that can be used to evaluate a State’s treaty compliance. In a 2011 WTO ruling, for example, a Dispute Settlement Panel found that several non-binding political commitments generated under the auspices of the International Dolphin Conservation Program constituted the “relevant international standard” for purposes of measuring U.S. compliance with its WTO Technical Barriers to Trade Agreement.<sup>221</sup>

What about using the international legal doctrine of estoppel to require continued State performance of its political commitments? Scholarship has long debated whether under the right circumstances a political commitment might cause others, to rely on its continuing the agreed behavior as a matter of good faith, even if not required by the (non-binding) agreement itself.<sup>222</sup> This is the same logic, for example, that explains the legal force of certain unilateral declarations.<sup>223</sup> Member States do not appear enthusiastic about this possibility.<sup>224</sup> Moreover, where an agreement is clearly “non-binding” it will be difficult to establish that other States’ reliance on continued performance is reasonable (in a legal sense). As the *Chagos Arbitration Tribunal* emphasized: “Not all reliance, even to the clear detriment of a State, suffices to create grounds for estoppel. A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate.”<sup>225</sup> Still, the matter may remain open to debate, and States should at least be aware of the possibility that some might invoke estoppel in the context of certain political commitments.

**5.4 Legal Effects of an Inter-Institutional Agreement.** *States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.*

**5.4.1** *States should expect that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.*

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<sup>219</sup> See, e.g., Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the “Kimberley Process,” which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arrangement, at <http://www.wassenaar.org>.

<sup>220</sup> ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Text of the draft conclusions adopted by the Drafting Committee on second reading*, Seventieth session, A/CN.4/L.907 (11 May 2018).

<sup>221</sup> See WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Panel Report* (15 Sept 2011) WT/DS381/R, ¶¶7.707 and 7.716; see also Pauwelyn, *supra* note 206, at 155-56.

<sup>222</sup> See, e.g., Schachter, *supra* note 49, at 301 (suggesting estoppel might apply where there is a gentleman’s agreement and reasonable reliance on it); Aust, *supra* note 160, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will); but see KLABBERS, *supra* note 3, at 138-40 (insisting an agreement cannot be non-binding if it has legal effects); see also *supra* note 208.

<sup>223</sup> See *supra* note 2.

<sup>224</sup> See, e.g., *supra* note 216. Peru, however, notes that political commitments may trigger a State’s good faith (rather than *pacta sunt servanda*) which might suggest some solicitude for an estoppel claim in the right circumstances. *Supra* note 211.

<sup>225</sup> *Chagos Arbitration*, *supra* note 130, at 177, ¶445.

**5.4.2** *Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.*

**5.4.3** *Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it.*

**5.4.4** *States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.*

**Commentary:** Inter-institutional agreements are not, by definition, associated with any particular type of international agreement. They may be binding (whether as treaties or contracts) or non-binding, political commitments. Which type of agreement exists will be a function of the capacities of the institutions involved and the methods of identification employed.<sup>226</sup> Once the status of an inter-institutional agreement becomes clear, so too will its legal effects. Inter-institutional treaties may generate the same primary and secondary international legal effects as well as any domestic legal effects accorded by a State's legal system. The legal effects of inter-institutional contracts, like inter-State ones, will flow from the relevant governing law, while inter-institutional political commitments will not generate any direct legal effects, although States should be cognizant they could still generate some indirect ones.<sup>227</sup>

There is, however, one area where inter-institutional agreements—particularly inter-institutional treaties—raise a novel question. Specifically, to whom does an inter-institutional treaty's legal effects apply—the institution alone or the whole of the State with which it is associated? A number of Member States' practices suggest the latter view; even where the parties to a treaty are State institutions, its effects will still extend to the State as a whole.<sup>228</sup> This appears to be the case regardless of whether the State institution is part of the national government or a sub-national territorial unit. It is, moreover, the position taken by the ILC in the ASR. ASR Article 4(1) provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.<sup>229</sup>

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<sup>226</sup> For a definition of inter-institutional agreements, see *Guideline 1.5* and accompanying commentary. On the capacity of State institutions to conclude treaties, political commitments, and contracts, see *Guidelines 2.2, 2.4, and 2.6*. The methods for identifying treaties, political commitments and contracts are laid out in detail in Section 3 of these *Guidelines* and the accompanying Commentary.

<sup>227</sup> Jamaica Response, *supra* note 69 (describing domestic legal effects of inter-institutional agreements including their being “open to the interpretation of domestic courts”); U.S. Response, *supra* note 70 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”); see also Dominican Republic Response, *supra* note 46 (non-binding agreements done at the agency or sub-national level “are in no sense binding”);

<sup>228</sup> See, e.g., Jamaica Response, *supra* note 69 (“International legal responsibility lies with the State. At the domestic level however, the agency or sub-national territorial unit has a responsibility to the Government to ensure that its obligations are performed under the Agreement”); U.S. Response, *supra* note 70 (“The United States considers treaties (as defined in Article 2 of the VCLT) concluded by its agencies to create legal obligations applicable to the United States, though in practice performance of those agreements generally rests with the agency that enters into them.”). Argentina likewise professed a preference for state responsibility, while noting the law was not entirely clear. Argentina Response, *supra* note 70.

<sup>229</sup> ASR, *supra* note 136, Art. 4(1); see also *id.*, Art. 4(2) (“Any organ includes any person or entity which has that status in accordance with the internal law of the State.”).

Given these views, the current guideline articulates a starting expectation: States may reasonably expect that an inter-institutional treaty will bind the States to which the institutions belong, not just the institutions themselves.

Such an expectation may generate at least three advantages for States. First, it may provide greater certainty to all States and institutions engaged in treaty-making. Knowing that a State is expected to stand behind commitments governed by international law and made by its institutions may encourage other States and their institutions to engage in such treaty-making. Second, it will ensure a more consistent set of direct legal effects for all treaties (rather than having to elaborate different effects for inter-State treaties from inter-institutional ones). Third, this approach comports with the basic architecture of public international law. If most State institutions are not discrete international legal persons, it follows that international law will resist according their activities direct legal effect, but rather attribute them to the State of which they form a part.

Despite such advantages, this guideline only frames state responsibility as an expectation, rather than a presumption or a rule of international law. It does so because State practice on the question is not entirely uniform. Several States take the view that international legal responsibility could lie with the concluding institution, *not* the State as a whole, with one State—Mexico—adopting this view expressly.<sup>230</sup> While accepting that treaties concluded by the Mexican State bind Mexico, Mexico cites its federal structure to suggest that “it would be unconstitutional for [Mexico] to assume responsibility for interinstitutional agreements concluded by state and municipal areas and entities since this would encroach on the authorities conferred upon them by the Constitution itself.”<sup>231</sup> Instead, Mexico considers those inter-institutional agreements governed by international law only have effects for the institutions that conclude them.<sup>232</sup> Other States admit the situation is not always clear; Panama, for example, views “the possibility that a new international custom has arisen” with respect to responsibility for inter-institutional agreements.<sup>233</sup>

These *Guidelines* are not designed to resolve the discrepancy in how far inter-institutional treaty obligations extend. They may, however, help raise awareness among States that this is an issue to look for when their institutions pursue binding international agreements. Moreover, the consensual nature of the international legal order suggests a practice that States may use to avoid the issue. In cases where two States hold different views of how far an inter-institutional treaty binds, they may agree to a uniform position.

- States could, for example, agree to treat their institution’s treaty commitment as equivalent to treaties made in the name of the two States; or
- States could specifically consent to having the effects of an inter-institutional treaty extend only to the institutions involved.

States could include such conditions in the inter-institutional treaty itself or they could agree to them separately, whether generally or on a case-by-case basis. They would ideally do so in advance, although it would be possible to reach such an accommodation after the inter-institutional treaty has come into existence. Such a practice might be novel, but it provides a way to bridge divergent views on responsibility that otherwise might lead to disagreements or the need for some form of dispute resolution.

Finally, there is a question of what, if any, legal effects States and other stakeholders should accord binding inter-institutional agreements concluded where one or more of the institutions involved did not follow the appropriate domestic procedures? In other words, how should States

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<sup>230</sup> Hollis, Second Report, *supra* note 10, at ¶38-40 (describing views of Peru and Uruguay); Panama Response, *supra* note 67.

<sup>231</sup> Mexico Response, *supra* note 107. In addition, Mexico claims that “[i]t would also be unlawful [under Mexican Law] for the federal government to assume that responsibility, since the interinstitutional agreement was concluded without observing the formalities established by the Law on the Conclusion of Treaties.” *Id.* Peru denies that its institutions can conclude “treaties” but acknowledges that its inter-institutional agreements may create “a legal relationship ... only for the institutions entering into them”. It does not, however, explain what law would govern that legal relationship. Peru Response, *supra* note 64.

<sup>232</sup> *Id.*

<sup>233</sup> Panama Response, *supra* note 67.

deal with unauthorized inter-institutional agreements? Giving such agreements domestic legal effects is likely to be problematic, especially within the State where the requisite procedures were not followed. In the Dominican Republic, for example, when its Deputy Secretary of State for Foreign Affairs concluded a Memorandum of Understanding (MOU) with the Inter-American Commission on Human Rights without following the constitutional rules for judicial review and National Congress approval, the Supreme Court treated the MOU as null and void.<sup>234</sup>

A number of Member States, moreover, believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects. Colombia, for example, has indicated that it “is not responsible for agreements concluded in violation” of domestic conditions for the legality of its international agreements.<sup>235</sup> Mexico emphasizes the personal liability of those who sign an interinstitutional agreement where the Secretariat of Foreign Affairs’ Legal Department has not issued its views.<sup>236</sup> Other States offer a more nuanced take, suggesting that international legal responsibility for an unauthorized inter-institutional agreement may best be determined based on the “nature of the agreement and circumstances surrounding its conclusion.”<sup>237</sup>

The current guideline proposes a best practice where States exercise any available discretion to decline to give legal effects to unauthorized inter-institutional agreements. The qualifier referencing “available discretion” is included to make clear that this guideline only applies where the State has a choice on whether or not to accord an agreement legal effects; it does not countenance avoiding legal effects that the State is required to afford, whether by international or domestic law. Still, where States have discretion, it would seem a best practice counsels against giving legal effects to unauthorized inter-institutional agreements. According inter-institutional treaties (or contracts) legal effects could incentivize State institutions to violate their own domestic laws and procedures if they perceive the benefits of reaching agreement with foreign actors outweigh the domestic consequences. These incentives would be especially perverse if the institution shared the costs of unauthorized agreements (in terms of responsibility and liability) with the State as a whole – the very State whose procedures were not followed.<sup>238</sup>

## 6. Training and Education Concerning Binding and Non-Binding Agreements

**6.1 Training and Education relating to Binding and Non-Binding Agreements by States.** *States should undertake efforts to train and educate relevant officials within a Foreign Ministry to ensure that they are capable of:*

- (i) *identifying and differentiating among the various types of binding and non-binding agreements;*
- (ii) *understanding who within the State has the capacity to negotiate and conclude which agreements;*
- (iv) *following any and all domestic procedures involved in such agreement making; and*
- (v) *appreciating the legal and non-legal effects that can flow from different types of international agreements.*

**Commentary:** As these guidelines make clear, existing State practice with respect to international agreements is of critical importance to international law and international relations. Yet, it is also clearly not some simple set of tools that States and their officials may apply intuitively. Extant variations in definitions, capacities, methods of identification, procedures, and effects, require expert knowledge and attention to ensure a State is able to advance its foreign policy interests while avoiding confusion, misunderstandings or disputes (legal or otherwise). As such, it is important for States to devote the resources to educate relevant officials on these topics.

<sup>234</sup> Dominican Republic Response, *supra* note 46.

<sup>235</sup> See also Ecuador Response, *supra* note 46.

<sup>236</sup> Mexico Response, *supra* note 107.

<sup>237</sup> Jamaica Response, *supra* note 69; see also Peru Response, *supra* note 64.

<sup>238</sup> This would, however, run counter to the presumption of validity accorded treaties done in violation of domestic procedures in the inter-State context by VCLT Article 46. See *supra* note 75. That said it is not clear that Article 46 constitutes customary international law. See Jan Klabbbers, *The Validity and Invalidity of Treaties* in THE OXFORD GUIDE TO TREATIES 551, 564 (D. Hollis, ed., 2012).

This guideline focuses on ensuring suitable training and education for Foreign Ministry officials on the various aspects of international agreements. Foreign Ministry officials are often charged with overall responsibility for a State's treaty practice. It makes sense, therefore, that States ensure that they have sufficient expertise to differentiate the State's treaties from the rising practice of other forms of international agreements, including binding inter-State contracts and inter-institutional agreements.

Having well-trained officials across the region will help improve existing practices and alleviate existing confusion over both the status of various agreements (such as those bearing the heading "MOU") as well as with which institutions other States may conclude binding and non-binding agreements. Increased knowledge around the various types and effects of binding and non-binding agreements may allow Foreign Ministry officials to advise decision-makers on the relative trade-offs in pursuing one type of agreement over another.

**6.2 Training and Education relating to Inter-Institutional Agreements.** *Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:*

- (i) identifying and differentiating among the various types of binding and non-binding agreements;*
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;*
- (iii) following any and all domestic procedures involved in such agreement making; and*
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.*

**Commentary:** Not all States will authorize inter-institutional agreements, whether as treaties, contracts, or political commitments.<sup>239</sup> For those that do, however, it will be necessary to ensure that institutions with an agreement-making capacity are sufficiently trained to use that capacity appropriately. This training may involve national-level exercises where non-Foreign Ministry officials of the national government are educated in international agreements, and just as pertinently, the procedures to be followed domestically to authorize them. Where sub-national territorial units can make agreements, they would benefit from similar training and education. Such efforts may mitigate situations where an institution acts without authority or otherwise enters into commitments to the detriment of the State as a whole. Like Foreign Ministry training, increased knowledge around the various types and effects of binding and non-binding agreements may allow State institutions to develop an agreement practice that aligns with its interests while also accommodating national foreign policies and procedures.

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<sup>239</sup> See Guideline 2.2 and accompanying commentary.

### 3. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards

#### Document

CJI/doc. 581/19 Recognition and enforcement of foreign judgments and arbitral awards  
(presented by Dr. Ruth Stella Correa Palacio)

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At the 90<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Ruth Stella Correa Palacio proposed the addition of a new topic titled: “Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards.”

The plenary accepted the proposal which was added to the agenda, and Dr. Correa, the Rapporteur designated, pledged to provide a report for the next session.

At the 92<sup>nd</sup> Regular Session (Mexico City, February 2018), the Rapporteur Dr. Ruth Stella Correa Palacio recalled that her work consisted of conducting a search on the prevailing legal framework and good practices, in order to demarcate the situation of the topic in the region. She mentioned the New York Convention, the Panama Convention and also the Montevideo Convention as the baselines for better understanding the current situation of the theme in the region, and she referred to the relative progress implied by the suppression of the *exequatur* in Europe (in certain cases).

From her comparative study we may infer that the recognition of foreign judicial decisions depends on the reciprocity practices in the area of treaties among States, and that there seems to be more flexibility for the recognition of the decisions awarded by arbitrators, vis-à-vis the sentences awarded by the courts, in addition to the requirements in terms of homologation that the latter must follow. She also pointed out the differences in the procedural burden required for trade arbitration awards and the costly procedures that the decisions ruled in litigation trials must endure. In the case of judicial decisions with evidential purposes, these are subject to homologation (confirmation) in some States such as Bolivia, or otherwise to authentication procedures. She also noticed differences between the competent authorities for the homologation of judicial decisions (high-rank officials) and the authorities in charge of enforcing arbitration awards (low-rank judges). In her opinion, communications and information technologies have not been used properly for simplifying the recognition process and the enforcement of sentence procedures. Finally, the Rapporteur proposed drafting a guide of good practices on facilitating the recognition of judicial decisions, so that these good practices might devise and implement a speedy procedure for the recognition of foreign judicial awards, especially in the absence of opposition by the party subject to the execution process.

Dr. José Moreno highlighted that there is abundant information on the recognition and enforcement of decisions both in ASADIP and in other forums on the issue, and that these could be used as valuable input for the work being carried out by Dr. Correa. At the same time, he asked the Rapporteur to specify the scope of the proposed guide.

Dr. Carlos Mata complimented Dr. Correa on her work and agreed with Dr. Moreno as regards the need to specify the scope and purposes of the proposed guide, taking into consideration that there is significant progress on the topic both at the domestic and regional levels, making special mention of The Hague Conference.

Dr. Hollis pointed out the relevance of the study made by Dr. Correa and highlighted the challenge in implementing a simplified recognition system for judicial decisions amidst such a diversity existing in the region regarding the requirements and procedures in that area.

The Chair was of the opinion that the New York Convention provides a solution to the problem involving the enforcement of foreign decisions in the area of arbitration, and suggested that the focus of the Rapporteurship should consist in seeking standards beginning with the Panama Convention

regarding the enforcement of national decisions and identifying the difficulties that this Convention has encountered in terms of massive ratification. He also suggested proposing specific actions, because the CJI cannot restrict its activities just to efforts of systematizing and codifying, and must be proactive in terms of propositions and effectively contribute to the progressive development of international law. The Chair's suggestion was therefore to concentrate efforts on enforcement of foreign decisions by local judges, and to make further progress in the study before determining the desired results.

Dr. Moreno was of the opinion that the topic is not completely resolved by the New York Convention and that there is still a considerable path ahead. He added that as the topic is being thoroughly addressed in other forums, perhaps the proposed guide should not elaborate too much on the issue of arbitration.

Dr. Correa explained that the proposal could consist in a legislative guide aimed at facilitating the procedure of homologating enforcement of sentences, or else a guide of good practices containing proposals enabling a more dynamic solution to the enforcement of decisions. The work would be restricted to the decisions awarded by the institutional organs of the Judiciary so as to facilitate juridical cooperation.

The Chair was in agreement with the need to introduce a dynamic procedure in the enforcement of foreign judicial decisions, but explained that the issue was well routed in The Hague Conference, so it would perhaps be wise to wait and see if those efforts reach a safe harbor or - on the contrary - just reach a point of stagnation. Should the Hague Conference - in which several OAS members are involved - achieve any result, it should be assessed whether the CJI can and should use such an outcome as the starting point for further study. He therefore proposed keeping the topic on the CJI agenda, in order to ask the legal advisers of the ministries of foreign affairs during the next session about the attitude of the OAS States vis-à-vis the work carried out by The Hague Conference, in order to determine whether the CJI is in fact the competent forum.

The Rapporteur suggested sending out a questionnaire to the Member States in order to find out their opinion on the issue.

Dr. Moreno urged keeping the topic on the agenda and waiting to see the result of the consultations with the legal advisers.

Dr. Dante Negro explained that not all the Member States are involved in the preparatory work of The Hague Conference. In this context, the Chair, taking into consideration that the Conference must not be seen as the sole parameter in the decision-making process, proposed sending the questionnaire suggested by Dr. Correa, and added that - on the basis of the responses received and the consultations carried during the next session - the CJI might be in a position to make the corresponding decisions.

Dr. Mata was of the opinion that the questionnaire must be drafted very carefully so that the questions focus on the efficacy of procedures instead of merely concentrating on the description of those procedures.

Dr. Moreno asked the Department of International Law to compile the material that The Hague Conference and ASADIP made available to the public for further study by the Rapporteur.

The Chair agreed with this suggestion and proposed including this theme at the meeting with the legal advisers in the region during the next session, in order to receive less standardized responses, the preference being for more candid replies regarding the efficacy of enforcement procedures, and then compiling the inputs regarding the content and wording of a proposed questionnaire that might be previously forwarded to each State. The members approved this proposal by unanimous decision.

During the 93<sup>rd</sup> Regular Session (Rio de Janeiro, August 2018), the Rapporteur Dr. Ruth Stella Correa Palacio presented a report entitled "Recognition and enforcement of foreign judgments and arbitral awards: preliminary report, document CJI/doc.564/18. The purpose of her report is to determine the necessary requirements within the States for a foreign sentence to produce mandatory effects. She confirmed that both the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards of New York of 1958 and the Inter-American Convention on Extraterritorial Efficacy

of Foreign Sentences and Arbitral Awards of 1979 (the Montevideo Convention) were been signed by the majority of the OAS Member States. The first refers to arbitration decisions, while the Montevideo Convention refers to recognition and enforcement. She found a certain resistance to technological advances such as electronic commerce. She also estimated that enforcement is the responsibility of the highest courts in systems that entail many stages, once a foreign judgment has been accepted. Aware of the preliminary draft that is being working by The Hague Conference on the subject and the need to avoid duplication of work, she considered that this case justifies the efforts of the Committee. The preliminary draft of the Conference is source of some concern; among other things, it only applies to the civil and commercial area, ignoring the labor issue. Additionally, it maintains a difference between recognition and enforcement by imposing cumbersome procedures. The Montevideo Convention on the other hand has a specific regulation that allows States to determine internal procedures without offering guidelines. This leaves a space for each State to make free judgments, something that repeats the preliminary draft. Therefore, the Rapporteur found it convenient for the Committee to takes a stand and develop something in this area. By way of conclusion, there is no obligation in internal legislations regarding the recognition of foreign court decisions; this contrasts with arbitration decisions, where recognition is undeniable, so the report should not rule on arbitration. Likewise, international regulation does not guarantee access to justice in the case of decisions produced by the judicial bodies of other States, so fundamental rights would be restricted. Therefore, it is suggested that certain procedures be changed, and it should be ask whether it is necessary to maintain duality, recognition and enforcement, or else reduce everything to enforcement.

Dr. José Moreno thanked Dr. Ruth Stella Correa Palacio for her work and explained that the New York Convention on sentences and arbitral awards is one of the most successful, with a large number of States parties, despite imposing challenges in the enforcement of judicial decisions. The issue of enforcement of sentences led to many divergences, and this discussion was resumed at the 2001 Conference of The Hague, whose diplomatic conference was scheduled for 2019. He proposed that this topic be part of the discussion with the representatives of The Hague Conference and that the Committee should define the type of product be dealt with by the Committee. Dr. Moreno recommended as well preparing a guide or a *soft-law* document to serve States. There is a very important work of ASADIP related to the issue of international procedures that must be taken into consideration. He recalled that there will always be considerations of a domestic nature.

Dr. Luis García-Corrochano thanked the Rapporteur for the importance of the issue of enforcement of sentences, an issue that involves various aspects and which is a source of concern when States resort to defense of public order. He urged the Rapporteur to work on all aspects, not just the commercial ones. He referred on issues that are related to the valuation of society, such as family law where a conflict arises between foreign and domestic law.

Dr. Duncan Hollis expressed his agreement with removing arbitration issues that the report should be involved with access to justice as a central objective and take into account challenges imposed by new technologies. He consulted the Rapporteur on the expression "change the norms" in the conclusions and asked her if she meant changing instruments or adopting new rules. Finally, he recommended combining the Civil Law and Common Law systems in her report, regardless of the nature of the final product that is decided upon.

Dr. Carlos Mata Prates congratulated Dr. Correa on her work, which stresses on foreign awards, and asked her about the nature of the instrument to be developed (the product to be expected). Considering the work of The Hague Conference on the matter, suggested that the Committee should take a position once it has a better idea of the outcome of those negotiations.

Dr. Joel Hernández thanked and congratulated the Rapporteur on her dedication. Regarding the contribution of the CJI to the development of the topic, the expertise of the members and the progress made in other forums must be taken into account. Aware of the progress of The Hague Conference with regard to the Preliminary Draft Law, it would not be appropriate to launch a document of the same nature. However, what the Committee could do would be a communication including recommendations

to the Conference. A second contribution would be the drafting of a guide for the States to facilitate the internal regulation with very precise recommendations to guide the States on minimum elements that allow the future enforcement of the Convention. In this regard, Dr. José Moreno proposed to ask Professor Nadia de Araújo if, in her capacity as observer of The Hague Conference, she could represent of the CJI.

The Chair thanked the Rapporteur on her report, clearly stating the need not to embark on something that duplicates the work of The Hague Conference. He said that he understood the difficulties imposed by enforcement, in particular by reason of the formal aspects. Progress must be made in conformity with existing developments. He shared the views expressed by Dr. Hernández regarding the available options, and also verified that next Thursday's meeting will be an excellent opportunity to discuss the subject. Finally, it was important to reach an agreement on the type of product that you want to work with.

Dr. Joel Hernández explained that in his opinion there was no duplication in this case due mainly depending on the time each institution takes to develop its topics, therefore there was no impediment in proceeding with the subject. He also noted that the idea of submitting amendments to the Montevideo Convention may take even longer.

The Rapporteur of the topic, Dr. Ruth Stella Correa Palacio, stated that, based on what emerges, the Committee is not expected to seek to modify the Montevideo Convention but should work on a guide or model law, in accordance with the preference of the rest of the members, limiting the issue to domestic recognition of decisions so as to face the problem of access to justice. The aim should be to provide States with mechanisms and procedures to facilitate authentication of foreign documents. She clarified that the Hague Conference seems not to be addressing these topics. She concluded by stating her option to favor a model law.

The Chair explained that the issue would remain on the agenda of the Committee, and invited members to take advantage of both meetings expected for the next days, the VII Joint Meeting with the Advisors (August 15, 2018) and the Session with Representatives of The Hague Conference (August 16, 2018), to determine the path to be followed.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February 18 to 22, 2019), the rapporteur for the topic, Dr. Ruth Stella Correa Palacio, presented her report entitled "Recognition and enforcement of foreign judgments and arbitral awards," (document CJI/doc.581/19), the purpose of which is to facilitate the adoption of mechanisms to ensure effective recognition of foreign decisions within States, including the possibility of proposing suitable mechanisms, taking as a reference the universal and regional regulations, in accordance with the 1958 New York Convention and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards - Montevideo Convention.

The Rapporteur then briefly described the international instruments governing the subject and some of the national laws mentioned in her first report, as well as the discussions held at the last working session on the status of the preliminary draft convention prepared by The Hague Conference, which showed, among other things, that the Committee was not seeking to replicate what that body was proposing. She also devoted space to the positive comments offered by the legal advisers in favor of a Committee pronouncement on the matter, noting the difficulties in enforcing court decisions abroad (among which she mentioned the cumbersome and obsolete procedural and enforcement processes, the obstacles imposed, or the reciprocity required by certain States). The Rapporteur also referred to the state of play in the United States where there would appear to be consensus on the applicability of state laws with regard to the recognition and enforcement of foreign judgments, despite the absence of a pronouncement by the U.S. Supreme Court. She concluded by describing the developments of the American Association of Private International Law (ASADIP) and the Ibero-American Institute of Procedural Law (IIDP), whose common denominator is the execution of the transnational effectiveness of judgments, included in the Montevideo Convention but not in the preliminary draft of The Hague Conference.

In that context she explained the options available for defining the work to be done:

- to prepare a guide or soft document that will be useful for States in the implementation of the Montevideo Convention;
- develop a model law for the implementation of the Montevideo Convention;
- send a communication to the Hague Conference with recommendations to be taken into account in the development of the draft.

Dr. José Moreno congratulated the Chair on her proposal, which had been shared with Professor Ochoa from Venezuela, an authority on the subject, who had praised the contribution proposed by the rapporteur. He noted an asymmetry between this issue and arbitration, which lacks instruments in the area of enforcement of judgments. He also supported the initiative of developing a model law accompanied by comments that proposed a set of regulations (a sort of mixed text of guidelines and model laws). Among the considerations that should be incorporated into the Chairperson's paper, he proposed that the exequatur be left voluntary and not included in the implementation process, and that the report refer to new technologies and the importance of flexibility.

Dr. Carlos Mata asked for clarification about the Committee's objective in this area, so as to avoid entering into conflict with developments in other forums and to take into account aspects regulated at the internal level (particularly considerations relating to procedures). He also mentioned an academic event to be held in Uruguay on the Montevideo Convention, in which the rapporteur could participate, a proposal that was supported by Dr. José Moreno.

Dr. Iñigo Salvador noted that the draft covered important issues aimed at making effective the decisions of courts of foreign jurisdiction. It urged the inclusion of the legal framework for recognition and enforcement of arbitral awards, which could serve as an example for judgment in terms of their modalities. With regard to the nature of the work to be undertaken by the Committee, he noted that the two initial proposals did not contradict each other and, in the light of the opinion of the legal advisers, he would be in favor of a model law. He concluded by proposing some specific formulations with respect to the text presented.

The Vice Chair, Dr. Luis García-Corrochano, referred to some of the obstacles in domestic legislation and the important role of parliaments in making rules.

Dr. Milenko Bertrand consulted on whether the work would include the enforcement of judgments of international courts or only of domestic courts. He also asked about the situation where the respondent is the State and where other bodies should appear, such as on labor issues. Finally, he addressed the matter of jurisdiction disputes between foreign courts in the light of the issue of forum shopping.

On the subject of forum selection, Dr. José Moreno invited the rapporteur to harness the real value of the work being done by The Hague Conference. In relation to the nature of the work, he suggested that the rapporteur first prepare a Guide and then work on the model law.

Dr. Mariana Salazar asked the rapporteur about the pros and cons of each of the proposed alternatives. With regard to the incorporation of judgments of international courts, she proposed that they not be incorporated into this study because they deal with different subjects.

The Rapporteur first referred to the issue of the asymmetry of the decisions of international tribunals, including arbitration tribunals, or in the field of human rights, which are automatically recognized by States by an express regulation or constitute an authoritative interpretation, differing, therefore, from the situation of judgments issued by State bodies. The aim is to facilitate procedures and achieve greater efficiency by prioritizing enforcement procedures (without burdening the beneficiary of the judgment with the recognition procedure). She expressed her interest in developing a properly supported model law that could serve as a practical guide, taking due account of the good practices of the Montevideo and New York Conventions. She was grateful for the invitation to Montevideo, which would serve as an input for her work as rapporteur (which should be disseminated

by all members of the CJI on the issues that concern them). She concluded by explaining that all the observations would be taken into account. Dr. José Moreno observed the good timing of this work, which coincided with a time when reforms of various kinds were being carried out in several States in the area of private international law.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. Ruth Stella Correa Palacio, described recent developments in the field and the challenges to ensuring an efficient mechanism in the face of the complexity of the rules. Based on the replies received to the questionnaire sent to States, he noted a certain flexibility on the part of national judicial bodies. At the regional level, he highlighted as an example to follow the regulations of the IACHR/Court that have special rules to facilitate the effectiveness of decisions. In the light of the recommendations presented by the members, the rapporteur explained her intention to present rules providing for expeditious procedures on matters where there are divergences, including exceptions with respect to the enforcement of foreign judgments, and to set aside the *exequatur*.

Dr. José Moreno thanked the rapporteur for her explanations, considering the important contribution of the subject to internal rules on enforcement of judicial decisions. Many procedural codes do not include standards adapted to the reality of civil procedural law, especially in view of the recent adoption of the Convention on the Enforcement of Judgments. He suggested as a way forward to develop a model law or model standard that countries could incorporate into their procedural codes, and that an explanatory text be included.

Dr. Milenko Bertrand noted that the courts do not make good use of the rules, and therefore a guide to the enforcement of judgments should be worked on.

Dr. Mariana Salazar requested the incorporation of a greater number of States to the extent of that the rapporteur's possibilities allowed.

Dr. George Galindo urged reflection on the object of what is to be done, and suggested developing a guide to good practice in normative language.

The Rapporteur for the topic, Dr. Ruth Correa Palacio, noted the difficulty of drawing up a guide to good practices due to the high number of exceptions imposed by the procedures in the Hemisphere. She therefore welcomed Dr. José Moreno's suggestion to work on a model law that would serve as an explanatory guide on how to easily access justice, which could respond to Dr. Milenko Bertrand's concern.

Dr. José Moreno suggested to develop a model law following the example in the area of UNCITRAL arbitration.

Dr. Espeche-Gil referred to his experience in the field of letters rogatory in his role as Ambassador of Argentina in Switzerland, in relation to which the complex processing of the mechanisms required by that country obliged him to provide the information in Spanish at the different levels of his country.

Dr. Milenko Bertrand referred to the challenge posed by judges' lack of knowledge of their own domestic law, and therefore urged the linkage of key concepts to the Rapporteur's work that could help modernize national systems.

Dr. José Moreno brought up the importance of dissemination and the experience of the Department of International Law in that regard, citing as an example the training of judges in the field of arbitral awards.

The Rapporteur undertook to work on a model law accompanied by explanations, including, insofar as possible, good practices.

The following document was presented by the Rapporteur for the topic, Dr. Ruth Stella Correa Palacio in February 2019:

CJI/doc. 581/19

## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS

(presented by Dr. Ruth Stella Correa Palacio)

### I. Introduction

The purpose of this paper is steered by the intention of ascertaining the validity of the fundamental law of access to justice and its natural consequence, effective protection through the Courts, in proceedings addressing the recognition of foreign decisions taken by the States and, if appropriate, proposing the implementation of suitable mechanisms able to ensure the full efficacy of this right, acknowledged in Article 8 of the Universal Declaration of the Rights and Duties of Man<sup>1</sup> and Article 25 of the American Convention on Human Rights<sup>2</sup>.

This study is grounded on the understanding that the right of access to justice is not limited to freedom and the possibility of turning to judges and courts through lawsuits seeking the definition of a juridical situation; of being represented in court and with the proceedings culminating in a well-founded judgment; it is furthermore a matter of concern to all “means through which rights become effective”,<sup>3</sup> thus ensuring efficacious protection through the Courts, whose achievement is viewed as one of the barriers or obstacles hampering the recognition and enforcement of judgments outside the State in which they are rendered.

On the grounds that this issue involves the validity of two principles – *pacta sunt servanda* and the autonomy of the States – the Committee will focus on establishing the mechanisms for deploying the international standards in domestic regulations, in order to determine the need to proposals intended to underpin the efficacy of foreign decisions.

### II. Background

During the 90<sup>th</sup> Regular Session period held in Rio de Janeiro in March 2017, the Committee decided at its own initiative (Article 12-C of its By-Laws), to undertake a study of the situation the States in terms of “The Application of Foreign Judgments and Arbitral Awards”, basically under the aegis of the Convention of New York (1958) and the Inter-American Convention on the Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards (1979), known as the Montevideo Convention.

During the 92<sup>nd</sup> Regular Session period held in Mexico City in February 2018, the first report was presented, with an analysis of the scope of international instruments regulating this issue, namely: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention (1958), applicable to decisions handed down by arbitrators appointed to specific cases, and judgments rendered by the permanent arbitration entities to which they were submitted by the parties involved; EU Registration No. 1215/12 dated December 12, 2012, “on

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<sup>1</sup> UDHR, Article 8: Everyone has the right to an effective appeal to the competent Courts, offering protection against acts breaching their fundamental rights as acknowledged by the Constitution or by the Law.

<sup>2</sup> ACHR, Article 25: Protection through the Courts. 1. Everyone has the right to a fast and simple appeal or any other effective appeal to the competent judges or Courts, protecting them against acts breaching their fundamental rights acknowledged through the Constitution, the Law of this Convention, even if such violations committed by persons engaged in the performance of their official functions. 2. The States Party agree to: a. Ensure that the competent authority established by the State legal system will decide on the rights of each person lodging such an appeal; b. Develop the possibilities of appeals through the courts; and c. Ensure compliance by the competent authorities with all decisions in which the appeal is deemed to be well-founded.

<sup>3</sup> CAPELLETI and GARTH, *Accès a la Justice et Etat-Providencia*, Institut Universitaire Européen, Économica. Paris, 1984.

court jurisdiction, the recognition and enforcement of court decisions on civil and commercial matters” issued by the European Parliament and Council; the Inter-American Convention on International Commercial Arbitration signed in Panamá on January 30, 1975 and the “Montevideo Convention” dated May 8, 1979.

This report also included the content of some domestic legislation in the American States, intended to establish the procedural structure for the recognition and enforcement of foreign awards, namely: the Civil and Commercial Procedural Law Code (Argentina); the Civil Procedural Law Code (Bolivia); the Organic General Procedural Law Code (Ecuador); the Civil Procedural Law Code (Paraguay); the Civil Law Code (Peru); the General Procedural Law Code (Uruguay); the General Procedural Law Code and National and International Arbitration Statute (Colombia).

The preliminary conclusions on the status of this matter in the compiled domestic law were synthesized as follows:

As a general rule, with a few exceptions, the requirement was identified for court recognition prior to the enforcement of a foreign decision, which is the *exequatur* proceeding.

It was thus noted that domestic legislations distinguish between recognition procedures and those required for the enforcement of foreign awards.

Also proven was the ease with which domestic legislators regulate the procedures for the recognition and enforcement of foreign arbitral awards, in contrast to stringent procedures for the recognition of judgments rendered by court entities in other States.

Finally, lighter treatment was noted in some legislations, addressing only the recognition of the evidentiary effects of foreign awards, in opposition to the recognition procedure for enforcement.

This report also presented the results of the session with international law experts, who mentioned the need to eliminate the specter of forms, as well as distinctions between judgments rendered in commercial terms, and others that are not; between international and domestic business agreements; the principle of reciprocity underpinning the recognition of judgments handed down by a Court in another State. The experts also underscored the benefits of using technology to replace authentications.

The rapporteur proposed that a good practices guide or legislative handbook be drawn up, in order to facilitate the recognition and enforcement of foreign decisions.

Before deciding on the focus and shape of the paper, the Committee suggested that the issue be examined with the legal advisers of the Chancelleries at a meeting scheduled at this level, as well as defining the progress of the work of The Hague Conference on this matter.

During the 93<sup>rd</sup> Regular Session period held in Rio de Janeiro in August 2018, a status report was presented on the Draft Convention drawn up by The Hague Conference, which did not establish procedural guidelines for the recognition and enforcement of foreign awards by States, although laying down acknowledgement and enforcement criteria (Article 5), as well as events leaving room for the denial of recognition and enforcement, among which the international public order clause remains valid.

The conclusions presented in this Report were the following:

1. International regulations addressing the recognition and enforcement of arbitration awards handed down in another State is more streamlined and efficacious than those related to judgments rendered by the Courts in another State. As a result, it is suggested that the study should not encompass matters related to arbitration.

2. International regulations currently in place on the recognition and enforcement of judgments rendered by Courts in another State do not guarantee the fundamental right of access to justice and effective protection through the Courts, in terms of the domestic legislation of the respondent State the regulation of the proceedings for this purpose, establishing no parameters at all.

3. The Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments prepared by The Hague Conference on Private International Law does not address the aspect

related to procedures within the States, with steps that are once again left to domestic regulation, with the only variation of requiring speedy processing.

4. Current international regulations require a modification in terms of domestic recognition and enforcement proceedings, which clusters the identified difficulties, with important effects on the fundamental right of access to justice, and consequently effective protection through the Courts.

5. The required modification must review at least the following aspects:

5.1 The need to maintain the duality of recognition and enforcement procedures, or else abolish it and reduce it to the enforcement proceeding.

5.2 Whenever the recognition procedure is eliminated, this allows a claim to be raised as an exception in the enforcement proceeding, of circumstances enshrined as grounds for denial of recognition.

5.3 Urge that domestic proceedings should progress with the fewest number of stages and as quickly as possible.

5.4 Include procedural advances accepting the use of new technologies in matters relating to document authentication and legalization.

5.5 Embody the use of information technologies and their impacts on hearing court decisions.

5.6 Examine the ways in which recognition and enforcement proceedings are handled.

5.7 Block the possibility of reviewing the grounds for a decision.

5.8 Different parameters for acknowledging the evidentiary effects of the judgment.

6. The existence of work undertaken by the Special Commission on the Recognition and Enforcement of Foreign Judgments at The Hague Conference does not result in the replication of work undertaken by this Committee.

In the course of the discussion of the report during the 93<sup>rd</sup> Regular Session period, the Committee suggested supplementing it through including the civil law and customary law systems, as well as reviewing the work on this matter undertaken by ASADIP. It also suggested discussing this issue at a meeting with the legal advisers of the Chancelleries, which was held during this same session period.

Several proposals on the work to be done arose during the discussions of the draft by the Committee, without selecting any of them, namely: (i) drawing up a loose guide or document that would be of use to the States, in order to facilitate domestic regulation with very specific recommendations guiding the States on the minimal elements allowing the future application of the Convention; (ii) drafting a model law; (iii) forwarding a notification to The Hague Conference with recommendations to be borne in mind when preparing the draft. The scope and form of this work is still awaiting definition.

Questions were also raised over the need to modify the Montevideo Convention, and in exchange it was suggested that a solution to the problem could be provided by a soft law tool.

### **III. Recognition and Enforcement of Foreign Court Decisions in the USA**

Article IV of the US Constitution is known as the “full faith and credit clause”, through which a judgment originating in one State must be acknowledged and enforced in another State.<sup>4</sup>

Judgments rendered outside the USA are not encompassed by this clause.

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<sup>4</sup>. The interpretation of this clause was confirmed by the US Supreme Court in *Underwriters National Assurance Co. v. N.C. Guaranty Assn.* 455 U.S. 691 (1982) and has been supplemented by federal legislation specifically addressing its enforcement. The Uniform Law Commission drew up the Revised Uniform Enforcement of Foreign Judgments Act; the original decree promulgated in 1948 was amended in 1964. This constitutes "a simplified way of enforcing decisions originally handed down in another State, endowing them with full faith and credit", and has been promulgated in 48 States.

The starting point is customary law doctrine dating back to a decision handed down in 1895 by the US Supreme Court.<sup>5</sup> The Court explained that the concepts of courtesy derived from international law generally favor the recognition by US Courts of decisions rendered by foreign Courts but, due to the specific facts in this case, recognition was denied on the grounds of a lack of reciprocity.<sup>6</sup> This decision formed the grounds for a juridical *corpus* that extended well into the XX century, but then crumbled as Court viewpoints varied: some of them analyzed the courtesy element, but rejected the reciprocity requirement, while others did not.

Except for federal matters, this seems to be consensus on the recognition and enforcement of foreign Court decisions being subject to State laws, while the Federal Courts will apply the law of the State in which they are located. However, the US Supreme Court has never issued a statement on this matter.<sup>7</sup>

The customary law criterion was followed by the progress of laws. In 1962, the Uniform Law Commission<sup>8</sup> drew up the Uniform Foreign Money-Judgments Recognition Act (1962 Recognition Act), that was subsequently updated as the Uniform Foreign-Country Money Judgments Recognition Act (2005 Recognition Act). By August 2018, 35 States (together with the District of Columbia and the US Virgin Islands) had promulgated a similar decree.<sup>9</sup> In the remaining fifteen States, this issue is basically ruled by customary law. Consequently, although the basic concepts of the same, there are important differences that vary from one State to another; some States have promulgated the 1962 version, others have done the same with the 2005 version; others are jurisdictions under customary law, and some of them include the requirement of reciprocity, while others do not.

However, most of the States present similarities in the structure of their analyses of foreign court decisions that are taken into consideration for their recognition and enforcement. Both the Restatement Act<sup>10</sup> and the Uniform Act start with the rule that a judgment that is definitive and enforceable in the place where it was rendered must be recognized, if there is no reason for refusing such recognition. Next, they list mandatory and discretionary reasons for not recognizing a foreign court decision. The list of mandatory reasons begins by requiring non-recognition when the original Court system in which the judgment originates does not include impartial courts and due process of law, or lack individual jurisdiction. In each case, evidence of individual jurisdiction yields to the application of US jurisdictional concepts for issuing a decision, rather than simply examining whether the court of origin holds jurisdiction under its own laws. The lack of jurisdiction for the matter is a mandatory reason for non-recognition under both the Uniform Acts, but is a discretionary reason under the Restatement Act. The discretionary reasons for non-recognition are generally similar in both Acts and the Restatement Act, but have important differences.<sup>11</sup>

In 2005, the American Law Institute suggested that the recognition of decisions be unified into a Federal statute, although no steps have been taken in this direction so far.

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<sup>5</sup>. *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>6</sup>. A US citizen (Hilton) living in New York State was taken to Court in France by a French company. The French Court handed down a decision against Hilton, which Guyot attempted to enforce in New York. The Court refused to recognize the French decision, on the grounds of the absence of reciprocity with France on this issue.

<sup>7</sup>. Restatement (Second) Conflict of Laws and following. (1988).

<sup>8</sup>. The ULC is a non-profit professional association set up to foster legislative uniformity in the States. [www.uniformlaws.org](http://www.uniformlaws.org)

<sup>9</sup>. Until August 2018, the ULC website indicated that 23 States (plus the District of Columbia) had promulgated the 2005 model, while 31 States (plus the District of Columbia and the US Virgin Islands) had promulgated the 1962 model. Some States have promulgated both models.

<sup>10</sup>. The Restatements are prepared by the American Law Institute, which is an organization of eminent US jurists that organizes, summarizes and "interprets" prevailing trends in case law. Although similar in appearance to the house in the civil jurisdiction law codes, these Restatements are not endowed with the same legal status of the USA. They are intended to summarize the law in compliance with Court decisions and reconcile varying interpretations of assorted decisions.

<sup>11</sup>. These may be set forth in greater detail subsequently, if necessary.

#### **IV. Conclusions of the Meeting with the Legal Advisers of the Chancelleries**

In general terms, the speakers qualified domestic procedures on *exequatur* as a type of trap for parties engaged in litigation, doomed to face all types of difficulties when attempting to enforce legal decisions abroad.

On the other hand, there was warm acceptance of the fact that the Committee was working on this issue, to the extent that it could render massive services to the law in the region, as well as the administration of justice for private parties in the region, by addressing a model law that would allow domestic proceedings to be more efficient and less costly.

Similarly, the option was aired of the Juridical Committee establishing interpretive criteria on the Usual Convention (1958) and the Inter-American Convention on the Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards (1979), known as the Montevideo Convention.

A warning is sounded that this work must bear in mind constructions related to international public order.

#### **V. Studies on the Topic by the ASADIP and the IIDP**

In view of its relevance in the academic environment, we are submitting below the list of studies drafted on the topic by two relevant academic forums: The American Association of International Private Law— ASADIP— and the Ibero-American Institute of Procedural Law— IIDP.

The ASADIP, through a complete work has compiled the principles on Transnational Access to Justice, which “seek to improve the Access to Justice of natural and legal persons in private disputes of transnational nature ...” that is: of “maximum respect to human rights and the Access to justice”; of “favoring amicable solutions”; of “jurisdictional equivalent”; “transposition of procedural warranties to the transnational sphere”; of “international legal cooperation”; of “transnational judicial activism”; of “procedural celerity”, of “procedural adaptation”; of “protection of collective rights”.

This study is proposing a regulation for the efficacy of foreign judgments, therefore expanding the area of enforcement beyond judgments.

“Chapter 7. Efficacy of foreign judgments

“Article 7.1. The extraterritorial efficacy of judgments is a fundamental right, closely related to the right of Access to justice and with the fundamental rights of the due process. Therefore, judges and other State authorities will always seek to favor the efficacy of foreign judgments and enforce the requirements that those decisions must follow.

Article 7.2. The right to secure extraterritorial efficacy of the foreign judgment will not be considered infringed if the judgment whose efficacy is sought has been ruled in transgression of fundamental rights related to the procedure, or when the real effects of its recognition or enforcement are clearly infringing the fundamental rights of the core issue.

Article 7.3. The required State may also deny extraterritorial efficacy to a prior foreign and final judgment in the same case, ruled by a foreign court able to be recognized in the required State.

Article 7.4. Denial of the recognition or enforcement of a foreign ruling due to indirect jurisdiction reasons will solely be justified in the following cases:

- a. When the jurisdiction of the authority that ruled such a judgment is based on an exorbitant criterion.
- b. When the jurisdiction of the authority that ruled such a judgment is based on an agreement related to the election of a venue that has not been freely consented by the impacted party or when it has ignored a prior validly accepted agreement.

- c. When the jurisdiction of the authority that ruled such a judgment has ignored a case of plea of pendens (litispendence) in another procedure, infringing Article 3.7 of these Principles.

Article 7.5. The revision of the main issue of a foreign judgment infringes the right of Access to justice, without prejudice of the legal authority of the required State to carry out the necessary control to avoid infringement of fundamental rights.

Article 7.6. The demand of reciprocity in the efficacy of judgments and acts of foreign authorities is presumed to be against the law.

Article 7.7. To ensure extraterritorial efficacy of foreign judgments, these will be assimilated to the corresponding analogue decisions of the required State, if and when those decisions, whatever their denomination is, produce final and unappealable effect in the State of origin. This rule is also applicable irrespective of those decisions being ruled by authorities of public powers that are not those that would be competent in the required State.

7.9. A foreign decision takes effect in the required State from the moment it gains efficacy in the State of origin.

7.10 When the efficacy of a foreign decision is claimed during a procedure, the required State will admit its incidental acknowledgement, without prejudice of the ratification process or *exequatur* that the legislation of the required State may establish for its recognition or enforcement.

7.11 The ratification or *exequatur* of foreign judgments shall be filed and adjudicated in summary proceedings, limited to attesting the basic requirements for its recognition or enforcement in the required State. The effective enforcement of those judgments shall be guaranteed through an expedite processing, seeking to maintain the precautionary measures ruled until the enforcement has been completed.

In turn, the Ibero-American Institute of Procedural Law —IIDP—, approved the Model Code for Inter-Jurisdictional Cooperation for Ibero-American Countries during the Assembly session of October 17, 2008. The main purpose of the Code is to achieve transnational judicial protection. Sections V and VI on the Efficacy and Enforcement of foreign judgments, proposes the automatic enforcement of the foreign decision. This means that the efficacy does not depend on the previous recognition of the judgment, without prejudice of the acceptance of grounds for challenge of the efficacy by whoever opposes to it:

“Section V. Efficacy of foreign judgments.

“Article 10. Automatic effect of foreign judgments.

The effects of the foreign judgments will automatically occur and do not depend on prior judicial recognition.

Article 11. Requirements for the efficacy of a foreign judgment.

The efficacy of the foreign decision in the required State will depend on the compliance of the following requirements:

I - to be compatible with the fundamental principles of the required State;

II - to have been given in a process in which the guarantees of the due legal process are in place;

III - to have been given by a competent international court according to the rules of the required State or to the norms established in Section IV above;

IV - not be dependent on a decision about an appeal accepted with suspensive effect;

V - to be compatible with another decision ruled in the required State, in an identical case, or in other State, in an identical process having the necessary conditions to gain efficacy in the required State.

Sole paragraph. The efficacy of the foreign decision may be controlled *ex officio*, by the judge, in an ongoing process, with due respect for the controversial procedure, or by challenging it in the terms of articles 42 to 47.

“Section VI

“Enforcement of a foreign judgment

Article 12. Enforcement.

“The enforcement of a foreign judgment is subject to the compliance of the requirements established in the previous article ...”

“Challenge procedure of the efficacy of the foreign judgment

“Section III

Action and ancillary challenging procedure of the efficacy of the foreign judgment

Article 42. Active legal standing for filing a challenging ancillary action

The action for challenging the efficacy of a foreign judgment shall be filed by the person having a legal interest in the rejection of its effects in the required States.

Sole paragraph. The competent court to deal with the challenging procedure will be that which, according to the procedural norms of the required State, is the one competent to address the main issue of the case.

Article 43. Guarantees for the due process

Procedures for the current action, of a controversial jurisdiction, will ensure the parties the guarantees of the due legal procedure.

Article 44. Reasons for filing a challenging action.

The challenge shall be restricted to the compliance of the requirements established in Article 11, and the foreign judgment will revise the merits of same under any circumstances.

Article 45. Retroactive effects on the judgment of the action.

The effects of the judgment accepting the challenging procedure shall be retroactive to the date on which the efficacy in the required State started.

Article 46. Ancillary procedure on foreign *res judicata*.

Pursuant to the provisions contained in Articles 42 to 44, the challenging procedure against the efficacy of the foreign judgment will be accepted if and when one of the parties claims the efficacy of the foreign *res judicata* decision, and the other party, or a legally interested third party, intends to discuss the enforcement of the requirements established in Article 11.

Sole paragraph. The court competent to address the main action will be the one to judge the challenging ancillary procedure.

Article 47. Challenging ancillary process on plea of *lis pendence* (litispence)

The challenging ancillary procedure may be filed against the party that has been successful in the international litispence.

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#### 4. Protection of Personal Data

##### Documents

- CJI/doc. 579/19 Report on the sixteenth annual meeting of the Ibero-American Data Protection Network  
(presented by doctor Carlos Mata Prates)
- CJI/doc. 582/19 Updating on principles on privacy and personal data protection  
(presented by doctor Carlos Mata Prates)
- CJI/doc. 597/19 Updating on principles on privacy and personal data protection: Third report  
(presented by doctor Carlos Mata Prates)

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At the 92<sup>nd</sup> Regular Session of the Inter-American Juridical Committee (Mexico City, 26 February to March 2, 2018), Dr. Carlos Mata spoke of the work of the CJI on the theme of protection of personal data, and proposed that the Committee return to and follow up on the theme to enable contributing to the revision of the Model Law on Access to Public Information in the light of the work of the Ibero-American Network of Protection of Data (RIPD).

Dr. Hollis requested that the follow-up to be done on the theme of protection of data should not be restricted to the activities of the RIPD, nor reduced to attempting to implement this in the Americas, given the risk of excluding common-law countries.

Dr. Negro explained that document DDI/doc.9/17 presented by the Department of International Law on Monday's session includes a comparison between the work of the CJI and the new Ibero-American standards precisely so that members use this analysis as a starting-point to produce a result made to measure for the Member States of the OAS.

Dr. Correa agreed with Dr. Mata Prates as to the advisability of the revision of the Model Law on Access to Information articulating with protection of personal data in the hands of authorities.

Dr. Hollis asked that this discussion include the theme of the responsibility of whoever has possession of the personal data of third parties, and their obligation to notify these third parties when the personal data in their possession have been compromised or used in some unauthorized manner.

Dr. Cevallos warned that the CJI should not ignore this chance to revise the juridical bases on which both themes – protection and access – lie.

The Chair concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Mata suggested using the document presented by the Department of International Law to start developing a proposal to update the guide of principles drawn up by the CJI, as well as incorporating other perspectives.

The members agreed to revisit the subject as proposed by Drs. Mata and Hollis, and appointed Dr. Carlos Mata as the Rapporteur.

In June 2018, the General Assembly of the OAS reiterated the mandate initiated within the Committee and requested the CJI that "it begins updating the Principles on Protection of Personal Data, bearing in mind how such data have evolved," resolution AG/RES. 2926 (XLVIII-O/18).

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 6 – 16 August, 2018), the topic was not discussed.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the Rapporteur for this topic, Dr. Carlos Mata Prates, presented a report on his

participation in the XVI Ibero-American Meeting on the Protection of Personal Data, held in Costa Rica on November 28 and 29, 2019. The meeting gathered together members of the Ibero-American Network on Data Protection (RIPD) which included the main national authorities on the issue, where he explained the OAS Principles on Privacy and Protection of Personal Data, drafted by the CJI on March 27, 2015. The meeting served to conduct a debate on the importance of protecting personal data and its relationship with the free flow of information. He referred to the comparative work done by the Department International Law, represented in this case by Dr. Magaly McLean.

The Rapporteur also submitted his first report on the Protection of Personal Data (document CJI/doc.582/19), pursuant to the mandate of the General Assembly which requested updating the aforementioned OAS Principles on Privacy and Protection of Personal Data, “*bearing in mind how such data have evolved*” AG/RES. 2926 (XLVIII-18) item “i”- International Law, “Observations and recommendations on the Annual Report of the Inter-American Juridical Committee (CJI)”. He explained that most Latin-American countries have enacted legislation on this issue in the past decade, and that the provisions were included – in some cases – in their constitutions. He then referred in detail to the ‘OAS Principles on Privacy and Protection of Personal Data.’”

The Rapporteur proposed studying the following aspects of the Principles in greater detail:

- a) measures seeking to “*prevent the identification or re-identification of a natural person without deploying disproportionate efforts*”;
- b) the relationship and effects of the Principles vis-à-vis rights under domestic law;
- c) the handling of personal data of children and adolescents;
- d) the right of *portability* of personal data;
- e) the broadening of the legitimation of natural persons related to dead persons or designated by them;
- f) the right to be forgotten.

The Rapporteur ended his speech with a request that the civil law and common law traditions be included in the update, so as to encompass all the OAS Member States.

Dr. Milenko Bertrand referred to the difficulties and challenges of the subject under study, and urged the Rapporteur to include information on data control, citing in this regard the transfer of data transmitted to the IRS in the United States, that are not necessarily protected by those handling them. He also invited the Rapporteur to consider the storage of data on transitional justice in the private sphere, considering that national institutions may be weak in providing due care and diligence in the area of information protection.

Dr. Luis García-Corrochano emphasized the problem of the proper use of personal data and raised as a challenge the search for a penalty in the event of inadequate use of such data.

The Chair welcomed the judicious work of the Rapporteur on this matter, and recommended that he take into account situations involving the handling of personal data linked to informed consent, in which the owner of the data should know where the data will be disclosed. She also urged him to check out the topic of financial data protection with respect to the declaration of income and assets, where the use of such data may have negative consequences on a person’s financial record.

Dr. George Galindo congratulated Dr. Milenko Bertrand for proposing that the Rapporteur include the issue of global governance.

The Rapporteur thanked the members for their comments pointing out the complexity of the subject. He indicated that the provision needed to be consistent with the close relationship between data protection and the issue of freedom of movement and access to information. He agreed with the members of the Committee on the importance of consent in the field of private data protection and use of the information. Finally, he referred to the challenges posed by the difficulty of striking a balance

between privacy and freedom of movement and (access to) information, citing the declassification of international banking system accounts and diplomatic communications, as revealed by the Assange case.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the Rapporteur for the topic, Dr. Carlos Mata Prates, presented an updated version of his previous report, "Update on the Principles on Privacy and Personal Data Protection," document CJI/doc.597/19, in which he noted, among other things, that the protection of personal data is covered by existing regulations, at both the regional and the state level, in addition to pronouncements by the Inter-American Court of Human Rights. On that occasion, he submitted proposed elements that could accompany the OAS Principles on Privacy and Personal Data Protection, adopted in 2012:

- a) so-called anonymization;
- b) the linkage and effects of the OAS Principles with internal rights, it being understood that the Principles establish a minimum that does not prevent internal rights from establishing systems that provide more guarantees for individuals than those established in the Principles;
- c) treatment of personal data concerning children and adolescents;
- d) the right to the portability of personal data;
- e) extension of the legitimacy of natural persons linked to or designated by deceased persons, under the terms established to exercise the right of access, rectification, cancellation, opposition and portability;
- f) the so-called right to forget, under a broad concept;
- g) the incorporation of proactive responsibility; and,
- h) the establishment of security as a substantive principle.

Dr. George Galindo asked the rapporteur about the duty of confidentiality and the general rule of consent. Dr. Duncan Hollis thanked the rapporteur for his report which has ramifications for the issue of cybersecurity, the topic for which he was rapporteur. He asked if it would be possible to find common themes in light of the different conceptions visualized today (China and India, USA, Europe). The issue of portability and the right to forget could encounter resistance from the United States. Dr. Espeche-Gil consulted the rapporteur on precisely what his understanding was of the right to portability. Dr. Milenko Bertrand congratulated the Rapporteur and expressed his concern about the abusive use of data protection by public officials who want to avoid control or oversight. Dr. Mariana Salazar urged adaptation to the new trends, and asked the rapporteur if he had considered the problem of missing persons.

The rapporteur for the topic, Dr. Carlos Mata, explained that his work sought to update the Committee's developments on the subject and be consistent with the times. The right to forget is not something that is accepted by everyone, which is why he proposes it in the conditional in his report, in order to see if it would be acceptable under certain constraints, mindful that it is a European tradition that is not accepted by the United States or Canada. With regard to public officials, he noted that several OAS Member States have laws on access to information and protection of personal data. In relation to Dr. Salazar's question, the Rapporteur explained that his intention of legitimization referred to the situation of deceased persons (not to missing persons, in the case of which a stronger relationship would have to be sought). In response to Dr. Galindo, the Rapporteur expressed the possibility of distinguishing knowledge from consent. He noted that the entry of information in a legitimate manner required that the database accessed be public. The rapporteur explained his intention to include the issue of portability from a broad perspective that took into account European developments in the field. Finally, in Latin America the right to forget would not appear to imply an obstacle to freedom of expression; they can and should coexist.

Dr. García-Corrochano addressed some of the exceptions that arise in implementing access to information of public interest.

The Chair, Dr. Ruth Correa, thanked the Rapporteur, and noted that certain developments remained pending that would be seen in other reports, such as access to information and cybersecurity, in addition to the issues raised by Dr. Bertrand. At the end of the discussion, the plenary designated as co-rapporteurs Dr. Mariana Salazar and Dr. Milenko Bertrand, who expressed their interest in following up on the work of Dr. Mata, whose mandate would conclude in December that year.

The following are the documents presented by the rapporteur for the topic, Dr. Mata Prates, in February and August 2019:

**CJI/doc.579/19**

**REPORT ON THE SIXTEENTH ANNUAL MEETING OF THE  
IBERO-AMERICAN DATA PROTECTION NETWORK**

(presented by Dr. Carlos Mata Prates)

The sixteenth annual meeting of the Ibero-American Data Protection Network was held in the auditorium of the Supreme Electoral Tribunal of Costa Rica on November 28 and 29 in proceedings that were open to the public; on November 30, the Ibero-American Data Protection Network met in a closed session.

In order to clarify for the Inter-American Juridical Committee (CJI) certain organizational aspects of the Ibero-American Data Protection Network (RIPD), I should mention that, pursuant to Article 11 of its Rules of Procedure,

*“1. The Meeting of the Ibero-American Data Protection Network is the organ comprising all the members of the RIPD that convenes annually, its character being that of the Network’s General Assembly.*

*2. The nature of the annual meeting of the RIPD is that of a forum for direct discussion and adoption of decisions and documents.*

*3. The annual meeting of the RIPD may convene in both open and closed sessions...”*

It is worth bearing in mind, given its importance to the CJI, that, in accordance with Article 3 of the Rules of Procedure of the RIPD, *“The public entities and organizations in the Ibero-American framework ... that meet the following criteria shall have the status of Member of the RIPD:*

- “(a) If they are a public entity created by means of an appropriate legal instrument based on the legal traditions of the country or international organization to which they belong;*
- (b) If they are accorded competencies in the area of protection or privacy of personal data;*
- (c) If the law under which they operate is compatible with the principal international instruments concerning data or privacy protection, and*
- (d) If they are vested with an appropriate array of legal powers to carry out their functions.”*

I participated for the CJI as an invited guest in the closed session of the annual meeting of the RIPD. The importance of the relations between the CJI and the Annual Meeting of the RIPD is based, *inter alia*, on the fact that the Committee prepared the *OAS Principles on Privacy and Personal Data Protection*, approved on March 27, 2015, by resolution CJI/RES. 212 (LXXXVI-O/15), and subsequently adopted on June 5, 2018, by the General Assembly in resolution AG/RES. 2926 (XLVIII-O/18), “International Law,” in which paragraph *“I. Observations and recommendations on the Annual Report of the Inter-American Juridical Committee”* assigns the

CJI the mandate to “begin updating the Principles on Protection of Personal Data, bearing in mind how such data have evolved.”

Since the CJI has received the above mandate, it is clearly important for it to have fluid communications with that organization for different reasons: First, the preparation by the RIPD of the Standards on Personal Data Protection for Ibero-American States; and second, because it is made up of public organs that are “accorded competencies in the area of protection or privacy of personal data,” which naturally generate *administrative practice or administrative precedents* that, leaving aside the extent of their effects on different countries, are an important input, which one might even call *best practices*, when it comes to developing standards on the subject of personal data protection, without forgetting that *such best practices* are representative of, or reflect, broadly speaking countries that hail from the continental legal tradition, as opposed to that of Anglo-Saxon origin.

At the same time, the CJI already has an established link with the RIPD, having invited some of its officers to participate in the Rio Course, who were also invited in that capacity to a meeting of the CJI to share perspectives.

At the closed session of the RIPD the rapporteur delivered a presentation on the OAS Principles on Privacy and Personal Data Protection approved by the CJI on March 27, 2015 [CJI/RES. 212 (LXXXVI-O/15)] and on the recent mandates to update those principles. He also reaffirmed the importance of the collaboration between the CJI and the RIPD.

For its part, the RIPD expressed thanks for the presence of a member of the CJI at its meeting and reaffirmed its willingness to work with the Committee on the subject and in carrying out the work entrusted to it.

Finally, I would like to underscore that it was a meeting that enriched the debate on the complexity and importance of personal data protection in the current context, as well as its necessary correlation with the right to freedom of information and its ancillary right, access to public information.

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**CJI/doc.582/19**

### **UPDATING ON PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION**

(presented by Dr. Carlos Mata Prates)

As I mentioned in a previous study on the theme, among the new ideas, referring to was said before in historical terms that keep us apart from immediate issues, about the structure of current societies, we may find different demands from individuals, not necessarily new ones, but certainly more immediate – essentially but not exclusively, about the legal protection needed for different values that are considered primary and inalienable ones that are part of the essence of the Rule of Law in States worthy of the name.

In this regard, and related to the issue under study, we must refer to the *Right of Privacy and Protection of Personal Data*, to the free circulation of information, as well as [the right of] *Access to Public Information*, as structuring elements of a democratic society. It should be highlighted that we are not referring to opposite approaches of that pursue dissimilar purposes. They are, in fact, of complementary nature and in some of their aspects they need a precise demarcation implying a balance, an estimate of the values they seek to protect and that, in each case, it will be essential to determine them. In light of the above, we should point out that that although we are witnessing complementary institutes that are intrinsically related, they are different and they admit a diversified approach, although not an independent and autonomous one.

The relevance of the issue has been reflected in the acceptance that the domestic legislation of States have already shown. We should point out here that in some countries, the *Right of Protection of Personal Data* has been included in the norm with the highest formal efficiency, that

is, the Constitution, either in an express format or derived from the evolutionary interpretation of same and, in other cases, this right has been established by means of legislative norms. In turn, we should highlight that most of the Latin American countries the enacting of legislation on the Right of *Protection of Personal Data* has taken place during the last decade.

In the area of the American International Law it should be said that the General Assembly of the Organization of American States (OAS), through resolution AG/RES. 2811 (XLIII-O/13), commissioned the Inter-American Juridical Committee (CJI) to draft proposals to the Commission of Juridical and Political Affairs on the different approaches for the regulation of the protection of personal data, including a Model Draft-Law on the Protection of Personal Data, taking into consideration the international standard on the issue.

The Inter-American Juridical Committee (CJI) through Resolution (CJI/RES. 212 (LXXXVI-O/15) dated March 27, 2015, established to

*“Approve the report of the LAJC on “Privacy and the protection of personal data”, document CJI/doc. 474/15 rev.2, attached to this Resolution. 3. To communicate this resolution to the Permanent council of the Organization of American States. 4. To conclude the work of the Inter-American Juridical Committee on this topic”.*

The first aspect to be considered refers that the Inter-American Juridical Committee was inclined – taking into consideration the nature of the topic under study and the impact caused on it by the new information technologies - by a *Declaration of Principles on Privacy and Protection of Personal Data in the Americas*. As mentioned in the report above:

*The purpose of these principles is to urge the Member States of the organization to adopt measures to protect the privacy, reputation and the dignity of people. Its aim is to be the basis so that Member States may consider the possibility of formulating and adopting legislation to protect the personal information and privacy interests of individuals throughout our hemisphere.*

In turn, the

*aim of the OAS Principles on privacy and protection of personal data is to establish a framework for safeguarding the rights of people to the protection of their personal data and to the self-determination regarding information. Principles are based in well-known international norms. They intend to protect people from the unlawful or unnecessary compilation, use, retention and dissemination of personal data... The norms on privacy must allow consumers and companies to benefit from the use of personal data in a safe and protected manner. They must be balanced and technologically neutral and allow the free flow of data within each country and through the national borders in such a manner to promote technological innovation and economic development and the growth of trade. In addition to 1) protection effectively the personal privacy; 2) guaranteeing the free flow of data in order to promote economic advances; and in order to achieve these states must 3) enforce a clear policy of transparency with due respect to their protections and procedures.*

The concept of privacy, as said before, is *“clearly established in Article V of the American Declaration on the Rights and Duties of Man (1948) and in articles 11 and 13 of the American Convention on Human Rights (“San José Pact”) (1969) (Appendix A). The Inter-American court of Human rights has confirmed the right to privacy. In addition, the Constitution and the fundamental legislation of many OAS Member States guarantee the respect and the protection of privacy, of personal dignity and of family honor, the inviolability of the home and of private communications, personal data and related concepts... furthermore, the fundamental principles of freedom of expression and association and the free flow of information are acknowledged by the main human rights systems worldwide, among them the OAS system”.*

In addition, the area of enforcement comprises both public and private organizations in relation to the data that are generated, compiled or managed by them.

In relation to the *Principles on the Protection of Personal Data*, they are achieved as follows:

**Legitimate and Fair Purposes:** personal data must be compiled just for legitimate purposes and through fair and legal means;

**Clarity and Consent:** The purposes for which personal data are compiled must be specific when compiling them. As a general rule, personal data should only be compiled with the consent of the person they refer to;

**Pertinence and Necessity:** Data must be veridical, pertinent and necessary for the purposes expressed in their compilation;

**Restricted Use and Retention:** personal data must be kept and used only by means of legitimate uses that are compatible with the purpose or purposes for which they were compiled. They should never be retained beyond the time they are needed and for the purpose or purposes of compilation, pursuant to the corresponding domestic legislation;

**Duty of Confidentiality:** Personal data must not be disclosed or made available to third party, or use them for other purposes that are not those for which they were compiled, except with the awareness or consent of the person in question or according to the allowance provided by law;

**Protection and Safety:** Personal data must be protected through reasonable and adequate safeguards against unauthorized access, loss, destruction, use, modification or disclosure;

**Data Veracity:** personal data must be kept truthful and updated to the maximum extent as necessary for the purposes of their use;

**Access and Correction:** Reasonable methodologies must be established to allow those people whose personal data have been compiled to request data controls to modify, correct or erase them. In case of restriction to data access or correction, the reasons for that must be given in conformity with the domestic legislation;

**Sensitive Personal Data:** Some types of personal data, taking into consideration its sensitive nature in specific contexts, are especially susceptible to cause considerable damage to people, when and if they are misused. Data controllers should adopt privacy and safety measures concomitant to the sensitivity of data and their capacity to cause damage to the individuals they refer to;

**Liability:** Data controllers shall use and implement the measures leading to the compliance of these principles.

**Cross bordering Flow of Data and Liability:** Member States shall mutually cooperate for the implementation of mechanisms and procedures guaranteeing that data controllers working in more than one jurisdiction may be effectively made liable for any in compliance of these principles.

**Publicity of Exceptions:** when the national authorities establish exceptions to these principles for reasons related to national sovereignty, domestic or external security, the fight against crime, the compliance of norms or other public order prerogatives, they must inform the public about those exceptions.

The resolution of the General Assembly of June 5, 2018–AG/RES. 2926 (XLVIII-O/18)-International Law, item “*i. Observations and recommendations to the CJI annual report*” establishes a mandate for the IAJC to “*start the updating work on the Principles on the Protection of Personal Data, taking into consideration their evolution*”.

It should be highlighted that, in turn, the Inter-American Juridical Committee (CJI/RES. 212 (LXXXVI-O/15) in the Resolution approving the report containing the *OAS Principles on Privacy and of Personal Data Protection*. Item 4 of the Report reads as follows: “*To consider the work of the Inter-American Juridical Committee on this topic completed*”. Notwithstanding this, the evolution of the question claimed for the inclusion of the theme in the Committee’s agenda during the 92<sup>nd</sup> Regular Session which took place from February 26 to March 2, 2018 in Mexico, DF. This decision was supported, among other aspects, by the Standards on the protection of Personal Data for Ibero-American States, drafted by the Ibero-American network of Data Protection (RIPD), which is the new regulatory document of the European Union on the issue, as well as some other notorious facts directly related to this question.

As in this case it is the first movement towards the updating of those principles, I take the liberty of saying that the work drafted by the CJI on the *OAS Principles on Privacy and of Personal Data Protection* are still in full force. However, certain aspects should be studied in greater detail, such as, among others: a) the so-called **Anonymization**, which is understood, in a first approximation, as “*the enforcement of measures of any kind seeking the prevention of the identification or re-identification of a natural person without displaying disproportionate efforts*”;

- b) the relationship and effects of the Principles with the Domestic Rights;
- c) the study of personal data of children (girls and boys) and adolescents;
- d) the right of *portability* of personal data; and
- e) the broadening of the legitimation of natural person related to dead person or to the people the latter have appointed, according to the terms to exercise the right of access, modification, cancellation, opposition and portability.

This document is a guide drafted in order to start analyzing the mandate established by the General Assembly on this topic.

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**CJI/doc.597/19**

### **THIRD REPORT**

#### **UPDATE ON THE PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION**

(presented by Dr. Carlos Mata Prates)

In the *Second Report on the Updating of the Principles on Privacy and Personal Data Protection*, delivered on February 21, 2019, I provided a review on the work of the Inter-American Juridical Committee (CJI), pursuant to the resolution of the General Assembly of the Organization of American States AG/RES. 2811 (XLIII-O/13), which culminated in the Committee resolution CJI/RES. 212 (LXXXVI-O/15) dated March 27, 2015 through which the entity decided to “*Approve the report of the Inter-American Juridical Committee on Privacy and Personal Data Protection, document CJI/doc. 474/15 rev.2, attached to this resolution. 3. To convey this resolution to the Permanent Council of the Organization of American States. 4. To conclude the work of the Inter-American Juridical Committee on this topic*”.

It is convenient to note that the Second Report also included a description of the philosophy and of the technique used and developed by the Committee for the drafting of the *Declaration of Principles on Privacy and Personal Data Protection*.

Subsequently, the resolution of the General Assembly of June 5, 2018 - AG/RES. 2926 (XLVIII-O/18) - International Law, item “*i. Remarks and recommendations to the CJI Annual Report*” established a mandate for the CJI to “*Start updating the Principles on the Protection of Personal Data, taking into consideration the progress of same*”.

We should mention here that, as mentioned in the Second Report on the topic, the Committee, taking into account – among other aspects – the Standards for the Protection of Personal Data for the Ibero-American States drafted by the Ibero-American Network of Protection of Personal Data (RIPD) and the new norms of the European Union on the issue, decided, during its 92<sup>nd</sup> Regular Session – which was held from February 26 to March 2, 2018 in Mexico City – to include this topic on its agenda again.

The concept of privacy, as mentioned before, is

“*clearly established in Article V of the American Declaration of Rights and Duties of Man (1948) and on articles 11 and 13 of the American Convention on Human Rights (“San José Pact”) (1969) (Appendix A). The Inter-American Court of Human Rights has*

*confirmed the right to privacy. In addition, the constitutions and the fundamental laws of many OAS Member States guarantee the respect and the protection of privacy, personal dignity and family honor, the inviolability of the home and of private communications, personal data and related concepts ... In addition, the fundamental principles of freedom of expression and of association and the free flow of information, are enshrined in the main systems of human rights worldwide, among them in the OAS system”.*

In turn, the area of enforcement comprises also the public and private organizations as regards the data they themselves create, comply or manage.

As regards the *Principles on Privacy and Personal Data Protection*, they are specified as follows:

**Lawful and Fair Purposes:** Personal data must be compiled solely for lawful purposes and through fair and lawful means;

**Clarity and Consent:** The aims for which personal data are compiled must be specified at the time of compiling them. As a general rule, personal data must only be compiled with the consent of the person they refer to;

**Pertinence and Necessity:** Data must be veridical, pertinent and necessary for the purposes mentioned in the compilation;

**Restricted Use and Withholding of Data:** Personal data must be maintained and used solely in a lawful manner compatible with the aim or aims for which they were compiled. They should not be withheld longer than necessary for their purpose or purposes and in conformity with the related domestic legislation;

**Duty of Confidentiality:** Personal data must not be disclosed, or made available to third parties nor be used for purposes other than those for which they were secured, except with the knowledge or consent of the person in question, or in case of legal authorization;

**Protection and Security:** Personal data must be protected by means of reasonable and adequate safeguards against unauthorized access, loss, destruction, use, modification or disclosure;

**Data Accuracy:** Personal data must be accurate and updated as required for the purposes of their use;

**Access and Correction:** Reasonable methods must be established for allowing persons whose personal data has been compiled to request the controller thereof to modify, correct or delete them. Should there be any constraint on such access or correction, justification must be given for the reasons behind any of such constraints, in compliance with national legislation.

**Sensitive Personal Data:** In view of their sensitivity in certain contexts, some types of personal data are particularly likely to cause considerable harm to people if misused. Data controllers must take steps that ensure the privacy and security thereof, aligned with the sensitivity of the data and their capacity to harm individuals addressed by this information;

**Responsibility:** Data controllers shall adopt and implement the corresponding steps as red to comply with these principles.

**Transborder Data Flow and Responsibility:** The Member States shall cooperate among themselves in order to create mechanisms and procedures ensuring the data controllers operating in more than one jurisdiction may be effectively held liable for any failure to comply with these principles.

**Disclosure of Exceptions:** When national authorities establish exceptions to these principles for reasons related to national sovereignty, the processing of personal data concerning children and adolescents

or external security, fighting crime, compliance with regulations or other public prerogatives, they must publicly disclose such exceptions.

As mentioned in the Second Report on Updating these Principles, I beg to reiterate that the work of the CJI on the *OAS Principles on Privacy and Personal Data Protection* remains fully

effective, although requiring efforts in greater depth, and if the Committee shares the Report, the remarks should include the following points:

- a) so-called **Anonymization**, taken as being roughly “*the application of steps of any type intended to prevent the identification or reidentification of a natural person without disproportionate efforts*”;
- b) the links with and effects of the Principles with Internal Rights, on the understanding that the Principles establish a threshold, which does not prevent Internal Rights from establishing systems with stronger guarantees for individuals than those established in the former;
- c) the treatment of personal data when related to children and adolescents;
- d) the right to portability for personal data;
- e) expansion of the legitimation of natural persons related to deceased personas or designated thereby in the established terms, for exercising the right of access, correction, cancelation, opposition, and portability;
- f) adopting a broader concept, the so-called *Right to be Forgotten* may be included;
- g) the inclusion of pro-active responsibility as a principle; and
- h) the establishment of *security as a substantive principle*.

Finally, should the views set forth in this Report be shared, steps must be taken to include the principles mentioned in the text prepared by the Committee, with the necessary structural harmonization and development, thus ensuring compliance with the mandate assigned by the General Assembly.

I am available to the Committee for any clarification or expansion of this rapportership.

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## 5. Access to Public Information

At the 92<sup>nd</sup> Regular Session of the Inter-American Juridical Committee (Mexico City, 26 February – March 2, 2018), Dr. Dante Negro called the attention of the members to the theme of access to public information, reminding them that the General Assembly has granted a mandate to revise the Inter-American Model Law on Access to Public Information in the light of the new themes to be incorporated into the text of same, suggesting that the CJI appoint a member to participate in the process of prior consultations.

He informed those present that the Department of International Law is carrying out consultations with prominent social actors to prepare a proposal for the CJI to analyze when the occasion presents itself.

Dr. Luis García-Corrochano suggested that a revision be made of the themes studied by the Rapporteurs of other institutions, such as the *Institut de Droit International*, in order to identify possible input material for the work of the CJI.

The Chair concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Luis García-Corrochano offered to work on the issue for the time being, subject to the discussion being re-opened in August in the light of the mandates granted by the General Assembly.

In June 2018, the General Assembly of the OAS requested the Department of International Law “to continue working on identifying thematic areas in which it considers it necessary to update or broaden the Model Inter-American Law on Access to Public Information, duly taking into consideration also the latest regional and global developments in the area of protection of personal data and to forward its findings to the Inter-American Juridical Committee”, resolution AG/RES. 2927 (XLVIII-O/18).

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 6 – 16 August, 2018), the topic was not discussed.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019), Dr. Dante Negro, Director of the Department of International Law (DIL), referred to the initiatives undertaken by the Department in compliance with the mandate of the OAS General Assembly requesting the DIL to identify thematic areas in order to “update or broaden the Model Inter-American Law on Access to Public Information”, approved in 2010 (which has had significant impacts on the region), and to forward its findings to the CJI for further consideration and development (paragraph ix of resolution AG/RES. 2905 (XLVII-O/17), “Strengthening of Democracy”).

The consultation process of the Department of International Law was conducted through a questionnaire based on Chapter II of the Model Inter-American Law that received responses from “12 public entities in 11 member countries, in addition to 10 civil society organizations, experts and other entities, including the Inter-American Commission of Women (CIM).”

The activity served to identify six topics of major interest: proactive transparency, rules governing exceptions, document (file) management, public information within the judiciary, persons required to provide information (political parties and trade unions), and oversight bodies (*órganos garantes*).

Once those topics had been identified, the Department began consultations among experts through four workshops: one focused on civil society organizations and the other three on national authorities. Replies were received from specialists, members of oversight bodies, and the largest NGO network in the region: the Regional Alliance for Free Expression and Information. These workshops received financial backing from the “Eurosocial” program and the RTA (“international exchange

network for bodies and/or public entities that have supervisory functions in transparency and the right of access to public information”).

The workshops were instrumental in harmonizing and agreeing on texts that have a common denominator. So far, the following topics have been addressed: i. definitions, scope, right of access and interpretation; ii. pro-active transparency; iii. system of exceptions; and, iv. document management.

The new vision regarding the publication of information, attaching more importance to disclosure than to publication schedules, was included in the proposed Model Law, along with mainstreaming of the gender perspective. Regarding exceptions, the 2010 Model Law catalog has been trimmed and divided into two parts: restricted information (i.e., information temporarily excluded from disclosure to the public in view of a clear, probable and specific risk of harm to public interests) and confidential information (to which public access is banned under the Constitution or by law due to the existence of a legally protected personal interest). A specific chapter on national security has also been included. Finally, two topics not included in the proposal presented on this occasion are expected to be addressed: oversight bodies and access to information in the judiciary.

Dr. Luis García-Corrochano thanked Dr. Negro for the work submitted, and agreed to serve as the Rapporteur for this topic, in a context in which access to information is emerging as a core and necessary component of the rule of law. He highlighted some of the limitations of transparency particularly in respect of the autonomy and independence needed in the executive and judicial branches of government. He also noted the existence of some cross-cutting issues in activities that have a social impact, including oversight of political parties.

The Chair mentioned the importance of the subject and, based on her own experience, illustrated some of the difficulties facing the Judiciary, especially regarding panel judges whose minutes of discussions cannot be disclosed because that would undermine their own autonomy. She also mentioned economic issues involving the part played by States, especially the equilibria required in governmental contracts, which, when disputed, force the authorities to disclose inside information that would not be requested in a private context. She expressed her fears regarding the use of evidence prior to lawsuits being filed that might jeopardize the action of the State in litigation in which it is a party and raise issues involving freedom of the press and access to information. She therefore invited the rapporteur to address the issue of reservations in both the judicial and contractual spheres.

Dr. Carlos Mata suggested that the Rapporteur bear in mind the current status of the subject in the Hemisphere, as most countries have enacted legislation establishing procedures for access to information and have established oversight bodies to ensure “sound practices”. The Committee should therefore take such case law and regulatory developments into account.

Dr. Milenko Bertrand asked the Rapporteur to address the topic of conflicts arising in connection with the protection of personal data relating to the privacy of public servants, and to attempt to distinguish between public and private activities. In addition, he mentioned the entrepreneurial State in countries in which a number of services (health care, drinking water supplies, etc.) have been privatized, and in which a balance needs to be struck between the well-being of the population and private competition.

Dr. George Galindo referred to the relationship between the inviolability of diplomatic records and access to information, especially in respect of a clash between national law and existing instruments, and asked Dr. Negro whether that matter had been addressed. In this regard, Dr. Negro explained that, as this topic had not been dealt with specifically, it would be included in the section on confidentiality. In this context, Dr. Milenko Bertrand mentioned the argument of people seeking information on the negotiations of free trade agreements, which mentions the fact that once those agreements are ratified, information concerning them should be disclosed for the sake of “democratic legitimacy”: a demand that could be detrimental to diplomacy and international law. Dr. Carlos Mata agreed with other members of the Committee that one of the major challenges for the rapporteur would

be how to deal with matters requiring discretion, such as diplomatic relations or in-house discussions of collegiate bodies in the upper echelons of the Judiciary.

Dr. Dante Negro pointed out that all the concerns mentioned were already contemplated in the proposal submitted by the Department of International Law (conduct of international relations, due process, deliberative processes in collegiate bodies, and so on.)

The Rapporteur for this topic thanked everyone for their interventions, noting that he also shared the legitimate concerns that had been mentioned. Reservation is part and parcel of the management of international affairs. Therefore, a balance must be struck between the public interest and the need for reservation. It is a sensitive issue and therefore the Committee's proposal must take that balance into account. Access is a right of citizens but cannot limit the capacity to act of the organs of state officials.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019) the rapporteur for the topic, Dr. Luis García Corrochano, referred to the advanced study prepared by the Department of International Law, entitled "Update or expansion of the Inter-American model law on access to public information," document DDI/doc.3/19 rev.1, noting in particular the following elements:

- The development of active transparency;
- The composition of the guarantor body for access to information; and
- Divergences regarding the administration of public funds or donations, in light of the necessary transparency in the use of resources.

Dr. José Moreno thanked the Department of International Law for its work and spoke in favor of control in relation to the administration of public funds for international cooperation.

Dr. Milenko Bertrand suggested including specific sanctions for the responsible party or verifying whether what is already in place is sufficient. In relation to the concept "document", its meaning should be revised to include, for example, the recordings of public hearings.

Dr. Mariana Salazar expressed appreciation for the presentation work and the inclusive process that has allowed a large variety of people to participate. She suggested that the issue of exceptions with respect to information that should be reserved be left to States. She inquired about the issue of the time limit for reservations, in the light of some practices where time limits are often reset.

Dr. Espeche-Gill noted the level and subtlety of the discussions within the Committee.

The Chair of the Committee expressed her opinion on oversight of authorities through the review of public documentation and the confidentiality of private data, which implies the protection of rights of higher rank. She also urged the rapporteur to take into account the role of States with respect to particular issues that require their protection.

The Rapporteur appreciated the issue of State sanction and supported the proposal to reflect and clarify the concept of "document." With regard to extendable deadlines, he suggested seeking reasonableness and trying to put a lock on extensions. He also urged that provision be made for the protection of certain information that might constitute an undue advantage. He concluded by thanking the Department of International Law for the document that had been presented.

Dr. Dante Negro explained that the mandate of the CJI was to expand the 2010 model law and therefore there was time to address existing concerns. That model law already included some of the above-mentioned definitions, such as the definition of documents and the reference to criminal and administrative penalties. Accordingly, the text that the CJI would adopt should be read as a supplement. The square brackets around the dates indicated a reference for the States concerning the deadlines according to the existing rules.

The Chair requested members to submit their proposals to the rapporteur by December 15 that year.

## 6. Electronic Warehouse Receipts for Agricultural Products

In June 2018, the General Assembly of the OAS requested the Committee to update its 2016 report on principles for electronic warehouse receipts for agricultural products “in light of the new developments...in connection with access to credit in the agricultural sector”, resolution AG/RES. 2926 (XLVIII-O/18).

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Jeannette Tramhel provided some contextual background on the issue. She reviewed how the topic originated in the Committee out of concerns over the lack of credit in the agricultural sector, the work carried out from 2012-2016 under the direction of the Rapporteur and former member, Dr. David Stewart and the legal challenges encountered during the course of the project. She noted the need not only for a potentially productive bio-physical eco-system, but also the need for a supportive financial eco-system that regulates and enables the business of agriculture. Dr. Tramhel provided a brief overview of the functions and operation of warehouse receipts financing and its advantages, particularly for small-scale producers, which include improved access to credit and reduced price volatility. She also noted the advantages of an electronic system over one that is paper-based. It would appear that few OAS Member States have updated legislation on warehouse receipts; Mexico is currently in the process of developing new legislation to encompass electronic receipts. Among the legal challenges that had been faced previously, two are key: to develop “medium-neutral” language that would accommodate both paper-based and electronic format, and to identify principles that would bridge differences in approach under the civil and common law systems. Among the new developments since 2016, Dr. Jeannette Tramhel noted that the UNCITRAL secretariat has been instructed to begin its technical study of warehouse receipts and that the topic is most likely to be under possible consideration by UNCITRAL Member States at the next annual commission session in 2019. In conclusion, Dr. Tramhel suggested two possible approaches in order to fulfill the mandate from the OAS General Assembly. One approach would be further technical development of the 2016 Draft Principles and in that regard she explained that the secretariat had been in communication with the National Law Center for Inter-American Free trade, which had agreed to provide technical support. Another approach would be to consider warehouse receipts financing as one component within the larger scope of the financial eco-system and the need to strengthen overall support to this important sector.

Dr. José Moreno thanked Dr. Tramhel for her presentation and the important support to the Committee. He referred to the work done by the Committee in secured transactions and underlined the support that can be obtained by institutions such as the National Law Center. He considered it worthy to join strength with other specialized institutions in the matter, such as UNCITRAL, UNIDROIT, FAO, etc. In regard to the options presented by Dr. Tramhel, his preference was to follow the second option.

The Chair considered that first it was necessary to appoint a Rapporteur, who in turn, could present options for consideration by the Committee. He said that the mandate of the General Assembly was very clear – to update the work the Committee had done in 2016.

Dr. Duncan Hollis agreed with the President and requested the Secretariat to explain the motivation by Member States behind such a mandate.

Dr. Dante Negro explained that the motivation of the political organs of the OAS was in part in response to the various presentations made by former member Dr. David Stewart, who was able to identify a list of challenges or serious problems that had not been resolved by the work done by the Committee. Furthermore, as stated by Dr. Tramhel there have been developments and it would be a good opportunity to take into account the options provided by Dr. Tramhel.

Dr. Carlos Mata expressed his congratulations to Dr. Tramhel for her fantastic report. He noted that in order to comply with the mandate received by the Committee, it would be necessary to take into account new developments since 2016 and to answer this request within the limited time allotted.

Dr. Joel Hernández suggested that the challenge imposed by this topic may prompt reflection on the working methods of the Committee. He explained that during his tenure, he had been able to undertake two topics: one by mandate of the General Assembly (cultural heritage) that required completion within a specific period of time and another at his own initiative (immunity of international organizations) that he was able to follow at his own rhythm. He suggested requesting Dr. Tramhel to prepare a draft paper for comment by the Committee so that the work could be completed on time for submission to the General Assembly.

The Chair asked the Department of International Law about the feasibility of such tasks to support the work of the Committee and Dr. Negro replied that it would be possible. Considering this would be in response to a mandate imposed by the General Assembly, a document could be presented by March 2019.

Dr. Ruth Stella Correa Palacio thought this could be achieved on time in light of the knowledge of Dr. Tramhel. She also suggested a joint Rapporteurship and said she was pleased to see the continuation of the work by Dr. David Stewart.

The Chair considered some ethical issues were at stake because the mandate was given to the Committee; the Department of International Law is called upon to provide assistance, but not to do the work. He felt it necessary to have a Rapporteur responsible who will take on the topic with the technical assistance of the Department.

Dr. Carlos Mata clarified his position that the Committee should always have a Rapporteur who can work with the support of the Department.

Dr. Duncan Hollis agreed on the need for some ownership on the part of the Committee. In this regard, he proposed a working group composed of 5-6 members that would be supported by the technical secretariat.

Dr. Baena Soares expressed his support of the Chair's position and the need for a Rapporteur to be appointed from among the members of the Committee.

Dr. Joel Hernández clarified that he did not intend to impose on the secretariat work that belongs to the Committee. Considering the technical aspect of the issue, he supported the proposal of Dr. Hollis in creating a working group. In regard to his proposed review of the methodology of the work process of the Committee, he considered it important to reflect on deadlines and creation of working groups.

Dr. José Moreno said it was clear that the work ought to be done by the Committee and queried whether there was any precedent regarding the composition of a working group.

The Chair was firm on the need for a Rapporteur responsible for the theme and expressed his disagreement with joint Rapporteurship. Although the topic is very complex, given that members are all lawyers, he was certain the work could be accomplished with the support of the Department of International Law. In concluding the discussions, he invited Committee members to consider the matter and consult with the Department as necessary to undertake ownership of the topic.

At the end of the debate, the Committee designating Dr. José Antonio Moreno Rodríguez as it Rapporteur, following up the mandate of the General Assembly.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the Rapporteur for this topic, Dr. José Moreno, presented his proposal to move ahead with this topic, which is supported by the Department of International Law, and particularly Jeannette Tramhel. Support is also expected from the National Law Center in the USA.

Although addressed by a mandate from the General Assembly, there is no firm deadline, which is why he advised evaluating the definition of this topic on the basis of developments in other fora. On this aspect, he explained that its inclusion on the UNCITRAL and UNIDROIT agenda will be assessed in the course of this year.

Dr. Rodrigo Galindo supported the proposal to seek input from other institutions, as there are no hard timelines.

The Chair asked the Rapporteur to keep the Committee informed on these developments.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019) the Rapporteur for the topic, Dr. José Moreno explained the Committee's interest in continuing the previous work done within the OAS, taking into account initiatives in other forums. Noting the decision of UNCITRAL not to move forward on the issue for the time being, he asked the plenary if it was pertinent to keep it on the Committee's agenda.

Dr. Dante Negro announced the interest of the National Law Center in the United States to continue advancing the topic. In that connection, he proposed inviting a representative of that think tank to the next session of the Committee in order to move this highly technical subject forward. He therefore suggested that the issue be kept on the agenda until the visit of the experts.

Dr. Duncan Hollis expressed his support for keeping the topic on the agenda, as it would allow them to know what the universal agency does and learn the proposals of the National Law Center.

At the end of the discussion of the topic, the Chair asked Dr. Moreno to continue to report on the subject and invited anyone interested to participate as a co-rapporteur. She also asked the Secretariat to issue a formal invitation to the National Law Center to make a presentation to the Committee.

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## 7 Cyber Security

### Documents

- CJI/doc.578/19 International law and state cyber operations: improving transparency  
(presented by doctor Duncan B. Hollis)
- CJI/doc.594/19 International law and state cyber operations: improving transparency (third report)  
(presented by doctor Duncan B. Hollis)

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During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Duncan Hollis presented a report under the title *International Law and State Cyber Operations: Improving Transparency*, document CJI/doc.570/18, which might serve as a proposal for a new theme to be considered by the Committee. He explained that the global impact of cyber-attacks that affect many countries has now become common and may have economic consequences, in the form of considerable amounts of money, the theft of personal information and treats to infrastructure and national security. Cyber operations may adopt defense themes, but also an offensive viewpoint. In this regard it would be relevant to know the view of international law. He referred to the work of a group of UN experts that have met at least twice but were unable to agree in 2017 on the way in which international law should be applied. Moreover, mentioned efforts deployed outside UN grounds, that is, independent experts funded by NATO who have produced two manuals so far (The Tallin Manuals), which have also failed to agree on the norms to be applied in the case of violation of sovereignty in the area of all cybercrimes. They have pointed out differences in terms of interpretation, and studied the different consequences of the acts perpetrated. Finally, there seems to be a problem in relation to the difficulty in establishing liabilities for acts perpetrated, especially in view of the lack of understanding at a collective level. This is a topic that concerns all parties, even those States that cannot determine the norm that has been infringed. In this regard, Dr. Duncan Hollis presented a preliminary proposal in terms of asking authorization from the plenary to send a questionnaire to States so as to know their positions regarding how international law applies in cyberspace operations. The purpose is not codification itself, but instead to provide an opportunity for States to present their opinions.

Dr. Espeche-Gil thanked Dr. Hollis for his brilliant description of a severe problem. In order to facilitate the understanding of the question, he proposed using the decision of the Committee in a report approved in the year 1965 on differences between “intervention and collective action”. He then proposed distributing the document as an additional element in order to define the phenomenon of modern cyber-attacks, especially in the case of armed attacks. He concluded saying that the topic deserves the attention of the Committee.

Dr. Carlos Mata Prates congratulated Dr. Duncan Hollis on his initiative to bring this new theme for discussion by the Committee. The appearance of a new phenomenon does not necessarily create a new right, and for that reasons the topic must be analyzed from the viewpoint of international law, in order to include it within a certain context, so the Committee must be part of the solution. Might a cyber-operation be considered as a use of force? The attack of a cyber-operation could cause spectacular damage. This is a topic on which the Committee can provide a great contribution. He endorsed the proposal of sending a questionnaire to Member States, and also to legal advisors, but paying special attention to the questions posed.

Dr. Alix Richard asked Dr. Duncan Hollis if there was any responsibility on the part of the State in relation to the conduct of nationals involved in cyber-crimes

Dr. Baena Soares expressed his agreement with the manner in which the topic was to be addressed, that is, by means of a questionnaire. In view of how the issue impacts daily life, he proposed

considering the impacts of the topic on persons, and suggested working on a short term, in view of the emergency of the theme.

Dr. José Moreno congratulated Dr. Duncan Hollis and asked him about the reasons for the failure of the initiatives at the UN, and invited him to include in his report the intention of his work.

In turn, the Chair noted that the current situation calls for drafting a questionnaire, and urged endorsing treating the questionnaire taken into account the suggestions of all members. In agreement with Dr. Mata's opinion, she recommended the Rapporteur to be careful with the questions to be included, because of the dissuasive effects that highly complex questions may contain.

Dr. Duncan Hollis thanked the plenary for the enthusiasm shown regarding the topic. He said that matters relating to non-intervention are essential to the issue. In the case of an armed attack, international law already provides a response regarding how to address this. In relation to the suggestions by Dr. Mata to proceed with care, he recognized the importance of knowing the current rules about this behavior. He added that the purpose is not to seek proposing new rules, but rather to make the existing rules transparent. In relation to the questions, he urged separating the topic of the use of traditional force from cyber-attacks, and discovering when a cyberattack could constitute a use of force. In the topic of the attribution that Dr. Richard had highlighted, he referred to the difficulty to identify the source of a cyber operation, but that for the time being he would not speak about it. He is also aware that there is some urgency due to the type of attack that is carried out lately if a hospital is attacked, such an attack would also be against people, and also against the stability of a structure that defends people's lives. In response to Dr. José Moreno's remarks, he said that the UN experts meetings were confidential, but public reports show that some States considered that certain norms of international law would not apply to cyber-attacks such as international humanitarian law (China, Cuba, etc.). Dr. Duncan Hollis proposed maintaining a sophisticated level of questions, urging States to respond as much they can, with the support of the Department of International Law.

The Committee decided to add this topic to its agenda and elected Dr. Duncan Hollis as its Rapporteur.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the Rapporteur for this topic, Dr. Duncan Hollis, presented his new report on “International Law and State Cyber Operations: Improving Transparency”, document CJI/doc.578/19, through a video conference since he could not travel to meetings of the Committee. On that occasion he provided information on new developments in the areas addressed in his first report, which had led him to ascertain the “scant international legal responsibility for the conduct of States in cyberspace.” He noted that discussions reached an impasse in the United Nations Group of Experts in 2017, stalled over the idea that international law applies to cyber-operations. Even when States accept the application of international law, there would be disagreements linked to issues regarding the sovereignty of States or the obligation of non-intervention: issues regarding which handbooks have been written by the ICRC and NATO. He referred, in that context, to a lack of transparency regarding the opinions of States on the requirements of international law.

He then explained the purpose of his work as a Rapporteur, striving to ascertain the opinions of OAS member states on the most important aspects of international law related to cyberspace. To that end, the Permanent Missions to the OAS would be asked to fill in a questionnaire. Based on the information provided, he would then publish the opinions of the States.

He referred to recent developments within regional organizations, such as the Association of Southeast Asian Nations (ASEAN) and the European Union, which support the idea that international law applies to cyberspace. That opinion had also been endorsed by the United Nations General Assembly, which gave its support to the conclusion reached by the Group of Government Experts. In that sense, the work of the Committee provides an opportunity for the OAS to let its voice be heard internationally, as not all its Member States are represented in that Group of Experts.

Finally, he presented his proposed questionnaire, which would be sent to the States with the following ten questions:

- Question 1 responds to a suggestion made by one of the legal advisers of the Ministry of Foreign Affairs, who asked the Committee to request and compile existing statements on international law and cyberspace.
- Question 2 addresses existential issues: asking the States to confirm or deny whether certain current norms of international law do or do not apply to cyberspace issues.
- Question 3 refers to the use of force (*jus ad bellum*), with particular attention to the criteria used by a State to determine whether a cybernetic operation is a use of force or an armed attack.
- Questions 4 and 5 explore what States think about the adjudication of international legal responsibility for the behavior of non-state actors.
- Questions 6 and 7 address international humanitarian law and two of the most crucial aspects, namely, the definition of an "attack" in the cybernetic context and the question of whether cybernetic operations targeting only data would constitute an attack (Note: these questions were substantively revised in the light of suggestions and comments made by the International Committee of the Red Cross).
- Question 8 asks for the opinions of States on whether sovereignty comprises its own distinct rule for a State's behavior in cyberspace or whether it is rather a substantial principle underpinning the content of other norms.
- Question 9 conducts a similar investigation with respect to due diligence.
- Finally, question 10 invites States to identify additional areas of international law on which the Committee should focus with a view to enhancing transparency on cyber issues.

Dr. Mariana Salazar stressed the importance of the question on the responsibility of non-state actors and its implications in the field of protection.

Dr. George Galindo asked whether the issue of extraterritorial application of the law would be considered, in view of the amount of space devoted to the applicability of international law.

The Chair thanked the rapporteur and invited him to include the aspects relating to extraterritorial application of the law and the issue of State responsibility.

The Rapporteur thanked the Committee members and reaffirmed the importance of ascertaining the opinion of States on the aforementioned issues of responsibility, extraterritorial status, and due diligence, via their respective responses.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the Rapporteur for the topic, Dr. Duncan B. Hollis, presented his third report on the subject, document CJI/doc.594/19. Dr Hollis clarified that in addition to his academic activities he was then working as a consultant for the Microsoft.

He noted the lack of agreement on the application of international law in the field and the reluctance of certain States to explain their position in that regard. Only a small group of States had issued general statements, and in some cases inferences could be drawn from State practice or *opinio juris*. He noted the complexity and variety of elements that the issues involved, such as measures relating to the use of force and self-defense, issues of international humanitarian law, matters relating to sovereignty, and due diligence.

He announced that a meeting of the UN Working Group would be held in Washington, D.C., with the collaboration of the OAS, in which four OAS Member States that belonged to the UN working group would participate: Brazil, United States, Mexico, and Uruguay. With regard to the questionnaire sent to States, he explained that he had received replies from seven countries: Bolivia, Brazil, Costa

Rica, Ecuador, Guatemala, Peru, and Guyana. He noted that some stressed the importance of legal training to help better understand relevant issues. As follow-up, the Rapporteur suggested sending the questionnaire again to those States that had not responded to it before preparing a new report by March the following year, at which point he hoped to be able to present States' perceptions of the application of international law to the cyber environment and ICTs (information and communication technologies).

Dr. George Galindo welcomed the perspective of the rapporteur which aimed to determine state practice.

Dr. Mariana Salazar appreciated the contribution and the intention of obtaining more answers. She asked the rapporteur whether the OAS could contribute on the areas not covered by the Budapest Convention.

Dr. Carlos Mata stressed the novelty of the topic and urged clarification of what was expected of the study from the point of view of international law in order for it to be a practical contribution for States.

The Chair reiterated the rapporteur's request to make efforts in their countries to encourage more responses.

The Rapporteur reiterated his interest in revealing the perceptions of States, without trying to impose positions. He also clarified that the aim of the exercise was to go beyond the work of the UN, which was limited to the issues of peace and security, whereas his would include issues of human rights and cybersecurity, among others.

In response to Dr. Mariana Salazar, the rapporteur explained that the first Tallinn Manual covered a broad variety of elements but did not elaborate much on the human rights aspect. He noted that the terrorist attacks in New Zealand and the United States had brought up issues of freedom of expression. The essence of the rapporteur's proposal was to present the position of States in the field of international law.

The following documents were presented by the Rapporteur for the topic, Dr. Duncan B. Hollis, in February and August 2019:

## CJI/doc. 578/19

**INTERNATIONAL LAW AND STATE CYBER OPERATIONS:  
IMPROVING TRANSPARENCY**

(presented by Dr. Duncan B. Hollis)

1. The topic of international law and state cyber operations was raised for the first time during the Committee's 93<sup>rd</sup> Regular Session. The author was invited to present an initial report on the questions of international law's application to cyberspace and ideas for how the Committee might engage with the subject-matter.
2. My initial report surveyed the poor state of global cybersecurity and the financial, humanitarian, and national security costs of cyber-threats, with particular attention to those targeting critical infrastructure and electoral processes. It explored the increasing efforts by nation States to develop capacities to engage in defensive *and* offensive cyber operations directly. Other States appear to have deployed non-State actor "proxies" to engage in cyber operations under varying levels of State control or support.
3. With all this cyber activity, my initial report noted how little visibility international law has had in regulating State cyber-operations. Although governmental experts agreed in 2013 (and again in 2015) that "[i]nternational law, and in particular the Charter of the United Nations, is applicable" to cyberspace, efforts to agree on *how* it does so have faltered.<sup>1</sup> A 2017 GGE failed, reportedly because governmental experts from a few key States differed on whether certain fundamental rules of international law (e.g., self-defense, international humanitarian law, counter-measures, due diligence) applied to State cyber-operations.<sup>2</sup>
4. The International Committee of the Red Cross has offered its views on how international law applies to cyberspace in the specific area within its mandate – i.e., international humanitarian law (IHL).<sup>3</sup> And the two *Tallinn Manuals* offered the views of an independent (albeit NATO-funded) group of experts on how international law applies to cyber operations more generally.<sup>4</sup> Both Manuals are important reference works and governments were consulted in their drafting. But recent research suggests that States have left these Manuals "on the shelf" in their actual practice.<sup>5</sup> Indeed, there is little evidence that States are invoking international law in response to specific cyber incidents and only a few States have offered public statements on the application of international law generally.<sup>6</sup>

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<sup>1</sup> See U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, p. 19, U.N. Doc. A/68/98 (June 24, 2013); U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, p. 10, U.N. Doc. A/70/174 (July 22, 2015).

<sup>2</sup> See, e.g., Arun M. Sukumar, *The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?* LAWFARE, July 4, 2017.

<sup>3</sup> See ICRC, COMMENTARY (2016) ON THE FIRST GENEVA CONVENTION OF 1949, 91 p. 253–256, and 158-159 p. 436-437; and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report, 39-44 (Oct. 2015).

<sup>4</sup> See Michael Schmitt, ed., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn, Estonia: NATO CCD COE, 2017); Michael Schmitt, ed., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn, Estonia: NATO CCD COE, 2013).

<sup>5</sup> Dan Efrony and Yuval Shany, *A Rule Book on The Shelf? Tallinn Manual 2.0 on Cyber Operations and Subsequent State Practice*, 112 AM. J. INT'L L. 583 (2018).

<sup>6</sup> See, e.g., Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century*, May 23, 2018 (United Kingdom); *Revue stratégie de cyberdéfense* 82-84 (Feb. 2018) (France); Brian Egan, *Remarks on International Law and Stability in Cyberspace*, Berkeley Law School, Nov. 10, 2016

5. Reflecting on these experiences, my report suggested three sets of problems with respect to international law’s regulation of State behavior in cyberspace. First, there are existential questions about whether certain international law rules or doctrines have any purchase in the cyber-context. Although they have not done so publicly, in the GGE context, experts for a few States reportedly resisted the application of international humanitarian law, self-defense, and due diligence doctrines to cyberspace.<sup>7</sup> Second, even where States accept the relevance of a particular international law concept—e.g., sovereignty, the duty of non-intervention—they diverge as to its proper “interpretation” in the cyber context.<sup>8</sup> Third, there is the aforementioned “application” problem, where States have done relatively little to employ international law with respect to actual cyber incidents.<sup>9</sup> As a result, there is little international legal accountability for State behavior in cyberspace today.

6. The Committee received the first report favorably. It agreed the topic was an important one that fit within the Committee’s mandate, adding it to its regular agenda and appointing the present author rapporteur. That said, the Committee’s focus on cyber operations remains relatively narrow – rather than formulating the Committee’s views on how international law applies to cyberspace, the Committee believes a more fruitful first step would involve increasing the transparency of how OAS Member States view this issue. In short, the Committee supports the idea that Member States need to formulate *and* publicize their views on these questions.

7. Doing so would have clear benefits. As a legal matter, understanding how States view international law and cyberspace will permit a mapping of State practice – identifying areas where states have a general and uniform view of what international law requires. With sufficient support, these views may help elaborate how customary international law regulates State cyber operations. But even if States turn out to have differing—or even conflicting—views, it is just as important to publicize such differences. Otherwise, there is a risk that States with differing baseline understandings of what international law says might inadvertently escalate a conflict (i.e., where State A assumes its operation would not cross the armed attack threshold but the victim State B understands it to have done exactly that). Knowing where States disagree would highlight areas in need of further dialogue, whether to close these gaps, articulate clarifications, or to seek

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(United States); Harold Koh, *International Law in Cyberspace*, 54 HARV. INT’L LAW. J. 1, 7 (2012) (United States). There is one, recent notable exception to this pattern. In October 2018, the United Kingdom accused the GRU—Russia’s military intelligence arm—of responsibility for a series of cyber-operations, including targeting the Organization for the Prohibition of Chemical Weapons (which was investigating the use of a nerve agent against a former Russian spy and his daughter in Salisbury, U.K.). The U.K. Foreign Secretary attributed the Russian behavior as reflecting a “*desire to operate without regard to international law or established norms*” while a related press release described the GRU’s operations as a “*flagrant violation of international law.*” Press Release, Foreign Commonwealth Office, *UK exposes Russian cyber attacks*, 4 Oct. 2018; NCSC, *Reckless campaign of cyber attacks by Russian military intelligence service exposed*, Oct. 4, 2018.

<sup>7</sup> See, e.g., Sukumar, *supra* note 2.

<sup>8</sup> For example, with respect to sovereignty, *Tallinn Manual 2.0* envisions sovereignty as a rule that States may violate directly by their cyber-operations. See *Tallinn Manual 2.0*, *supra* note 4, Rule 4 (“A State must not conduct cyber operations that violate the sovereignty of another State.”). The Dutch government appears to support that approach. Bert Koenders, Foreign Minister, Neth., Remarks at The Hague Regarding Tallinn Manual 2.0 (Feb. 13, 2017). In contrast, the UK Attorney General has questioned that view (as has the chief lawyer for the U.S. Cyber Command, albeit while writing in his personal capacity). See Wright, *supra* note 6 (“Some have sought to argue for the existence of a cyber specific rule of a ‘violation of territorial sovereignty’ ... Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government’s position is therefore that there is no such rule as a matter of current international law.”); Gary Corn, *Tallinn Manual 2.0—Advancing the Conversation*, Just Security (Feb. 15, 2017).

<sup>9</sup> See *supra* note 6 and accompanying text.

modifications to ensure that international law can be more effective in regulating actual State behavior in cyberspace.

8. The Committee's efforts on international law and cyberspace will thus focus on *transparency* – on soliciting, collecting and publicizing the views of OAS Member States on how international law applies in the cyber context. The Committee authorized the author to prepare a questionnaire for Member States to obtain their views on some of the most prominent international legal questions associated with cyberspace to date.

9. On August 15, 2018, the author presented the Committee's transparency project during its meeting with OAS Member State Foreign Ministry Legal Advisers. The project was received quite positively by all attending. Suggestions were made to shorten the list of questions posed (the original report had annexed twenty potential questions). In addition, one Legal Adviser's representative suggested that the Committee endeavor first and foremost to collect any prior public statements made by OAS Member States relevant to the application of international law generally.

10. Since the Committee's August meetings, new efforts in multilateral and multistakeholder fora have continued to emphasize the application of international law to cyber-space, including having human rights that exist off-line apply on-line as well.<sup>10</sup> At least two regional organizations—ASEAN and the European Union—have affirmed the view that international law applies to cyberspace and signaled support for further elaboration on how it does so.<sup>11</sup> The European Union, moreover, endorsed the idea that *all* UN Member States “should submit national contributions on the subject of how international law applies to the use of [information and communication technologies] by States” in order to advance “the global understanding on national approaches which is fundamental to maintaining long-term peace and security and reducing the risk of conflict in cyberspace.”<sup>12</sup> Thus, the Committee's approach is consistent with the views of other regional organizations.

11. In the meantime, the United Nations General Assembly has endorsed the conclusion of earlier GGEs that international law applies to cyberspace.<sup>13</sup> It also agreed to commence two new processes related to global cybersecurity – (i) a new Open Ended Working Group to discuss cybersecurity in a relatively open and standing forum; and (ii) a new GGE that will be formed and begin

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<sup>10</sup> See *Paris Call for Trust and Security in Cyberspace*, Nov. 12, 2018 (“We also reaffirm that international law, including the United Nations Charter in its entirety, international humanitarian law and customary international law is applicable to the use of information and communication technologies (ICT) by States. We reaffirm that the same rights that people have offline must also be protected online, and also reaffirm the applicability of international human rights law in cyberspace.”); Please note that, in addition to my membership on the Committee, I serve as an external consultant to Microsoft on issues of international law and cyberspace, including its work with the French Government to launch the Paris Call.

<sup>11</sup> See ASEAN-United States Leaders' Statement on Cybersecurity Cooperation (18 November 2018) (“Reaffirm that international law, and in particular the Charter of the United Nations (UN), is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful ICT environment and recognise the need for further study of how international law applies to the use of ICTs by States); EU Statement – United Nations 1st Committee, Thematic Discussion on Other Disarmament Measures and International Security (October 26, 2018) (“the EU recalls that ‘International law and in particular the UN Charter, is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment.’”).

<sup>12</sup> EU Statement, *supra* note 11.

<sup>13</sup> UNGA Res. 266, U.N. Doc. A/RES/73/266 (2 Jan. 2019) (“Confirming the conclusions of the Group of Governmental Experts, in its 2013 and 2015 reports, that international law, and in particular the Charter of the United Nations, is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful information and communications technology environment”).

meeting later in the Spring or early Summer of 2019.<sup>14</sup> With respect to the new GGE, the UN General Assembly requested

[T]he Secretary-General, with the assistance of a group of governmental experts, to “continue to study ... how international law applies to the use of information and communications technologies by States, and to submit a report on the results of the study, including an annex containing national contributions of participating governmental experts on the subject of how international law applies ... to the General Assembly at its seventy-sixth session.<sup>15</sup>

12. Taken together, it appears that there is growing momentum to have States express their views on international law’s application to cyberspace. Such support—including in the United Nations—reinforces the importance and timeliness of the Committee’s work on this subject matter. The GGE will be comprised of experts from 20 to at most 25 States. Less than a handful of these will be OAS Member States. The Committee thus has an opportunity to survey and gather a larger—and more diverse—set of views from among *all* OAS Member States than the GGE process will allow. Moreover, as other regional organizations encourage their Member States to elaborate views on the application of international law, it is important that the OAS Member States have an opportunity to advance their views, lest other regions have an outsized voice in delineating the boundaries and contents of international law in the cyber-context. As such, it is critical that the Committee gather and share OAS Member State views not only within the region but with other regional international organizations and within the U.N. system.

13. It is important to note, moreover, that GGE’s own important efforts will be constrained by its mandate to certain, limited topics. As a product of the First Committee, the GGE will focus only on questions of international law *vis-à-vis* issues of disarmament and security. The Committee’s mandate, in contrast, is broader, and State responses to its questionnaire can touch on a broader range of subjects, including all matters of public and private international law implicated by State cyber operations. Thus, the Committee can improve transparency across the entire range of international law subjects.

14. Since producing my first report, I produced a summary call for OAS Member States on this topic along with a revised—and shorter—list of questions. The Committee questionnaire ended up comprising 10 questions:

- The first question responds to the suggestion of one of the Foreign Ministry Legal Advisers that the Committee solicit and compile existing statements on international law and cyberspace.
- The second question is geared towards existential questions – asking States to confirm or deny whether certain extant rules of international law do (or do not) apply in the cyber context.
- The third question focuses on the use of force (the *jus ad bellum*) with particular attention to what criteria a State uses to identify a cyber operation as a use of force or an armed attack. The fourth and fifth questions ask about how States understand the assignment of international legal responsibility for non-State actor behavior.
- The sixth and seventh questions address international humanitarian law and two of the critical outstanding issues, namely the definition of an “attack” in the cyber-context and the question of whether cyber operations that only target data would constitute such an attack (note: these questions were revised substantially from the original proposal in light of suggestions and comments provided by the International Committee of the Red Cross).
- The eighth question seeks States views on whether sovereignty comprises its own

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<sup>14</sup> See U.N. Doc. A/RES/73/27 (re the OEWG, which will be open to all UN Member States with plans to include consultations with industry); U.N. Doc. A/RES/73/266 (2 Jan. 2019) (re the GGE).

<sup>15</sup> U.N. Doc. A/Res/73/266, at paragraph 3.

distinct rule for State behavior in cyber space or is, instead, a background principle that informs the content of other rules.

- The ninth question makes a similar inquiry with respect to due diligence.
- Finally, the tenth question invites States to identify additional areas of international law on which the Committee should focus improving transparency in the cyber context.

15. The revised Questionnaire was finalized with able assistance from the Committee Secretariat and distributed to Member States in January 2019. A report on relevant responses to the Committee Questionnaire will be prepared in advance of the Committee's next Regular Session. Once a sufficient body of responses has been received, the Committee will need to discuss whether to follow up with further questions or to simply approve their circulation to the General Assembly with a recommendation that it approve their distribution within the region and beyond.

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**INTER-AMERICAN JURIDICAL COMMITTEE**  
**QUESTIONNAIRE FOR MEMBER STATES**

**INTERNATIONAL LAW & STATE CYBER OPERATIONS: IMPROVING TRANSPARENCY**

Cyberspace has become an integral component of civilian life in all its social, economic, cultural and political aspects. At the same time, “cyberthreats” to information and communication technologies (ICTs) have become ubiquitous. Cyber operations have generated significant financial losses, violated human rights, and threatened national security. States have responded by regulating cybercrime and building capacity, whether directly or through proxies, to engage in defensive *and* offensive cyber operations. The increase in capacities—and activities—of States in cyberspace has led to wide-spread calls to clarify what rules regulate State behavior. In 2013 and 2015, a Group of Governmental Experts (GGE) convened by the U.N. General Assembly's First Committee confirmed that “International law, and in particular the Charter of the United Nations, is applicable” to cyberspace.<sup>16</sup> Earlier this year, the United Nations General Assembly endorsed this conclusion.<sup>17</sup>

Unfortunately, however, States have not been able to agree on *how* international law applies. Only a few States have offered public views on the matter.<sup>18</sup> And although independent experts (most

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<sup>16</sup> U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, p. 19, U.N. Doc. A/68/98 (June 24, 2013); U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶ 10, U.N. Doc. A/70/174 (July 22, 2015).

<sup>17</sup> UNGA Res. 266, U.N. Doc. A/RES/73/266 (2 Jan. 2019) (“Confirming the conclusions of the Group of Governmental Experts, in its 2013 and 2015 reports, that international law, and in particular the Charter of the United Nations, is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful information and communications technology environment”).

<sup>18</sup> See, e.g., Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century*, May 23, 2018 (United Kingdom); Revue stratégie de cyberdéfense 82-84 (Feb. 2018) (France); Brian Egan, *Remarks on International Law and Stability in Cyberspace*, Berkeley Law School, November 10, 2016 (United States); Harold Koh, *International Law in Cyberspace*, 54 HARV. INT'L LAW. J. 1, 7 (2012) (United States). The International Committee of the Red Cross has also expressed views on the application of international humanitarian law to cyberspace. See ICRC, COMMENTARY (2016) ON THE FIRST GENEVA CONVENTION OF 1949, 91 p. 253–256, and 158-159 p. 436-437; and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report, 39-44 (Oct. 2015).

notably via two *Tallinn Manuals*<sup>19</sup>) have tried to fill in this information gap, States have not done so. To date, States have refrained from invoking international law both in general and in response to specific cyber incidents.

A new UN GGE will be convened later in 2019. Its mandate will encourage experts to elaborate on how their States understand the application of international law to cyberspace.<sup>20</sup> The new GGE will, however, have a small membership with only a limited set of voices from the Americas. The Inter-American Juridical Committee (CJI) supports the UN GGE's past and future work. Nonetheless, it believes that there is room for complimentary efforts to increase transparency on how States understand international law's application to cyberspace. Moreover, this is a view shared by other regional organizations, including ASEAN and the European Union.<sup>21</sup>

The attached questionnaire represents the first step in the CJI's effort to solicit, compile, and publicize Member State views on international law's application to cyber operations. It reflects some of the most important or discussed issues that have arisen to date. The Committee does not anticipate offering its own views on these questions. Rather, the goal is to provide a forum in which State views may be collected and publicized for purposes of advancing mutual understanding in the Region. To the extent Member State responses conform to existing statements on international law offered at the UN GGE or elsewhere, these responses would make an important contribution to elaborating the current international legal rules. It is, however, just as important to identify areas where State views diverge. Doing so will allow States to appreciate how other States may perceive offensive or defensive cyber-operations, setting expectations for their future interactions and providing a baseline for further dialogue.

Thus, the Committee would welcome all Member States to respond to the following questions. Ideally, Member States would respond to all ten questions posed. Member States may, however, opt to provide a more limited set of responses if there are particular questions where its Government has not yet formulated a view (or it has a view that it is not yet prepared to make public). As the final question indicates, the Committee would also welcome Member State views on additional questions or topics where more transparency would benefit the application of international law to cyberspace.

#### QUESTIONS:

1. Has your Government previously issued an official paper, speech, or similar statement summarizing how it understands international law applies to cyber operations? Please provide copies or links to any such statements.
2. Do existing fields of international law (including the prohibition on the use of force, the right of self-defense, international humanitarian law, and human rights) apply to cyberspace? Are there areas where the novelty of cyberspace excludes the application of a particular set of international legal rights or obligations?

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<sup>19</sup> MICHAEL SCHMITT (ED.), *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* (NATO CCD COE, 2017); MICHAEL SCHMITT (ED.), *TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE* (NATO CCD COE, 2013). Although funded by NATO's Cyber Defense Centre of Excellence, *Tallinn* represents the work of an independent group of experts.

<sup>20</sup> See UNGA Res. 266, U.N. Doc. A/Res/73/266, paragraph 3 (2 January 2019).

<sup>21</sup> See ASEAN-United States Leaders' Statement on Cybersecurity Cooperation (18 November 2018) ("Reaffirm that international law, and in particular the Charter of the United Nations (UN), is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful ICT environment and recognise the need for further study of how international law applies to the use of ICTs by States); EU Statement – United Nations 1st Committee, Thematic Discussion on Other Disarmament Measures and International Security (October 26, 2018) ("UN Member States ... should submit national contributions on the subject of how international law applies to the use of ICTs by States" to advance "the global understanding on national approaches which is fundamental to maintaining long-term peace and security and reducing the risk of conflict in cyberspace.").

3. Can a cyber operation by itself constitute a use of force? Can it constitute an armed attack that triggers a right of self-defense under Article 51 of the UN Charter? Can a cyber operation qualify as a use of force or armed attack without causing the violent effects that have been used to mark such thresholds in past kinetic conflicts?
4. Outside of armed conflicts, when would a State be responsible for the cyber operations of a non-State actor? What levels of control or involvement must a State have with respect to the non-State actor's operations to trigger the international legal responsibility of that State?
5. Are the standards of State responsibility the same or different in the context of an armed conflict as that term is defined in Articles 2 and 3 common to the 1949 Geneva Conventions?
6. Under international humanitarian law, can a cyber operation qualify as an "attack" for the rules governing the conduct of hostilities if it does not cause death, injury or direct physical harm to the targeted computer system or the infrastructure it supports? Could a cyber operation that produces only a loss of functionality, for example, qualify as an attack? If so, in which cases?
7. Is a cyber operation that only targets data governed by the international humanitarian law obligation to direct attacks only against military objectives and not against civilian objects?
8. Is sovereignty a discrete rule of international law that prohibits States from engaging in specific cyber operations? If so, does that prohibition cover cyber operations that fall below the use of force threshold and which do not otherwise violate the duty of non-intervention?
9. Does due diligence qualify as a rule of international law that States must follow in exercising sovereignty over the information and communication technologies in their territory or under the control of their nationals?
10. Are there other rules of international law that your government believes are important to highlight in assessing the regulation of cyber operations by States or actors for which a State is internationally responsible?

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**CJI/doc.594/19**

**THIRD REPORT  
INTERNATIONAL LAW & STATE CYBER OPERATIONS:  
IMPROVING TRANSPARENCY**

(presented by Dr. Duncan B. Hollis)

This is my Third Report on the topic of improving transparency with respect to how Member States understand the application of international law to State cyber operations. My first report examined the increasing number of cyber incidents associated with States and their proxies as well as their economic, humanitarian, and national security implications<sup>1</sup> It highlighted how little visibility international law has had in regulating State cyber-operations. To be sure, many States have confirmed the applicability of international law to their behavior in cyberspace.<sup>2</sup> Moreover, although the OAS has not, three major international organizations—

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<sup>1</sup> See Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser. Q. CJI/doc. 570/18 (9 August 2018) ("Hollis, First Report").

<sup>2</sup> See U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, 19, U.N. Doc. A/68/98 (June 24, 2013) ("[i]nternational law, and in particular the Charter of the United Nations, is applicable" to cyberspace); U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, 24, U.N. Doc. A/70/174 (July 22, 2015) (same).

ASEAN, the European Union, and the United Nations have done so as well.<sup>3</sup> To date, however, efforts to delineate *how* international law applies to cyberspace have born little fruit.

My second report highlighted several areas where questions of how international law applies to cyber operations has generated controversy or confusion, including the use of force and self-defense, international humanitarian law, counter-measures, sovereignty, and due diligence.<sup>4</sup> States have been largely reticent about explaining their views on whether and how these (and other) areas of international law apply in cyberspace. Indeed, States appear quite reluctant to invoke the language of international law in making accusations about other State's cyber-operations.<sup>5</sup> A handful of States have offered general statements on such topics, including most recently comments by the President of Estonia.<sup>6</sup> But the number and specificity of such statements has not been sufficient to rely on them as evidence of state practice or *opinio juris* in this important area.

With the Committee's support, my second report detailed a plan to focus on *transparency* with respect to how States understand international law's application to cyber operations. The Committee supported my asking States for their views on some of the most relevant international legal questions. Doing so has several clear benefits for the region. Mapping OAS Member State views on international law and cyber operations can help identify how much convergence (or divergence) there is on key questions, ranging from self-defense to sovereignty to counter-measures. Knowing where States agree may provide much-needed evidence to delineate States' customary international law responsibilities in cyberspace. At the same time, identifying disagreements may be just as important. Publicizing such differences can mitigate the risk of States operating from different base-line assumptions in ways that could escalate a conflict (if, for example, one side views its cyber-operation as a non-forceful counter-measure, but the State against which the operation is directed perceives it as an armed attack, entitling it to respond with

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<sup>3</sup> See UNGA Res. 266, U.N. Doc. A/RES/73/266 (2 Jan. 2019) ("Confirming the conclusions of the Group of Governmental Experts, in its 2013 and 2015 reports, that international law, and in particular the Charter of the United Nations, is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful information and communications technology environment"); ASEAN-United States Leaders' Statement on Cybersecurity Cooperation (18 November 2018) ("Reaffirm that international law, and in particular the Charter of the United Nations (UN), is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful ICT environment and recognise the need for further study of how international law applies to the use of ICTs by States"); EU Statement – United Nations 1st Committee, Thematic Discussion on Other Disarmament Measures and International Security (October 26, 2018) ("the EU recalls that 'International law and in particular the UN Charter, is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment.'").

<sup>4</sup> Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser. Q, CJI/doc 578/19 (21 January 2019) ("Hollis, Second Report").

<sup>5</sup> See, e.g., Dan Efrony and Yuval Shany, *A Rule Book on The Shelf? Tallinn Manual 2.0 on Cyber Operations and Subsequent State Practice*, 112 AM. J. INT'L L. 583 (2018). The most notable exception was the United Kingdom's willingness to suggest that Russian cyber-operations constituted a "flagrant violation of international law." The United Kingdom did not, however, specify precisely which cyber-operations did so (their accusation listed several attributed to the Russian Federation) nor which international laws were violated. See Press Release, Foreign Commonwealth Office, *UK exposes Russian cyber attacks*, 4 Oct. 2018; NCSC, *Reckless campaign of cyber attacks by Russian military intelligence service exposed*, Oct. 4, 2018.

<sup>6</sup> See Kersti Kaljulaid, President of Estonia, Opening Remarks for CyCon 2019, 29 May 2019; see also Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century*, May 23, 2018 (United Kingdom); Revue stratégie de cyberdéfense 82-84 (Feb. 2018) (France); Brian Egan, *Remarks on International Law and Stability in Cyberspace*, Berkeley Law School, Nov. 10, 2016 (United States); Harold Koh, *International Law in Cyberspace*, 54 HARV. INT'L LAW. J. 1, 7 (2012) (United States).

kinetic acts of self-defense). It would also highlight areas in need of further dialogue, whether to reconcile conflicting positions, clarify the law's contents, or, perhaps even, pursue changes to it.

Beyond its regional impacts, elaborating the views of multiple OAS States may also help illuminate the state of international law globally. Publicizing such views will coincide with global efforts at the United Nations First Committee, specifically the upcoming U.N. Group of Governmental Experts, to be chaired by a governmental expert from Brazil.<sup>7</sup> Among other things, the new GGE will reportedly invite its government experts to offer national views on international law in the information security context. Four of the GGE's 25 members hail from the region: Brazil, Mexico, the United States, and Uruguay. The Committee's efforts will allow additional States to weigh in with their views without competing or conflicting with the GGE's work. Indeed, the Committee's efforts should supplement and support the GGE's project, providing a fuller range of views from across the region on international legal issues, improving our understanding of international law in cyberspace, and its efficacy in regulating State relations therein. This approach is, moreover, consistent with that proposed in other regional organizations. The European Union, for example, has suggested that *all* UN Member States "should submit national contributions on the subject of how international law applies to the use of [information and communication technologies] by States."<sup>8</sup>

As detailed in my Second Report, with the help of the OAS Department of International Law and input from the International Committee of the Red Cross, I prepared a questionnaire for Member States. The OAS International Law Department circulated the Questionnaire in January 2019. It contains 10 questions:

- The first question solicits existing national statements on international law and cyberspace from each Member State.
- The second question asks Member States to confirm whether they have identified certain extant rules of international law that do (or do not) apply in the cyber context.
- The third question focuses on the use of force (the *jus ad bellum*), asking what criteria a State uses to identify a cyber operation as a use of force or an armed attack.
- The fourth and fifth questions ask about how States understand the assignment of international legal responsibility for non-State actor behavior, in particular the extent of State "control" required.
- The sixth and seventh questions address international humanitarian law (the *jus in bello*) and two of its critical outstanding issues, namely the definition of an "attack" in the cyber-context and the question of whether cyber operations that only target data constitute such an attack.
- The eighth question seeks States views on whether sovereignty comprises its own distinct rule for State behavior in cyber space or is, instead, a background principle that informs the content of other rules. There is currently a division of views among States on this topic.
- The ninth question makes a similar inquiry with respect to due diligence.
- Finally, the tenth question invites States to identify additional areas of international law on which the Committee should focus improving transparency in the cyber context.

To date, the Committee has received six responses to its Questionnaire from Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, and Peru. Brazil's response highlighted its pending work at the UN GGE (which will be chaired by a Brazilian expert). Another response by Costa Rica, highlighted the need for further capacity building on how international law applies to cyber

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<sup>7</sup> See U.N. Doc. A/RES/73/266 (2 Jan. 2019) paragraph 3 (on the GGE's mandate). In addition, to the new GGE, there will also be a UN-sponsored Open Ended Working Group (OEWG) that will look to operationalize the work of prior GGEs, and in some cases revisit or even revise the outcomes of that work. See U.N. Doc. A/RES/73/27.

<sup>8</sup> EU Statement, *supra* note 11.

operations as well as the possibility of the Committee undertaking work to develop domestic legal regulations for cyber threats. The other four responses addressed the Committee's questions specifically. I have annexed all six responses to this Report for review by the Committee.

In this Third Report, I am not offering any substantive analysis or summation of the responses received to date. Rather, my aim is merely to update the Committee on where things stand. I would also invite Committee members from States that have not yet responded to the Committee Questionnaire to encourage their national governments to do so.

I understand that other States are continuing to work on and prepare their responses. As such, I believe it would be better to have a fuller set of responses before undertaking any analysis of how OAS Member States understand international law applies to cyberspace generally, or cyber operations in particular. Moreover, the OAS Secretariat of the Inter-American Committee against Terrorism (CICTE) is holding consultations with the United Nations Office for Disarmament Affairs 15-16 August 2019.<sup>9</sup> Those consultations are likely to address the utility of the Committee's efforts as well as some of the substantive international legal issues on which it seeks greater transparency. As such, they offer an additional rationale for waiting before offering a detailed analysis of Member State views.

In my next report, I do plan to summarize how responding Member States understand international law applies to State cyber-operations. I will attempt to do so with an eye to ongoing efforts at the UN (including the GGE, which will begin meeting formally in December, but also a new Open-Ended Working Group (OEWG) that will commence in September 2019), asking how—if at all—they may impact our understanding of Member State responses.

As at the outset, I do not anticipate this project will result in either an effort to codify or progressively develop international law (nor even an effort to identify best practices or general guidance). Rather, the goal remains a modest one – to provide OAS Member States a platform to be more transparent on how they understand international law applies to cyberspace and the information and communication technologies from which it derives. I look forward to hearing the Committee's views and advice on how to ensure more transparency on what is widely recognized as one of the highest priorities for nation States today.

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<sup>9</sup> This is one of a series of consultations ODA is hosting this summer with various regional organizations across the globe, including the OSCE, ASEAN, and the EU.

## 8. Foreign interference in democratic elections

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Alix Richard submitted a report under the title “Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of states, responses under international law,” document CJI/doc.565/18, aiming at showing its relevance while proposing a new theme for the working agenda. The report analyzes various kinds of interference in electoral systems, in an attempt to make available international juridical mechanisms to protect States. Among the various forms of interference, he highlighted the topic involving the funding of electoral campaigns and cyber-interference in the digital era. In this regard, he wondered whether the current mechanisms of international law were sufficient to provide juridical protection to the States as well as an effective response in case of foreign interference in electoral processes. He confirmed that the Tallin Manual presents a complete analysis of cyber-operations. However, in view of the relevance and complexity of the issue, the Committee could well issue some recommendations to the States, including the best practices that might help them. At the end of his presentation he volunteered as a Rapporteur for the theme.

Dr. Luis García-Corrochano recognized the sophistication of cyber-threats during campaigns and noted that the topic is related to the provisions of the Inter-American Democratic Charter, therefore that the Committee might well be involved in this issue.

Dr. Duncan Hollis thanked the previous speaker for introducing the topic, and agreed with the pertinence of evaluate the study of this theme by the Committee. He confirmed that there were two ways to address it. One of them could refer to the manipulation of elections to change the final results; the second option would be related to the use of social media and the control of speeches in order to influence people’s decisions. In this last case, it is really difficult to make a distinction between undue influence and mere influence.

Dr. Carlos Mata thanked Dr. Alix Richard for the proposal and also Dr. Hollis for his support. He said that the topic was a complex and broad one that should be connected to the OAS Charter. In this regard he was in favor of including the theme on the agenda. Dr. Baena Soares was thankful for the proposal and suggested contacting Member States in order to find out their interest on the topic. Dr. Ruth Stella Correa Palacio was of the opinion that this topic might complement the report of Dr. Hernán Salinas. Dr. Miguel Espeche-Gil explained that this theme had been considered by the Committee in the year 1965, and that the report made a distinction between intervention and collective action, and the innovation was represented by the cybernetic aspect in the case of elections. In this regard, the Inter-American Democratic Charter establishes guidelines to be added to the report. Furthermore, he confirmed that electoral fraud within the States must be studied by the Committee, and should also to some extent be included in development regarding the Democratic Charter. In this context, he asked to distribute the reports presented by Dr. Jean-Michel Arrighi to IHLADI (*Instituto Hispano Luso Americano de Derecho Internacional*) and the cited Committee report of 1965.

The Chair welcomed the proposal and emphasized the interest to protect electoral processes and distinguish this from cases in which the OAS could intervene. The issue of freedom of expression is of prime importance. Therefore, the objective of the study should be limited to good practices regarding undue interference. In this regard, he asked Dr. Alix Richard, with the support of Dr. Hollis, to present a scheme containing the elements of what is proposed together with specific contents.

Dr. Duncan Hollis proposed including the topic in the agenda of the 7<sup>th</sup> Joint Meeting with Legal Advisors (August 15, 2018), in order to gather their opinion, which was accepted by the plenary.

At the last day of the session and having discussed the issue with the legal advisors, the theme was incorporated into the agenda of the Committee. Dr. Alix Richard, who was designated as

Rapporteur, expresses its appreciation to the response of the members of the Committee and undertook to present a report at the next session of the Committee.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019) the issue was not discussed.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the Rapporteur for the topic, Dr. Alix Richard, explained the background to his proposal and his intention to prepare a document that would include an inventory of past and present forms of interference as well as describing the existing norms to confront such interference and, to the extent possible, determine their effectiveness. He asked if it would be preferable to draft a binding instrument, a model law, a study, or a guide. He alluded to challenges to efficiently determine interference and to punish (or deter) those who do. He explained differences between his topic and electoral fraud, which in principle would have domestic overtones, as opposed to foreign interference, as well as clarifying that it was not his intention to include developments of that nature in his report. Finally, he suggested sending a questionnaire to States to find out the state of affairs from firsthand sources, and he asked committee members to suggest the way forward in order to provide States with practical contributions.

Dr. Carlos Mata urged the rapporteur to determine the object of the work in order to better define his task. He suggested working on the impact of new technologies, through actions coming from abroad, taking as a reference point the principle of non-intervention stipulated in the OAS Charter. In this regard, he cited the case of influence that political parties exerted through telephone calls from abroad. In his view, the Committee's contribution did not necessarily need to be a model law.

Dr. Milenko Bertrand stressed the importance of the purpose of the study, that there was no need to develop a model law, but that it should include topics concerning the responsibility of States. He urged the rapporteur to limit himself to legal issues that refer to new forms of intervention, but without omitting the ways in which the States of the Americas have historically suffered interference and its effects, and to include solutions in each case.

Dr. Espeche-Gil invited the Rapporteur to present developments in the area of non-intervention and collective action, as well as the necessary updating to confront new situations.

Dr. Duncan Hollis suggested not determining the format at that stage and that the nature of the document be defined based on the report to be submitted. Mechanisms should be sought to defend against interference. The initial report should contain developments on the events that occurred in the elections in France, the European Union, and the United States. Determining steps to confront interference, such as the G-7 political commitments; Macron's appeal that takes up the G-7 commitment (the Paris Appeal), which involved both states and nongovernmental actors. An analysis should also be made of the impact of non-intervention and its definition under the current state of international law.

The Rapporteur for the topic, Dr. Alix Richard, welcomed the comments and committed to include both traditional and newer forms of interference, including cyber attacks; all with the aim of finding a formula to protect governments from various forms of interference.

The Chair asked the rapporteur to present a report that propose the nature of the instrument to be developed at the next session of the Committee.

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## 9. Guidelines for the further development of regulations on diplomatic asylum

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July/August 2019), Dr. Íñigo Salvador presented a proposal for a new item to be included on the Committee's agenda by means of a report entitled "Guidelines for the further development of regulations on diplomatic asylum," document CJI/doc.592/19. To that end, the rapporteur identified the conventional norms (1954 Convention, which gives the State exclusive power) and the jurisprudential developments in the field. He also referred to the distinction between territorial and diplomatic asylum, citing opinions of the Inter-American Court of Human Rights and doctrine from specific cases in the Hemisphere and beyond. In that regard, Dr. Salvador presented three legal principles that should be considered in relation to the obligations of asylum seekers:

1. *No obligations should be established that are impossible for asylum seekers to fulfill or that place too great a burden on them.*
2. *On no account should the obligations of asylum seekers be a kind of consideration for the granting of asylum.*
3. *The obligations of asylum seekers must be compatible with the legal nature of the form of asylum applied.*

In conclusion, he said that his proposal sought to determine the conditions, content, and scope of diplomatic asylum, taking into account the obligations of the person who has been granted asylum, the principles of non-interference in the internal affairs of the receiving State and the inviolability of diplomatic missions, and the issue of the qualification of its nature by the host State.

Dr. Milenko Bertrand thanked the Rapporteur for the proposal on a topic around which there was a bit of anarchy. He suggested including progress on laws against terrorism and genocide. In his view, the grounds for refuge should be considered in the application for asylum. On the issue of sovereignty and human rights, he cited the case of a Chilean national who had several charges pending against him for crimes committed in his country and who had been granted refuge in Argentina (the defense for which alluded to political asylum). It urged that the pertinence be reviewed of the possible elimination of the institution of asylum. He was aware that asylum had made it possible to save lives, but the refugee crisis of our times and the expansion of the grounds for it made it necessary to develop a concept of refuge that could include asylum.

Dr. Mariana Salazar appreciated the topicality of the subject and the description proposed by Dr. Salvador. She opposed any attempt to eliminate the figure of asylum in the light of the increased non-recognition of the Cartagena Convention on Refugees and the possibilities that allowed when one was unable to leave one's country of origin. She called for caution regarding the characterization of asylum as a human right, in relation to the causes cited in the report.

Dr. George Galindo thanked Dr. Salvador and stressed the appropriateness of the proposal. In relation to the purpose of the work, he considered that a study on asylum would allow for an update and would be an important contribution. He suggested adding the duties of states in relation to diplomatic asylum (in light of the *Iran v. USA* case which established that diplomatic law was self-contained), as well as the relationship with asylees and diplomatic personnel. He proposed verifying the political dimension with regard to the way States relate to each other, and not only the human rights dimension. He also urged the inclusion of elements on the duty to ensure the inviolability of diplomatic missions and the necessary guarantees to maintain neutrality.

Dr. Luis García-Corrochano noted a lack of clarity in certain elements that were not resolved by the International Court of Justice in the *Haya De la Torre* case. It was not a question of a right to asylum, but rather a discretion of the State under certain guidelines. The inclusion of the status of the asylum seeker in the report was fundamental; that was also related to the ability to maintain neutrality

and allow the State to guarantee the asylum seeker his or her essential rights. Finally, it was decided to regulate the temporal aspect (since by nature diplomatic asylum should be transitory).

The Chair referred to the importance of the inviolability of Embassies and invited Dr. Inigo Salvador to serve as the Rapporteur for the topic, to which the plenary agreed.

The Rapporteur for the topic welcomed the comments and the interest in the continued study of the topic and requested guidance on the way forward.

Dr. Arrighi recommended that the Committee educate the public on the proper use of the concepts formulated, taking into account the elements raised by the members. The rapporteur proposed identifying the terms without losing sight of the interest of being able to make a normative proposal at the end of that first task.

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## 10. Regional customary international law

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the Rapporteur for the topic, Dr. George Galindo presented a new proposal to be included in the Committee's agenda, entitled "Regional Customary International Law," document CJI/doc.587/19. The rapporteur explained the three main motivations for the subject:

- that the CJI reflect on what it means to belong to the American hemisphere;
- to consider the advisory opinion of the Inter-American Court of Human Rights of May 30, 2018, Advisory Opinion OC-25/18 on "The Institution of Asylum, and Its Recognition as a Human Right under the Inter-American System of Protection," and
- to analyze the pronouncement of the International Law Commission on identification of customary international law, notably Conclusion 16 (of which the General Assembly took note):

*Conclusion 16*

*Particular customary international law*

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States
2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves."

Among the elements that will be considered in his study, Dr. Bandeira Galindo, proposed the following topics:

- The "delimitation of customary rules", in the light of doctrine proposals that limit it to a number of States that make it up.
- The consent, its express or tacit character. Need to investigate the issue of silence in the restricted environment imposed by the regional system.
- The relationship between regional and universal custom.
- The principle of persistent objection, in particular to a customary rule requiring consent.
- The existence of a regional *jus cogens*.
- The determination of a concept of region that is "legally relevant."

As a methodology, he proposed identifying the customary rules that currently exist in the Hemisphere (general primary rules in the area of regional custom) through a study of the decisions of international tribunals, doctrinal contributions, and a survey in OAS member states.

Dr. Iñigo Salvador supported Dr. George Galindo's proposal and, as a way to enrich his consideration of the topic, proposed reflecting both aspects of the concept under study—regional as well as universal, including the particular versus general aspect, in order to include the opinions of the International Court of Justice in the invocation of custom. With regard to the relationship between this topic and asylum (for which he is rapporteur), he suggested including the cross-referencing of sources (elements from conventions and customary international law).

Dr. Luis García Corrochano also supported the proposal presented. He referred to the generating effect of custom of Judge Jimenéz de Arrechaga. Being a hemispheric unit, one would have to ascertain where custom begins and ends. A case-by-case analysis should be done. Finally, he proposed to refer to the passage from customary norm to peremptory norm, independently of its questioning.

Dr. Milenko Bertrand referred to the revitalizing challenge that the proposal entailed. He advised including in the analysis the "bilateral custom" (its point of connection and differentiation with estoppel); value aspects in relation to the practice of the Inter-American Court of Human Rights following the Atala case, for example; issues related to silence in consent, in particular the effect of the declarations of international organizations of a political order that are not voted on because it favors consensus.

Dr. Jean-Michel Arrighi recommended referring to the existence or absence of a custom of a regional nature in relation to democracy, based on the OAS Democratic Charter, a text adopted as a resolution.

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## 11. Electoral fraud as an international crime in the inter-American system

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July/August 2019), Dr. Miguel Angel Espeche-Gil expressed his interest in developing the theme of electoral fraud, which currently takes various forms and ramifications (including in the realm of cyberspace). Specifically, his proposal was to include a new provision in the Inter-American Democratic Charter, given its importance in this area, through an addition to Article 23 in Chapter V, which would read:

“Electoral fraud, in all its forms, is illegal within the inter-American system because it violates one of the fundamental principles of the OAS, namely the effective exercise of representative democracy. Electoral fraud is as illegal as *coups d'état*: both give rise to illegitimate governments.”

Dr. Arrighi explained that the original draft of the Inter-American Democratic Charter prepared by the Peruvian Government sought precisely to pronounce on electoral fraud, in light of both candidates' claims in the 2000 presidential election contested by Fujimori and Toledo. However, no progress was made on the issue and none of the four crisis scenarios envisaged by the Inter-American Democratic Charter makes provision for electoral fraud. He recommended avoiding modifying the Democratic Charter at present and adopting a resolution along the lines suggested by the Committee, which already had studies on the elements of democracy.

Dr. Espeche-Gil thanked Dr. Arrighi for his suggestion and agreed to work on a pronouncement on the issue of electoral fraud without for the time being proposing changes to the Inter-American Democratic Charter.

Dr. Luis García-Corrochano welcomed Dr. Espeche-Gil's proposal and the path proposed by Dr. Arrighi. In view of the increase in the number of threats to democracy, an extensive list of elements that have an impact should be included.

Dr. George Galindo requested additional information on the Committee's developments on the issue of democracy. In that regard, Dr. Dante Negro referred to the volume "Democracy in the Work of the Inter-American Juridical Committee," which compiles the developments from 1946 to 2010.

The Chair asked the Secretariat to forward to the members not only the approved reports but also to include the developments of Dr. Hernan Salinas.

To distinguish the treatment of this issue from Dr. Richard's proposal, Dr. Espeche-Gil proposed the possibility of submitting a separate opinion on Dr. Richard's report to clarify his position on electoral fraud. Dr. Espeche-Gil's proposal was kept on the Committee's agenda and he was appointed rapporteur for the topic.

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## 12. Model Law on the use of Fireworks, for either personal use or in mass firework displays

Dr. Milenko Bertrand explained the mandate from the OAS General Assembly, instructing the CJI "to prepare a model law regulating the use of fireworks, whether for personal use or in large-scale firework displays, based on the existing legislation on this matter in the region, as well as the inputs that the states provide in collaboration with the CJI," contained in resolution AG/RES. 2930 (XLIX-O/19) at Section iii. Regarding background, Dr. Bertrand said that the initial proposal was presented by two Chilean NGOs that provide assistance to burned children and that traveled to OAS headquarters to present the work done to the States. It was an issue that related to the Chilean experience which had a law specifically governing fireworks. The regulations prohibited their sale and use, and law breakers may be subject to fines and confiscations. The law also applied to fireworks displays and set permitted safety levels, covering both public and private institutions. The introduction of the rule was accompanied by advertising campaigns that sought to generate a cultural change in public opinion and proved very effective. Studies showed that since the publication of the law 15 years earlier, the number of burns had dropped considerably and that there had been no more deaths. He further noted that apparently there was already a study describing the type of regulations in place in 10 OAS Member States, and that a study by the University of California on the actual impact of the use of fireworks on children throughout the Americas was underway. In that context, he expressed his interest in being rapporteur for the topic—considering his interest in it and his links to the NGOs involved—and he proposed the following working agenda:

- Present the University of California's study that could allow a law to be developed based on effective information.
- Review the existing questionnaire and draft a new one to send to government agencies in member states.
- Propose a model law that incorporated models of legislative technique, both from the Americas and Europe, that would allow pronouncements on public policies based on specific cultures and practices. This would make it possible to incorporate issues concerning the effectiveness of laws in the Latin American context, including the generation of a methodology that could be used in other areas.

Dr. Espeche-Gil confirmed that the initiative was likely to encounter very stiff opposition from powerful companies in the region's countries.

Dr. George Bandeira noted the timeliness of the General Assembly's mandate and asked if there was any global initiative on the subject, highlighting the relationship of poverty with the issue of fireworks, so that the issue could be considered from the point of view of law. He also requested that the technical dimension of the work being done by doctors and engineers and other stakeholders be included.

Dr. José Moreno congratulated Dr. Bertrand, and asked him if there was anything in common law that could have any significant impact on the work of the Committee.

The Chair, Dr. Ruth Correa, referred to her country's law, which incorporated issues of public order, health (seen from various perspectives), and safety (as it regulates the use of gunpowder). She also asked the members if they would agree to appoint Dr. Milenko Bertrand as rapporteur for this mandate which had been requested by the OAS General Assembly.

It should be noted that in the days prior, the Ambassador of Chile to the OAS and former member of the Committee, Dr. Hernán Salinas had referred to the initiative regarding fireworks described by Dr. Bertrand, stressing the importance of introducing rules on their responsible use based on the positive experience of his country. Dr. Iñigo Salvador explained that problems with the use of white phosphorus fireworks were not limited to burns in his country, but also that when used as a poison it had had unintended consequences on people's health, including death. In that regard he

announced the filing of a case with the Inter-American Court of Human Rights. He also referred to the negative impact of fireworks in places such as the Galapagos Islands, where the effects were felt by animals and that they could start fires, and therefore that posed a risk to public health and the environment.

The designated rapporteur for the topic, Dr. Milenko Bertrand, welcomed the contributions. He explained that although he was not an expert on the subject, he was aware of the important impact it would have on the population. In addition, it would lead him to interact with specialists in technical issues, including doctors, engineers, and sociologists. As for the objective, he would seek to develop a methodology that would allow him to incorporate contributions from beyond the legal domain, in particular aspects of public policy. At the UN, there were no initiatives in that area, despite the efforts of one of the Chilean NGOs at the universal level. With regard to national legislation, he pointed out the need to make greater efforts in places where the State is much less present; he agreed, therefore, that there were a number of different challenges.

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## THEMES CONCLUDED

### 1. Law Applicable to International Contracts

#### Documents

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|------------------------------|---|
| CJI/RES. 249/19 (XCIV-O/19)  | Guide on the Law Applicable to International Commercial Contracts in the Americas   |
| CJI/doc.577/19 rev.1. corr.2 | Report by the Inter-American Juridical Committee on the Guide on the law applicable to international commercial contracts in the Americas |

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At the 84<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), Dr. Elizabeth Villalta presented a document entitled "Private International Law" (CJI/doc.446/14), thus introducing a topic which had not been on the agenda established in August 2013.

The aim was to promote certain conferences held under the purview of the CIDIP, in particular the Convention of Mexico on the Law Applicable to International Contracts, ratified by two OAS Member States.

Among the reasons for so few ratifications, she cited the lack of promotion and awareness about it and the fact that back then (1994) these solutions would have been too novel; the provision for autonomous free will; and the reference to *lex mercatoria*. Her conclusion was that Mexico could settle many international contracts problems with the Hemisphere's own solutions.

The Director of the Department of International Law, Dr. Dante Negro informed of the participation of them both (the Rapporteur and himself) in the ASIDIP meetings, and noted that there was consensus that certain Conventions adopted by the CIDIPs, particularly the 1994 Convention of Mexico, needed reviewing. He noted the interest in having Inter-American Juridical Committee support to disseminate those conventions. Dr. Dante Negro also spoke about the last CIDIP and the impasse about consumer protection, as well as the States' lack of agreement on holding another CIDIP. He said no specific new resolution on CIDIP's had been adopted, in terms of new topics or finding a solution to the consumer issue. He said the Department of International Law had informally approached states to promote ratification of the Conventions on Private International Law.

Meanwhile, Dr. Arrighi, who has also took part in the ASADIP meetings, noted that some members of the ASADIP held senior positions with their governments and never suggested ratification of the Conventions was a priority. He added that doing protocols or amendments to conventions already signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only ones to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

Dr. Salinas said what Dr. Arrighi spoke about was important to understanding why the Convention had not been ratified by a significant number of countries. He pointed out further that if consultations were to be held, they should include experts and practitioners in this field.

The Chair said that some consensus was already developing: Firstly, on keeping the issue on the agenda for August; secondly, that a study of the convention would be useful; and thirdly, that consultations should be held with the states and experts and practitioners as well.

During the 85<sup>th</sup> Regular Session (Rio de Janeiro, August, 2014), Dr. Elizabeth Villalta presented another report, entitled "Law Applicable to International Contracts," document CJI/doc.464/14, which

refers to all the Conventions on Private International Law adopted at the Inter-American Specialized Conferences on Private International Law (CIDIP's).

She explained that some countries indicated that the translations of the Conventions were not particularly fortunate, and that that was an obstacle to its ratification. Dr. Villalta mentioned that there were ways of correcting those deficiencies, so she suggested that the Committee bring countries' attention to the mistakes.

She said the Convention needed to be more widely disseminated, especially considering the current importance of international contracts and international arbitration. The conventions on this subject could resolve many of today's legal issues, such as the free will (contractual freedom) principle. This principle had been incorporated into Venezuelan legislation and in a bill (draft law) in Paraguay. Thus, material incorporation could, she said, be the path to reception of the principles enshrined in the Convention.

Finally, she said that the benefits of the Convention included receptivity to the principles of *lex mercatoria* and various other principles developed in international forums and trade customs and practices.

The Co-Rapporteur on the subject, Dr. Collot, gave an oral presentation of his report, called "Inter-American Convention on Law Applicable to International Contracts," document CJI/doc.466/14 rev.1. He highlighted the applicable legal instruments and broadly compared the Inter-American instrument with the European Treaty. He also expounded the principles regarding determination of the consent of the parties and the equivalence or near-equivalence of the considerations. He noted that the Convention on the Law Applicable to International Contracts does not cover extra-contractual obligations derived from the performance of contracts. Accordingly, he proposed directing the discussion toward the possibility of expanding the domain of applicable law under the Convention.

Dr. Arrighi said there had been no clear indication of where errors had been made in the translations. In his opinion, the problem had to do with the difficulty of reconciling the vehicles used for solutions: uniform laws and uniform conventions.

The Chair pointed out that silence with respect to ratifying was in itself a form of political response. Dr. Salinas said that some instruments adopted in The Hague suffered the same fate as some of the Inter-American conventions, in the sense of being ratified by only a handful of States. Dr. Elizabeth Villalta pointed out that her report mentions the possibility of incorporating solutions (developed in the Convention) into domestic law, as Venezuela had done and Paraguay was in the process of doing.

The President then proposed, as a way of concluding this discussion, that the Rapporteurs consult the States, including practitioners and academics, and that they come up with pertinent questions for the Secretariat to distribute in the form of a *questionnaire*. This proposal was adopted by the plenary.

During the 86<sup>th</sup> Regular Session (Rio de Janeiro, Brazil, March 2015), one the Co-Rapporteur for the topic, Dr. Elizabeth Villalta submitted a new version of the report, document CJI/doc.464/14 rev.1, which incorporates actions taken in the subject matter by other international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT). Additionally, the document explains the implementation process of the principles of the Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention), as conducted by some States in their domestic legislation, using as examples the laws of Venezuela, Dominican Republic, Panama and Paraguay.

Lastly, she released the *questionnaire* written for the States and academic experts and said that the first version of the *questionnaire* had been forwarded by the Secretariat to the Permanent OAS Missions in the second week of March and that, thus far, no State has responded.

The Chair suggested that two *questionnaires* be drawn up: one on international contracts and the other on the challenges faced by the region in the field of private international law. He also requested Co-Rapporteur Villalta to disseminate the questions to the other Members prior to submitting them to the States and experts, leaving the decision on formatting and content up to them.

During the 87<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Co-Rapporteur Villalta, introduced the document “Law Applicable to International Contracts” (CJI/doc.487/15), reviewing the first four responses to the questionnaire sent to the States, that had been received as of then (Bolivia, Brazil, Jamaica and Paraguay). Additionally, she mentioned and thanked academicians who responded to the questionnaire: Mercedes Albornoz, Nuria González, Nadia de Araújo, Carmen Tiburcio, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Didier Operti, José Martín Fuentes, Alejandro Garro and Peter Winship.

Dr. Stewart added he felt there was more of a consensus on drafting a Model Law or Guiding Principles on the subject.

Dr. Villalta stressed that the responses submitted by most of the experts revealed that the Mexico Convention was very forward thinking at the time it was approved, but in our times, the consensus seemed to support a soft law solution.

The Vice-Chair noted that the consensus would be to keep the topic on the agenda.

During the 88<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), one of the Co-Rapporteur for the Topic, Dr. Villalta reminded members that at the 86<sup>th</sup> session a *questionnaire* had been approved, in which most States declared to be in favor of the principle of party autonomy and supported the choice of the place with which the contract had the closest ties, in the event that the parties themselves had not determined the applicable law or that their choice was ineffective.

In response to the question on the need for an amendment to the Inter-American Convention, most states indicated that the political context should be taken into account.

Finally, in relation to the development of the CIDIPs, most considered that more promotional work should be done. Interest was also expressed in holding a general conference to discuss the virtues of updating inter-American conventions, if necessary.

Dr. Villalta also drew attention to the response of Paraguay, which described the influence of the Mexican Convention in adopting the recent law on Private International Law.

In her analysis of the replies of academicians, the Rapporteur verified that the vast majority noted the advanced nature of the Mexican Convention for the time, and the fact that its principles were consistent with the current commercial context. She also noted that some professors indicated a certain apprehension regarding the scope of the principle of freedom of choice. With regard to the Mexican Convention, some experts expressed favorable opinions, others proposed a model law, or that the Convention be used as a reference for drawing up a guide on principles of Private International Law. On this point, some academicians suggested that a conference be held using the principles in CIDIPs to develop model laws. In addition, the Rapporteur noted that there was no participation from Central American experts.

Dr. Stewart mentioned that it was his understanding that there was substantive support for the Mexican Convention, but there was no interest in developing a model law or proposing amendments to the Convention. Thus, in his opinion, the next step in this case should be a meeting of experts to work on preparing a guide of principles on the subject.

Dr. Salinas, in light of the explanations given, noted that there was not a great deal of interest in ratifying the Convention, and agreed with Dr. Stewart’s proposal to hold a meeting of experts with broad representation to prepare a Guide on Principles.

Dr. Hernández García noted that what had happened with that convention exemplified a pattern with international organizations, in which a theme is developed and an instrument designed, in the hope of having an impact on development of the theme domestically. He proposed that consideration be given to working on an interpretative guide, and suggested that the Rapporteur, with the support of the Secretariat, prepare a draft guide for evaluation by the members.

Dr. Moreno referred to how it had evolved since the 1990's, with the development of arbitration as a means for settlement of disputes, and the influence of the basic principles of the Mexican Convention, which are already part of the domestic legal systems in a number of countries in the Americas. In this regard, he advocated accepting the same principles of arbitration in areas of traditional justice. He pointed out that some of the countries of the region were already in the process of amending their laws in the field of Private International Law, and so he considered that it would be highly relevant to prepare a guide to benefit many.

Dr. Villalta said that in beginning her work as Rapporteur, she had not given thought to the objective of influencing ratification of the Mexican Convention, but was focused instead on promoting the pool of Private International Law of inter-American conventions. Thus she suggested that in addition to preparing a guide, this space should be used to promote the entire system of norms governing Private International Law.

Dr. Negro indicated that the Committee Secretariat was available to support the work of preparing a guide. He said that this is an ideal example of a case where the success of a Convention is not reflected in the number of ratifications, as its influence could manifest itself in other ways, such as by ensuring that their principles are inserted into domestic legal systems. He further noted that many of the obstacles to possible ratification did not seem to have to do with the content of the Convention, and that it may ultimately be possible to use its principles, together with the principles derived from The Hague Conference on the subject.

The members agreed to designate Dr. Moreno as Co-Rapporteur on this topic, and that the next step would be to have the Rapporteurs draft a guide on principles, to be presented at the next session.

It should be noted that during this session the Inter-American Juridical Committee organized a roundtable with experts on Private International Law where it was discussed about the future of Private International Law and specific topics, such as the Inter-American Convention on the Law Applicable to International Contracts; the written report of the roundtable is registered as document DDI/doc. 3/16.

During the 89<sup>th</sup> Regular Session (Rio de Janeiro, October, 2016), Dr. Villalta recalled the background of discussions on the issue of international contracts and informed about the guide on international contracts drafted with Dr. Moreno. This guide is based on the main principles of the Mexico Convention on the Law Applicable to International Contracts, on The Hague Principles on the Election of the Law Applicable to International Contracts, and the most important international instruments in this field. She also reported that the responses to the *questionnaire* had been considered for the drafting of the Guide, in addition to the surveys carried out with professors and jurists of the Hemisphere.

Dr. Moreno stated that he could notice the merits of the Mexico Convention, despite its low number of ratifications. The lack of ratification of the Convention was due, in his opinion, to three causes:

- The juridical community in the year 1994 was not prepared to receive a document of that nature.
- Certain formulations were a compromise text resulting from diplomatic discussions, such as for example articles 9 and 10.

- Some of the terms were not effectively translated into English.

In this context, the Rapporteurs proposed that the Committee adopt a set of guiding principles whose purpose would be similar to that of the Convention, considering that the guide can be used as a model for domestic legislation and become an academic reference for law operators regarding the solutions proposed in the Mexico Convention, among others. In addition, the guide will facilitate interpretation and understanding of complex concepts such as autonomy of the will and therefore can be useful for judges and arbitrators to use it in their decision-making processes. This can have an impact and lead to the ratification of the Convention and serve as a model to facilitate amending national laws and expand the scope of possible solutions, including the proposals of the principles of The Hague.

The Chair expressed his support for the perspectives on the guide proposed by the Rapporteurs.

Dr. Salinas questioned about the added value and relevance of a guide in the light of the principles of The Hague, considered an authority within the Organization on the subject and for that reason he found that a model law would be more advisable.

Dr. Villalta said that the added value of the guide is to expand the American regulatory system to incorporate more modern solutions in the national systems. She mentioned that since during the 88th Session, held in Washington, the Plenary decided to support the Rapporteurs in the preparation of a guide, they did not consider reasonable suggesting a model law.

Dr. Moreno referred to his experience in UNCITRAL where he worked on a legislative guide, a forum in which there were also doubts about the nature of the instrument. However, there is agreement that those solutions must be useful for individuals and not bind States to specific systems established in treaties, and that participants must have access to them.

The proposed guide contains the most modern solutions worldwide for international contracts, in light of the various international instruments, including the Convention of Mexico and is expected to serve the legislator, the judge, and even the arbitrators.

Dr. Mata Prates considered a "soft law" proposal by the Committee of great value to help jurists interpret and apply existing norms.

The Chair recalled that the Rapporteurs would also need members to analyze the possible solutions presented. As no member had objected the solutions offered, he asked the Rapporteurs about the elements needed to transform the project into a guide.

Dr. Moreno said that it would be important to ensure that the material presented is the best that the Legal Committee can draft.

Dr. Hernández García proposed the theme to be examined together with the legal counsels in order to have their opinions and direct feedback.

The Chair agreed to Dr. Hernández García's proposal and suggested distributing a copy of the draft presented by the Rapporteurs to the legal advisors of the Ministries of Foreign Affairs.

At the end of the discussion, the plenary agreed that the Rapporteurs would submit a document at the next meeting.

During the 90<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), both Rapporteurs, Drs. Elizabeth Villalta and José Moreno, shared their views on developments on the subject matter. Dr. Moreno mentioned efforts concerning the law of contracts and the 1980 Rome Convention in Europe and developments in the regional arena, with the Bustamante Code, the Montevideo Code and the work of the Inter-American Conferences on International Private Law (CIDIPs).

Dr. Moreno then explained the developments of The Hague Conference on Private International Law (PIL) in the area of contracts and, in particular, The Hague Principles, which are intended to aid legislators in their efforts to modernize contract rules. In fact, he noted that both the advances of The Hague and of the regional Convention have been a catalyst for the legislative changes in his country, Paraguay.

Dr. Moreno added that he had participated in the Working Group of The Hague Conference to draft the Principles and then later served as his country's representative in the political body that approved the document. At said forum, he said, the contribution of the Mexico Convention was consistently recognized as one of the principal sources.

Dr. Mata acknowledged that the purpose was to create a guide of these principles. He concurred that the States were not interested in ratification of the regional convention. However, he felt that we would have the Mexico Convention for some time to come as a point of reference. He said that although there could be hope that the guide would become law, common among States, he thought that for now, that was a bridge too far to cross.

Dr. Hollis asked about how the Rapporteurs' document would deal with the differences between the Mexico Convention and The Hague Principles, in view of the fact that the former encompasses all kinds of contracts, while the latter addresses full party autonomy to commercial contracts. He wondered, therefore, whether the guide was intended only for commercial contracts.

Dr. Hernández said that the objective was to standardize rules so that when a company from one State does business with a company from another State, they are able to do so smoothly. He also contended that the essential thing was to promote international business, and a guide on the subject matter would be the ideal way to do so. It should offer the best advice to the user for purposes of finding the most pragmatic solution to facilitate private exchange. In his view, that would be the added value for all who use it.

The Chair stressed the importance of having the input of the experts in the field of private international law. He also emphasized that the Committee should offer products that would be of use, in keeping with its objectives. He said that precisely on this last point he harbored some doubt as to the consultative role of the Committee (emanating from the Charter). He wondered whether it would be going a bit beyond the scope of the Committee's objectives. In his judgment, the guide should have a legislative nature and assist international trade, as Dr. Hernández had said. Therefore, he thought it should be a legislative guide addressed to the States so that they could modernize their laws. He felt that a 150-page manual seemed more like a "declaration" and suggested a shorter format.

Dr. Moreno addressed the Chair's concerns by explaining that last April the decision had been made to write a draft guide. He felt that if the approach were to change at this point, a great deal of the prior work would be lost; however, he acknowledged he was open to whatever the Committee should decide.

He has found that many legislators, even professors, did not have much of an understanding of private international law and, for this reason, the guide was intended to simplify the material and make it more accessible. He was concerned that legislators could take 25 to 30 years to amend domestic laws and regulations; while arbitrators, judges and many others could truly benefit right now from the guide. What was being created by this document, he stated, was essentially "soft law."

Dr. Moreno agreed with the comment of Dr. Hernández that the guide had been originally conceived of for commercial contracts. He noted that even though the current draft was long, it covered a great deal of material; even though it was intended to be simple and comprehensive, it just could not be both at the same time.

He added that it would be necessary to include further explanation about how consumer and labor law fall outside the parameters of the Guide.

In response to Dr. Hollis, he explained that The Hague Principles did not cover situations where no choice of applicable law had been made, which would have been way too ambitious.

In concluding, Dr. Moreno clarified that the idea had not been to prepare a declaration, but to explain the solutions from the Mexico Convention, The Hague Principles, and thus guide legislatures and, in so doing, serve the parties.

Dr. Hernández mentioned that perhaps the end user could be best determined after the Committee looked at the final product. At that point, it would be easier to decide whether it would be more suitable for legislators, judges, the parties, etc.

He also noted that the Mexico Convention had started out with good intentions. Nonetheless, its results offer good reason for political entities to consider whether or not to undertake the work of codification through a treaty. Thus, it was not necessary to go through a treaty and it would have been better to use a soft law instrument. Consequently, this stands as an example of the need for caution when embarking on a codification process, which requires a great deal of effort and resources.

Dr. Mata Prates felt that this exchange of ideas has brought the Committee closer to its goal. He also noted that it was an academic labor, which has its own rules; while the Committee also has its rules and even though we could have chosen a model law, we decided on a guide. He thought that it would be useful to introduce a guide because few States have a law on this subject, in addition to the non-binding nature. The CJI could, in this way, make a meaningful contribution to a very important area with practical application.

Dr. Moreno answered the last comment regarding a model law, by clarifying that the guide was not intended to go against the Mexico Convention, about which he said he is proud. If it is properly interpreted, he said, the regional convention would partially or totally solve core issues, such as party autonomy, selection in a narrower sense, etc. The important thing was for parties to be able to get what they had intended out of contracts. This is what arbitration had achieved so successfully. He said that at all national levels, States could ratify the Mexico Convention or they could rework it in combination with The Hague Principles. He noted that these two instruments had been immediately useful and provided examples where courts have already used them. His goal was for the guide to become an equally useful document.

The Chair understood this document to entail enriching the Mexico Convention with The Hague Principles and, from his point of view it would be a guide to aid legislative bodies because it is grounded in facts.

When the analysis of this item concluded, the Rapporteurs were asked to submit a draft of their proposals at the next regular meeting.

During the 91<sup>st</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the Rapporteur on the subject, Dr. José Moreno, elaborated on his report, “First Draft of the Guide on International Contracts in the Americas,” document CJI/doc.540/2017 corr.1. noting that the report reflects a collective effort in which many experts from different countries of the Hemisphere have taken part, such as accomplished professors from Argentina, Brazil, Canada, the United States, and Uruguay.

In his description of the report, he said the introduction explains the beginnings of international private law and efforts in the global arena (The Hague Conference, UNCITRAL and UNIDROIT), as well as in the inter-American arena, citing the Bustamante Code, the 1940 Treaties of Montevideo, in addition to mentioning the work of the CIDIPs (underscoring the high number of ratifications). At the regional level, he cited processes of integration within Mercosur and the European Union.

Under the heading of codification techniques, the Rapporteur explained that over the past 20 years, 10 conventions have been adopted out of a total of 79, mostly of a procedural nature, and he expressed his concern over difficulties in the diplomatic process of treaty approval and ratification,

which means that many instruments do not end up being ideal or are subject to reservations, thus undermining their unifying purpose.

He said our times have seen a proliferation of mostly soft law instruments; out of a total of 65 instruments adopted over the past years, 11 have been in the sphere of the OAS, in particular at CIDIPs VI and VII, and he noted in this regard the contribution of the CJI through the model law on access to public information, the model law on simplified stock corporations and the model law on electronic customs receipts for agricultural products.

In this context, he presented the Committee's objectives through the adoption of a Guide to International Contracts, which takes into consideration elements of the 1944 Mexico Convention:

- Facilitate the adoption of solutions through different mechanisms (calling for either adopting the OAS instrument or regulating said principles in domestic laws);
- Serve as an interpretative guide and even as a lingua franca for judges, arbitrators and contracting parties;
- Facilitate throughout the region the acceptance of universally widespread solutions with respect to party autonomy and acceptance of non-state law;

Next, Dr. Moreno gave a list of anachronisms in the field of contracts:

- Longstanding or 'out of date' legal solutions;
- Lack of consolidation of the principle of party autonomy and its derivatives;
- Reticence regarding acceptance of non-State law;
- Failing to find equivalents of non-state law in the legal and arbitral sphere;
- Use of the notion of public order in the sphere of private international law.

Consequently, in addition to being the first in the region, the guide will serve as a bridge instrument to the work carried out by The Hague Conference and UNCITRAL.

Upon making the report available, the Rapporteur invited everyone to take whatever time necessary to review it, given that it is not his understanding that the final version would be adopted at this meeting.

Dr. Villalta highlighted the positive influence of the Mexico Convention both at the universal and regional level and the Committee's potential to make a new contribution through the Guide.

Dr. Hollis found it necessary to draw a distinction between the descriptive and the normative parts, and commented that this should be reflected equally throughout the report. In this regard, he requested brief summaries to be included. As to the contribution of the Committee, he expressed the need to list available alternatives with their respective explanations and reasoning, which means a decision must be taken as to whether we want a document of a normative nature or a compilation.

Dr. Hernández expressed his appreciation for the impressive document, in addition to commending Dr. Villalta for the explanation about the motivation for the Guide, which is to aid operators in making decisions on the subject of contracts and not pursue further ratification of the Mexico Convention, in view of the fact that treaties should not be considered the only legal solution. As to the content of the report, he thinks that the document could be adopted as presented by the Committee, but he fears that in its current version it would not achieve the intended purpose, because we are not seeking an academic but rather a practical document. For this reason, it must be more concise, clearly identify the normative part and explain the principles and solutions to be promoted based on benchmarks that were found.

Dr. José Moreno asserted that even though it is not the intention of the Rapporteurs, the Guide could lead to ratification of the Convention, certain that it could serve as an important benchmark for

the States, and the specialized institutions, in the same way that The Hague Conference and UNCITRAL have, and this can help to disseminate and support it.

As to the comments of Dr. Hollis, he explained that the expectation is that these instruments serve a broad range of stakeholders, actors such as legislators, judges, parties and, therefore, the ideal thing would be to make clear throughout the document that the operator is very much at the forefront. He clarified that the Guide aims to provide a reasonable and well-founded explanation about the status of the issue in each particular case. The Rapporteur is intending to provide a collection of the positions of the States.

As for the normative part, he fears that in seeking to take a position on certain points, a choice has to be made between the Mexico Convention and The Hague Principles and, consequently, this alternative should be seriously evaluated. Today's guides are complex, technical and extensive and the Rapporteur has taken particular care in drafting a more brief and to-the-point product; in fact, it was shortened from 300 to 120 pages. With relation to corrective solutions, he proposed revisiting principles of the Mexico Convention, although the Conference also offers good options. He noted that we do not have the same conditions as The Hague Conference, which was supported by other institutions and experts from all over the world and was conducted over a much longer period of time. He proposed keeping the text in its current form, while considering the technical aspects of it, and voiced the need for the region to have an instrument available in the near future.

Dr. Hernández clarified his previous remarks expressing interest in producing practical reports that offer relevant solutions to address the issues raised, because the alternatives proposed in some instances varied widely.

Dr. Richard asked for these reports to be translated to enable wider dissemination of the Committee's work among experts from his country, in addition to international organizations such as the African Union.

Dr. Mata Prates underscored the difficulties that arose in light of the fact that no consensus has been reached on some topics, and he expressed his gratitude for the efforts made by the Rapporteurs in summarizing positions in the report. He asked the Rapporteur to reduce the high number of options to as few as possible, choosing only solutions with a solid foundation. He fears that it will lose effectiveness if it does not help the operator with concrete solutions.

The Chair noted his concern over the practical nature of the Committee's work, because the intention is not to criticize extensiveness. The expectation in the end is for the document to serve as reference material and aid in explaining proposed solutions. It is intended to explain how a solution is or not compatible with the standards and thus move forward in the normative work, whether the norms are final or, where there is no agreement, it should be so indicated.

Dr. Duncan Hollis felt that more clarity is needed about what we are trying to do, a kind of road map. The document already describes what we are doing, but in each case, it should determine where there is agreement, disagreement and ambiguity. When there are mixed opinions, we must decide which one is the most appropriate one and explain our reasoning. The challenge is to figure out whether we are seeking to create a supplemental document to The Hague Principles or a replacement to it. In fact, the report will be valuable even though there may be disagreement and no solutions can be offered.

Dr. Ruth Stella Correa Palacio felt it necessary to find possible solutions to applicable norms and procedures. Concretely, she suggested not including topics of arbitration in the study, because they involve issues that could be categorized as quasi-contractual. This topic could actually give rise to a separate paper. In fact, she asked the plenary for further explanations on the elements that a guide should include. If we are asking the Rapporteurs to imply which ones are the best solutions through definitions, then she will go that route in her report.

Dr. Villalta she invited Dr. Moreno to determine what is most relevant to private international law today, in addition to identify applicable law in each case, so a principle can be issued based on the issue.

The Chair proposed that it is essential to draw a distinction between guides and model laws, considering that the former have a practical side to them, which enables States to apply them based on the principles and standards presented and do not constitute doctrinal or authoritative writings; while model laws are a set of norms that are supposed to aid States in legislating.

Consequently, he proposed to the Rapporteur to keep the report as it currently stands as a point of reference for the guide.

Dr. José Moreno clarified that The Hague Conference does not have guides, but UNCITRAL and UNIDOROIT do. These guides are characterized to a great extent, among other things, by being extensive, complex and explanatory documents. There are variations in guides; in this regard, he proposed following the example of the UNIDROIT Guide on agricultural land investment contracts. It has an index, preface and includes an explanation, providing context to the topic without taking positions, but presents an opinion. UNCITRAL, for its part, does have guides that take positions.

He expressed his interest in drafting a quality document that respects the requested criteria. The positive thing about the guide, he said, is the flexibility to expand documents and even propose corrections. As to the topic of arbitration and investments, he added it is something that can be put off until a later date.

In concluding, the President drew a distinction between guides flowing from non-governmental and governmental organizations. In thanking the Rapporteur, he asked him to take the observations into account to create a new version for the next meeting.

The matter was not discussed during the 92<sup>nd</sup> Regular Session (Mexico City, Mexico, February, 2018) as the deadline for specialized organizations and experts to submit comments to the draft Guide on International Contracts in the Americas, (document CJI/doc. 540/2017 corr. 1) distributed by the Department of International Law, was still two months away.

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2018), the Rapporteur, Dr. José Moreno, made a brief presentation on the content of his Rapporteurship, initially thanking the Department of International Law for the good work carried out. He explained that during the 19<sup>th</sup> century the dream was to have a global instrument; this would only materialize in 2015, by adopting a *soft-law* instrument that makes reference to the UNCITRAL principles, which in turn make good use of the developments of the Mexico Convention. The Rapporteur further explained that he had received several responses to a questionnaire sent to the States and experts in order to best respond to the decision of the plenary of the Committee regarding the drafting of a legal guide useful for legislators, judges and lawyers. From the responses received it was evident that the current system is not equipped to encourage predictable international businesses. Therefore, the Department of International Law prepared a synopsis on how the work should be carried out and including some punctual considerations. The text presented to the Committee in August 2017 was also sent to experts and members of the academy at the regional and global levels, asking them to send their comments. The Department in turn included all the inputs received in a basic text that the Rapporteur is considering submitting for the approval of the Committee during the next working session in February 2019.

Dr. Carlos Mata Prates thanked Dr. José Moreno for his work, seeking as it does to present a practical contribution to legal operators and avoid repetitions regarding the work carried out globally or within the Inter-American system.

Dr. Duncan Hollis expressed his satisfaction at the draft on which Dr. Moreno is working, and asked him if it was too late to provide new comments by other United States professors.

The Rapporteur of the theme explained that the guide's intent is to go beyond the Mexico Convention in terms of developments, and that it seeks to provide the system with something based on the most recent advances, including The Hague Principles on choice of law for international commercial contracts. In response to Dr. Hollis, he specified that there is still room for new comments. He explained that the American Bar Association has expressed interest in sending comments as well. He confirmed that UNCITRAL and The Hague Conference are currently working on a document on international contracts, and that they had undertaken to send their comments to the OAS Guide, and also make a reference to the work of the OAS although normally they do not cite regional works or studies.

The Chair thanked Dr. Moreno for his proposal, which provides an updated, clear document that deals with conflict resolutions, so he encouraged and supported the continuity of the work.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019), the Rapporteur for this topic, Dr. José Moreno presented the final version of his report entitled "Guide on International Contracts in the Americas", document CJI/doc.577/19, written with a view to moving toward the adoption of a definitive Guide document. He thanked the Department of International Law for its ongoing support and also referred to support from the main institutions working in the field of private international law, such as the United Nations Commission on International Trade Law (UNCITRAL), The Hague Conference on Private International Law, and the American Association of Private Law.

He acknowledged that the Guide has taken both universal and regional regulatory developments into account in this field, such as the European regulations known as Rome I; the Inter-American Convention on the Law Applicable to International Contracts (1994) – Mexico Convention; and the Hague Principles (2015), approved by The Hague Conference on Private International Law.

The Guide strives to foster regional harmonization of the law applicable to commercial contracts, providing orientation for countries lacking national legislation on this matter and for judges and others involved in international contracts, while at the same time serving a useful didactic purpose. Finally, setting aside the idea of elaborating a treaty, it is hoped that the Guide will spur economic integration, growth, and development in the region.

As established in the report, the Guide pursues several goals, such as:

- a. to propose a current statement of the law applicable to international commercial contracts for the Americas as based on the fundamental principles of the Mexico Convention and with the incorporation of subsequent developments in the field to date, particularly as codified in the Hague Principles;
- b. to promote greater understanding of the Mexico Convention and the principles on which it is founded, to rectify the lack of information and misinformation about the instrument, and to clarify uncertainties and inconsistencies in the various language versions;
- c. to assist OAS Member States that are considering ratification of the Mexico Convention;
- d. to support efforts by OAS Member States to modernize their domestic laws on international commercial contracts in accordance with international standards;
- e. to provide assistance to contracting parties in the Americas and their counsel in drafting and interpreting international commercial contracts;
- f. to provide guidance to judges in the Americas, who may find the Guide useful both to interpret and supplement domestic laws, particularly on matters in international commercial contracts that are not addressed in such laws; and,
- g. to guide arbitrators in the exercise of their particular powers to apply, interpret and supplement the law applicable to international commercial contracts.

Dr. Carlos Mata thanked the Rapporteur and requested more detailed information from the Rapporteur on the final reference, as well as the scope of the expected approval of the document presented in full; all this, in light of the complexity of this issue and the willingness to accept many of the formulas in the report. In response, the Rapporteur explained that he sought adoption of the entire document, including the appendixes. Dr. Matta said that he agreed with the regulatory aspect of the document and noted that there are many references to doctrine, which is something that must be taken into consideration when adopting the Guide.

The Rapporteur explained that the universal code preparation agencies – UNIDROIT and UNCITRAL – use the same formula when regulating this law. He mentioned his interest in representing the different schools of thought, whose comments had resulted in a more balanced text than that initially proposed, which had been quite critical of the Montevideo (1989) developments. In that sense, the Guide clearly follows the lines established in the Mexico Convention.

Dr. Miguel Espeche-Gil noted with concern the current practice of banks, in terms of their moving away from contractual freedom (*autonomía de la voluntad*) in public order, for instance by imposing usurious interest rates as penalties. The Rapporteur expressed his agreement with this view, explaining that the Guide refers to the transcendence of the contract as an instrument governed by legislation, requiring specification of the law that regulates such matters and clarifying the role of the State and of public order.

Dr. Mariana Salazar mentioned the dissemination of the document, once adopted by the Plenary, asking whether it would be possible to give it, as well as other completed topics, broader thematic dissemination,

Dr. Luis García Corrochano noted that this paper bridges a gap in this field, where massive regional trade flows make it appealing. It also imposes a certain order in the area of commerce that is regulated by bilateral agreements. Finally, this is a text that is adapted to the needs of these new times and should be required reading in colleges in all our countries.

Dr. Milenko Bertrand supported all efforts to disseminate this type of document, which is not a convention, urging the members to endow it with greater visibility. He wondered whether there was any formula for connecting this Guide and the document to be presented by the Chair on arbitral awards. He also mentioned the relevance of facilitating access to the Guide for ordinary courts. Finally, he asked the Rapporteur whether there would be any opportunity to put forward additional comments, although he had no intention of delaying its adoption.

Dr. Íñigo Salvador suggested a publication for its dissemination within member states, paying special heed to academia, given that it contains a set of directives for practitioners of law.

The Chair concurred with the thorough assessment of the report undertaken with the support of the Department of International Law, and said she particularly supported the recommendations calling for clear rules and contractual freedom/party autonomy.

The Rapporteur explained the importance of efforts to ensure appropriate dissemination of the document, in accordance with current and future technology. There is a commitment from UNCITRAL and the Hague Conference to post it on their respective websites. It is expected that the American Association of Private International Law (ASADIP) members will be able to disseminate it and cooperate with national authorities on the significance of the Guide. Within the OAS, a tweet could be sent out by the Secretary General. He clarified that the report had benefited from the input of more than forty people, who are already aware of its importance and willing to disseminate it. He also thanked those who had expressed interest in using the Guide in academic circles. He pointed out that the English version had been used as a reference for final approval, so that the Spanish version requires some adjustments. He invited Dr. Bertrand to participate in that effort. Finally, he thanked the Department of International Law for the crucial part it had played in its preparation.

Dr. Bandeira Galindo asked about the issue of public order mentioned in paragraph 504 regarding a United Nations Resolution on Guiding Principles, which is a non-binding document, and requested the Rapporteur to make it clear that this is not binding on judges. Next, he asked about the reference to the mandatory status of human rights standards and principles. Finally, he requested clarification of whether internationally acknowledged rules are acknowledged by the State or by the international community. On this matter, the Rapporteur explained that that paragraph had been proposed by someone submitting a comment. In his experience, the intention is to provide guidance on the importance of internationally relevant instruments that could be applied. He invited Dr. Galindo to review the paragraph, making it clear that this should not contain an imperative verb form. In fact, as he immediately ascertained, the English version uses a verb form that is not imperative.

Dr. Carlos Mata recommended stressing that the legal nature of this document is that of a Guide, leaving ample room for discretionary action by the authorities, which would also safeguard the wording of some articles.

Dr. Milenko Bertrand explained that he had no in-depth comments, other than clarifying certain distinctions relating to Chile, which would allow him to validate the content, in the light of recent decisions. On this aspect, the rapporteur requested that any adjustments be as neutral as possible, prompting the least possible number of disputes, as very divergent comments had been received from Chile.

Dr. Ruth Correa, in her capacity as Chair of the Committee, asked that the fewest possible adjustments be made in a small working group, and that the Report be considered approved, subject to such adjustments and approval of the resolution. She ended by thanking the Rapporteur and the Department of International Law for its support of his work.

When reviewing the draft resolution approving the Guide, the Secretariat noted as an innovative aspect the request to the Rapporteur, with the support of the Department of International Law, that he draw up a proposal that would enable the Guide to be disseminated as widely as possible among the many interested actors.

The Rapporteur clarified that the recommendations originally listed in Annex A appear in the first part of the text, followed by the rest of the Guide. He also agreed with the proposal made by Dr. Mata to suppress part of the text of resolute paragraph 3. Finally, in response to Dr. Galindo's query, he explained his reasons for supporting the use of the word "harmonize" instead of "standardize" considering the interest of the Guide in proposing solutions to specific cases, although not indicating a single path. With regard to the promotion initiative addressed in resolute paragraph 3, he felt it was pertinent to prepare a publication and to participate in conferences. This is something that could be replicated in three events that will be held in South America in June (Santiago, Montevideo, and Asunción), then during a visit to Washington, D.C., and, finally, in Rio de Janeiro, during the next Committee session. He also mentioned the intention of The Hague Conference, UNCITRAL, and UNIDROIT to cite the Guide in a publication they were preparing, and the approaches being made to ASADIP, regarding good options for dissemination.

Dr. Miguel Angel-Espeche said he intended to present the Guide at the next meeting of the Hispano-Luso-American Institute of International Law, which will be held in 2020.

The Guide was unanimously approved through resolution "Guide on the law applicable to international commercial contracts in the Americas", CJI/RES. 249 (XCIV-O/19).

The resolution and the report adopted by the Committee are included below:

**CJI/RES. 249 (XCIV-O/19)****GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL  
COMMERCIAL CONTRACTS IN THE AMERICAS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

MINDFUL that one of the purposes of the Inter-American Juridical Committee is to promote the progressive development and codification of international law and to examine the possibility of harmonizing the legislation of the countries of the Americas, where appropriate;

RECALLING that the OAS approved the Inter-American Convention on the Law Applicable to International Contracts in 1994 and that in 2015 The Hague Conference on Private International Law took said Convention into account in drawing up the Hague Principles on Choice of Law in International Commercial Contracts;

BEARING IN MIND that, nevertheless, there are still disparities in the law applicable to international commercial contracts in the countries of the Americas; and

RECOGNIZING the importance of having a Guide on the law applicable to international commercial contracts in the Americas to advance important aspects in this area in order to promote legal harmonization in the region and, as a result, stimulate economic integration, growth, and development in the hemisphere,

RESOLVES:

1. To approve the Guide on the Law Applicable to International Commercial Contracts in the Americas (CJI/doc.577/19 rev.1 corr.2), attached hereto.
2. To thank the Rapporteur for this topic, Dr. José Antonio Moreno Rodríguez, for the significant effort he put into developing this issue and in preparing the Guide.
3. To request the Rapporteur for this topic to prepare, with support from the Department of International Law, a proposal for disseminating the Guide as widely as possible among the various stakeholders.
4. To transmit this resolution and the attached Guide to the policy-making bodies of the Organization for due attention and consideration.

This resolution was unanimously approved at the regular session held on February 21, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, George Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil, and Íñigo Salvador Crespo.

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**CJI/doc.577/19 rev.1 corr.2**

**REPORT BY THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE GUIDE ON  
THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL  
CONTRACTS IN THE AMERICAS**

Completing a process launched in 2015, the second preliminary draft of the “Guide on the Law Applicable to International Commercial Contracts in the Americas” (draft Guide) is being presented in February 2019 to the meeting of the Organization of American States’ (OAS) Inter-American Juridical Committee – hereafter CJI. Dr. José Antonio Moreno Rodríguez, a member of the aforementioned CJI, served as rapporteur for the draft Guide.

This draft Guide is the culmination of intensive research, consultations, and drafting activities, in line with guidelines received from the CJI at successive meetings. Accordingly, the

rapporteur spent all this time working in close collaboration with the OAS Department of International Law – hereinafter DIL – headed by legal expert Dante Negro and with the benefit of the involvement of Jeannette Tramhel, Senior Legal Officer, who devoted a great deal of time to the project with assistance from various interns.

This second draft of the Guide benefited from significant input from jurists Diego Fernández Arroyo (Argentina, Sciences Po-Paris) and Geneviève Saumier (Canada, McGill U.-Montreal), as well as Anna Veneziano and Neale Bergman (both members of the Secretariat of the International Institute for the Unification of Private Law of Rome or UNIDROIT) and Luca Castellani, members of the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The American Bar Association Section on International Law provided valuable comments, as did Valerie Simard, on behalf of the Department of Justice Canada. Further input came from Gustavo Moser (Brazil, Counsel with the London Court of Arbitration), Anayansy Rojas (Costa Rica), and José Manuel Canelas (Bolivia). In addition, the draft benefited from a second round of comments received from Cecilia Fresnedo de Aguirre (Uruguay), Frederico Glitz (Brazil), and Nádia de Araujo (Brazil), who had already contributed to the first draft as well.

That first draft Guide was presented by the rapporteur at the Inter-American Juridical Committee's August 2017 meeting.

It was subsequently considered by UNCITRAL, UNIDROIT, and the Hague Conference on Private International Law, and by prominent regional and international legal experts. Numerous replies were received, with a variety of input and generally very positive comments on the document, notably those from Hans Van Loon (former Secretary General of the Hague Conference on Private International Law), Daniel Girsberger (Univ. of Lucerne, Chairman of the working group which drafted the Hague Principles), Marta Pertegás (Spain, U. of Antwerp, member of the Secretariat, who worked closely on the drafting of the Hague Principles), Luca Castellani (UNCITRAL), Anna Veneziano (UNIDROIT), and Joachim Bonell (UNIDROIT-retired).

Valuable input was also contributed by Jürgen Samtleben (Germany, former Director of the Max Planck Institute), Alejandro Garro (Argentina, Columbia University, New York), Paula All (Argentina, Univ. del Litoral and Vice Chair of ASADIP), Brooke Marshall (Australia, Max Planck Institute for Comparative and International Private Law, who helped draft the Hague Principles), Maria Blanca Noodt Taquela (Argentina, Univ. of Buenos Aires), Nádia de Araújo (Brazil, PUC-Rio de Janeiro), Cristian Giménez Corte (Argentina), Laura Gama (Brazil), Frederico Glitz (Brazil), Valerie Simard (Department of Justice Canada), Jaime Gallegos (Chile, U. of Chile), Ignacio Garcia (Chile), Francisco Grob D. (Chile - ICSID Secretariat), Antonio Agustín Aljure Salame (Colombia), Lenin Navarro Moreno (Ecuador), Elizabeth Villalta (El Salvador, former CJI member), Pedro Mendoza (Guatemala), Nuria González (Spain, UNAM-Mexico and Stanford Univ.-USA), Mercedes Albornoz (Argentina, CIDE-Mexico), Jan L. Neels (South Africa, University of Johannesburg), David Stewart (Georgetown, United States, former CJI member), Antonio F. Perez (United States, former CJI member), Soterios Loizou (King's College, London), Cecilia Fresnedo (Uruguay), Claudia Madrid Martes (Venezuela), and Eugenio Hernández Bretón (Venezuela-Baker McKenzie).

Several of the above-mentioned individuals are also distinguished arbitrators or arbitration-related academics. The following well-known speakers from the arbitration arena also provided comments on the document: Felipe Ossa (Chile), Francisco González de Cossío (Mexico), Alfred Bullard (Peru), Fernando Cantuarias Salaverry (Peru), Roger Rubio (Peru), and Dyalá Jiménez Figueres (Costa Rica, currently Minister of Trade).

Several of the legal experts mentioned above are also officers and members of the prestigious American Association of Private International Law (ASADIP), which brings together the region's top experts in the field. Hence, in a statement dated January 10, 2019, ASADIP expressed support for the draft Guide, pursuant to a November 9, 2018 mandate from the ASADIP General Assembly and supports efforts toward approval of the final document. ASADIP is committed furthermore to working to establish channels of cooperation with national authorities, in an effort to convince them of the importance of the Inter-American Juridical Committee's work

in this field and of how tremendously important the Guide will be, not only for countries that do not yet have a specific regulation on the law applicable to international contracts, but also for those states that are promoting legislative reforms with a view to bringing their rules into line with the latest solutions in the field. ASADIP further stated that it would circulate the final document of the Guide as widely as possible in the academic and legal arenas.

It should be borne in mind that at its third plenary session, held on June 21, 2017, the OAS General Assembly itself had instructed “the Department of International Law to promote among member states further development of private international law, in collaboration with organizations and associations engaged in this area, including the United Nations Commission on International Trade Law, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the American Association of Private International Law (ASADIP)” (AG/RES. 2909 (XLVII-O/17)). The various forms of assistance received from these organizations or their members were therefore in compliance with and in fulfillment of the aforementioned General Assembly mandate.

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This draft Guide draws on a number of background documents as well. In 2015, at the initiative of CJI member Dr. Elizabeth Villalta, which initiative the CJI approved, DIL sent to the governments of the Americas a questionnaire on the subject of international contracts (“Questionnaire on the Implementation of the Inter-American Conventions on Private International Law,” document CJI/doc.481/15).

Based on these responses, the CJI and DIL prepared a status report on the subject (report entitled “The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas,” document OEA/SG, DDI /doc.3/16; see also the document entitled “The law applicable to international contracts,” document OEA/Ser.Q, CJI/doc.487/15 rev. 1).

CJI finally decided to move ahead with drafting a guide on the subject, to which end the DIL prepared a highly comprehensive synopsis that covered a range of topics to be addressed (“Promoting international contracts law in the Americas – A guide to legal principles,” document OEA/Ser.Q, CJI/doc.XX/16), including information highlighted by several jurists in the region who have been kind enough to pledge their assistance where their domestic law is concerned.

In addition, Dr. Villalta prepared a comparative analysis of the Mexico Convention (1994) and the Hague Principles, both concerning international contracts, which was also most useful as preparatory material (“The law applicable to international contracts,” document CJI/doc.464/14 rev.1).

Drawing on all this input and with the unfailing support of the DIL, the aforementioned first draft Guide was prepared in Spanish by Dr. José A. Moreno Rodríguez as rapporteur. Likewise, with the efficient support of the DIL, the above-mentioned material was translated into English by the OAS translation team, for consideration at the August 2017 meeting of the CJI.

The question of a prospective guide to international contracts has been discussed at previous meetings of the CJI: at Washington, D.C., in March 2016, and at Rio de Janeiro in October 2016 and March 2017. At those meetings the CJI had the opportunity to consider the different preparatory materials contained in the appendices to the within draft Guide, including the enriched synopsis prepared by the DIL.

A great deal of time has gone into this document, which has been drafted with input provided by states, several academics, the DIL, and members of the CJI. This final document is expected to contribute toward improving the legal regime applicable to international contracts in the Americas.

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The CJI has discussed the report presented and commented on the work done. A specific request was made for the Guide to be very explicit on the issues on which there is overwhelming

consensus and on those on which differing solutions are proposed, with specific positions or recommendations set out in the Guide in the latter case.

The draft Guide presented on this occasion has fewer pages than was initially contemplated (bearing in mind the scope of the topic and that many guides adopted by universal codifying bodies are considerably longer). The CJI was sound in its guidance that the document should not be too long and be as simple as possible.

We have sought to meet that objective with the draft Guide, which, apart from anything else, avoids excessive technicality, continual references, and even footnotes, except for those considered strictly necessary.

The draft Guide also relies consistently on the main instruments in force on the subject, including Rome I (the EU regulation) and, in particular, the Mexico Convention adopted within the framework of the OAS in 1994 and the Hague Principles adopted in 2015 by the Hague Conference on Private International Law. Provisions from those instruments, and even some comments on the Hague Principles are copied literally in the draft Guide, so as to maintain fidelity with them.

\* \* \*

The draft Guide contains a list of abbreviations, another list of terms in Latin and other languages used in the document, and then an explanatory introduction on the desired objectives (Part One), followed by its context and background (Part Two) which explains the main techniques of Private International Law and outlines the background to codification in the Americas and internationally, in the subject of contracts, notably the Treaty of Montevideo of 1889 and 1940, the 1928 Bustamante Code, the 1980 Rome Convention, the 1994 Mexico City Convention, and The Hague Principles of 2015.

Part Three describes the recent developments with the so-called uniform method, mostly based on the standardization efforts undertaken by UNIDROIT and UNCITRAL, in addition to efforts by the private sector and other developments in the arbitration arena.

Part Four describes the uniform method of interpreting international texts, both in terms of conflict of laws and uniform law.

Part Five pertains to the scope of the Guide, in terms of international commercial contracts with their corresponding classification and in terms of topics that are excluded, such as those related to capacity, family and inheritance relationships, insolvency, etc.

Part Six deals with the complex problem of non-State law and various related terminologies, such as uses, customs and practices, principles, and *lex mercatoria*.

Part Seven deals with the problem of party autonomy in international contracts; Part eight, express or tacit choice of law; Part Nine, formal validity of the choice of law; Part Ten, the law applicable to the choice of law clause; Part Eleven, the arbitration severability clause; and Part Twelve, other problems of law applicable to the field of international contracts, such as amending the chosen law and *renvoi*, among others.

Part Thirteen deals with the absence of choice of law by the parties; Part Fourteen, splitting of the law; Part Fifteen, flexibility to interpret international contracts; Part Sixteen, the scope of the applicable law; Part Seventeen, public policy (*ordre public*); and Part Eighteen, other issues, such as those related to the existence of other conventions, or to states with more than one legal system or territorial units.

Some of the lawyers consulted certainly proposed that the Guide should also include a summary of specific recommendations that could be made to legislators, judges, and the parties and their advisers on international contracts. It was thought that these could be included in the Guide as input that could prove highly valuable and of practical interest.

There were also suggestions to include a table comparing the Mexico Convention and the Hague Principles and to reconcile the official Spanish, English, and French texts of the Mexico

Convention. Lastly, the document contains appendices with a table of laws, a table of cases, and a list of databases and other electronic sources used in preparing various parts of the draft Guide.

### SUMMARIZED RECOMMENDATIONS

1.0 The purpose and objectives of this Guide should be taken into consideration by OAS Member States, in particular, by legislators considering reform of the domestic legal regime on the law applicable to international commercial contracts, by adjudicatory bodies in the resolution of disputes involving such contracts, and by contracting parties and their counsel.

2.0 OAS Member States, regardless of whether they have or have not ratified, or do or do not intend to ratify the Mexico Convention, are encouraged to consider its solutions for their own domestic legislation, whether by material incorporation, incorporation by reference, or other mechanisms as applicable to their own domestic legal regimes, taking into consideration subsequent developments in the law applicable to international commercial contracts as expressed in the Hague Principles and as described in this Guide.

3.0 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the advances that have been made in the uniform law method and to consider the use of uniform law instruments together with conflict of laws rules as supplementary and complementary in the application and interpretation of private international law.

4.1 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the overarching goal of unification and harmonization of law within the process of global and regional integration.

4.2 Adjudicators, both in the public realm of the judiciary and in the realm of arbitration, are encouraged to consider the advantages of uniform interpretation in the international legal instruments that are used in the settlement of disputes concerning international commercial contracts and to take into account the development and dissemination of international jurisprudence in this regard.

4.3 Contracting parties and their counsel should remain informed of developments regarding uniform interpretation that may be applicable to their international contracts.

4.4 Contracting parties and their counsel should take into consideration that instruments applicable to their specific case may provide a different solution from those recommended in this Guide and that adjudicators in some jurisdictions may not follow the recommended liberal interpretation.

5.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to its scope of application and the determination of internationality, should incorporate solutions in line with the Mexico Convention, the Hague Principles and the UNIDROIT Principles, thereby excluding consumer and labor contracts while adopting a broad concept of internationality, and may further stipulate that the sole agreement of the parties may internationalize a contract, but that if no other international element is present, internal *ordre public* will prevail.

5.2 The domestic legislation may also replicate the provisions of the PECL, Article 1:107 and thereby make applicable by analogy agreements to amend or terminate contracts and unilateral promises and all other statements and actions that denote intent in a commercial setting.

5.3 The domestic legal regime on the law applicable to international commercial contracts may expressly exclude from its scope of application:

- family relationships and succession, arbitration and forum selection, and questions of company law, in accordance with the relevant provisions of the Mexico Convention and the Hague Principles;
- securities and stocks, in accordance with the relevant provisions of the Mexico Convention;

- capacity, insolvency, proprietary effects and agency, in accordance with the relevant provisions of the Hague Principles.

6.1 The domestic legal regime on the law applicable to international commercial contracts should recognize and clarify choice of non-State law.

6.2 Legislators, adjudicators and contracting parties are encouraged, in relation to non-State law, to read the Mexico Convention in light of criteria offered in the Hague Principles and HP Commentary, and to recognize, in light of the latter instrument, the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

7.0 The domestic legal regime on the law applicable to international commercial contracts should affirm clear adherence to the internationally-recognized principle of party autonomy as iterated in the Mexico Convention and the Hague Principles and other international instruments.

8.1 The domestic legal regime on the law applicable to international commercial contracts should provide that a choice of law, whether express or tacit, should be evident or appear clearly from the provisions of the contract and its circumstances, consistent with the provisions of Article 7 of the Mexico Convention and Article 4 of the Hague Principles.

8.2 Adjudicators and contracting parties and their counsel are also encouraged to take these provisions into account in the interpretation and drafting of international commercial contracts.

9.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to formal validity of choice of law, should not contain any requirements as to form unless otherwise agreed by the parties, consistent with the provisions of Article 5 of the Hague Principles.

9.2 Adjudicators, in determining the formal validity of a choice of law, should not impose any requirements as to form, unless otherwise agreed by the parties or as may be required by applicable mandatory rules.

9.3 Contracting parties and counsel should take into account any mandatory rules as to form that may be applicable.

10.1 The domestic regime on the law applicable to international commercial contracts should provide that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties, consistent with Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

10.2 Adjudicators, in determining whether parties have agreed to a choice of law, should take into account Article 6 of the Hague Principles and Article 12, paragraph 2 of the Mexico Convention.

11.1 The domestic legal regime should confirm that a choice of law applicable to international commercial contracts cannot be contested solely on the ground that the contract to which it applies is not valid, consistent with Article 7 of the Hague Principles.

11.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solution.

12.1 The domestic legal regime on the law applicable to international commercial contracts should:

- provide that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties, consistent with Article 8 of the Mexico Convention and Article 2.3 of the Hague Principles;
- provide that no connection is required between the law chosen and the parties or their transaction, consistent with Article 2.4 of the Hague Principles;
- exclude the principle of *renvoi* to provide greater certainty as to the applicable law, consistent with Article 17 of the Mexico Convention and Article 8 of the Hague Principles;

- in relation to assignment of receivables, favor party autonomy to the maximum extent, consistent with Article 10 of the Hague Principles.

12.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solutions.

13.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the “closest connection”, consistent with the provisions of Article 9 of the Mexico Convention.

13.2 Adjudicators should apply the flexible criteria of the “closest connection” in a liberal interpretative approach.

14.1 The domestic legal regime on the law applicable to international commercial contracts should admit the “splitting” of the law (*dépeçage*), consistent with the provisions of Articles 7 and 9 of the Mexico Convention and Article 2.2 of the Hague Principles.

14.2 Adjudicators, when granted interpretive discretion, are encouraged to admit *dépeçage*.

15.1 The domestic legal regime on the law applicable to international commercial contracts should recognize the need for flexible interpretation, consistent with the provisions of Article 10 of the Mexico Convention.

15.2. Adjudicators, when the circumstances so require in the resolution of a particular case, if so authorized, should apply rules, customs and principles of international commercial law as well as generally accepted commercial usage and practices in order to discharge the requirements of justice and equity, consistent with the provisions of Article 10 of the Mexico Convention.

16.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to the scope of the applicable law, should address interpretation of the contract, rights and obligations arising therefrom, performance and non-performance including the assessment of damages, prescription and its effects, consequences of invalidity, burden of proof and pre-contractual obligations, consistent with the provisions of Article 14 of the Mexico Convention and Article 9 of the Hague Principles. For greater certainty, it would be preferable to do so by way of explicit provisions.

16.2 The domestic legal regime on the law applicable to international commercial contracts should provide both that the law of the State where an international commercial contract is to be registered shall govern all matters concerning filing or notice, consistent with the provisions of Article 16 of the Mexico Convention; and, that the rules of other international agreements which may be specifically applicable to an international commercial contract should prevail, consistent with the provisions of Article 6 of the Mexico Convention.

17.1 The domestic legal regime on the law applicable to international commercial contracts should provide that neither a choice of law nor a determination of applicable law in the absence of an effective choice,

- shall prevent the application of overriding mandatory provisions of the forum or those of other fora, but that such mandatory provisions will prevail only to the extent of the inconsistency;
- shall lead to the application of law that would be manifestly incompatible with the public policy of the forum, consistent with Article 18 of the Mexico Convention and Article 11 of the Hague Principles.

17.2 Adjudicators and counsel should take into account any overriding mandatory provisions and public policy as required or entitled to do so, consistent with Article 11 of the Hague Principles.

18.0 States with more than one legal system or different territorial units may wish to consider the provisions of Article 22 of the Mexico Convention and Article 1.2 of the Hague Principles and provide in the domestic legal regime on the law applicable to international

commercial contracts that any reference to the law of the State may be construed as a reference to the law in the territorial unit, as applicable.

**GUIDE ON THE LAW APPLICABLE TO  
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### ABBREVIATIONS

- AAA/ICDR:** International Arbitration Rules of the American Arbitration Association
- ABA:** American Bar Association
- ALI:** American Law Institute
- ASADIP:** American Association of Private International Law
- CCQ:** Civil Code of Quebec
- CENTRAL:** Center for Transnational Law
- CIDIP:** Inter-American Specialized Conferences on Private International Law
- CISG:** UN Convention on Contracts for the International Sale of Goods
- CJEC:** Court of Justice of the European Communities
- CJEU:** Court of Justice of the European Union
- CJI:** Inter-American Juridical Committee
- CIF:** Cost insurance freight
- CLOUT:** Case Law on UNCITRAL Texts
- DCFR:** Draft Common Frame of Reference
- ECJ:** European Court of Justice
- EGPIL/GEDIP:** European Law Institute, European Group of Private International Law
- EU:** European Union
- European Convention:** European Convention on International Commercial Arbitration
- FIDIC:** International Federation of Consulting Engineers
- FIDIC Contract:** Conditions of Contract for Works of Civil Engineering Construction
- FOB:** Free on board
- GAFTA:** Grain and Feed Trade Association
- General PIL Rules Convention:** Inter-American Convention on General Rules of Private International Law
- Guide:** Guide on the Law Applicable to International Commercial Contracts in the Americas
- Hague Agency Convention:** Hague Convention on the Law Applicable to Agency
- Hague Principles:** Principles on Choice of Law in International Commercial Contracts
- Hague Sales Convention:** Hague Convention on the Law Applicable to Contracts for the International Sale of Goods
- HCCH:** The Hague Conference on Private International Law

**HP Commentary:** Principles on Choice of Law in International Commercial Contracts Commentaries

**IACAC:** Inter-American Commercial Arbitration Commission

**IACAC Rules:** Rules of Procedure of IACAC

**IBA:** International Bar Association

**ICC:** International Chamber of Commerce

**ICJ:** International Court of Justice

**ICSID:** International Centre for Settlement of Investment Disputes

**ICSID Convention:** 1965 Convention on the Settlement of Investment Disputes between States and Other Nationals

**IIL:** Institute of International Law

**INCOTERMS:** International Commercial Terms

**LINDB:** Introductory Law to the Provisions of Brazilian Law

**MERCOSUR:** Southern Common Market

**Mexico Convention:** Inter-American Convention on the Law Applicable to International Contracts

**Montevideo Convention:** Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards

**New York Convention:** 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

**OAS:** Organization of American States

**Panama Convention:** Inter-American Convention on International Commercial Arbitration

**PECL:** Principles of European Contract Law

**PIL:** Private International Law

**Rome Convention:** Convention on the Law Applicable to Contractual Obligations

**Rome I:** Regulation on the Law Applicable to Contractual Obligations.

**TFEU:** Treaty on the Functioning of the European Union

**TJSP:** Tribunal de Justiça de São Paulo

**Transjus:** ASADIP Principles on Transnational Access to Justice

**TST:** Tribunal Superior do Trabalho (Superior Labor Court)

**Tucson Draft:** Draft Inter-American Convention on the Law Applicable to International Contracts

**UCC:** US Uniform Commercial Code

**UCP:** Uniform Customs and Practice for Documentary Credits

**UIA:** Union Internationale des Avocats

**UNCITRAL:** United Nations Commission on International Trade Law

**UNCITRAL Model Law:** UNCITRAL Model Law on International Commercial Arbitration

**UNCTAD:** United Nations Conference on Trade and Development

**UNIDROIT:** International Institute for the Unification of Private Law

**UNIDROIT Principles:** UNIDROIT Principles of International Commercial Contracts

**UPICC:** used by some to refer to the UNIDROIT Principles

**UNILEX:** Intelligent” database of international case law and bibliography on the UNIDROIT Principles and on the CISG

**WTO:** World Trade Organization

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### LATIN AND TERMS IN OTHER LANGUAGES

*Animus*

*De facto*

*De jure*

*Dépeçage*

*Electio juris*

*Ex officio:*

*Favor negotii*

*Lex arbitri*

*Lex causae*

*Lex fori*

*Lex Mercatoria*

*Lingua franca*

*Lois de Police*

*Ius commune*

*Ordre public*

*Pactum de lege utenda*

*Renvoi*

*Voie directe*

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## GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS PART ONE

### INTRODUCTION

#### **I. Rationale**

1. Various studies by the Inter-American Juridical Committee (“CJI”) of the Organization of American States (“OAS”) and the OAS Department of International Law indicate that major lacunae and disparities exist in the law applicable to international commercial contracts in states throughout the Americas.<sup>1</sup>

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<sup>1</sup> The *Inter-American Convention on the Law Applicable to International Contracts* and the Furtherance of its Principles in the Americas. OEA/SG/DDI/doc. 3/16, March 15, 2016 (“2016 Contracts Paper”).

2. In 1994, the OAS adopted the *Inter-American Convention on the Law Applicable to International Contracts* (“Mexico Convention”).<sup>2</sup> It was ratified by two States, Mexico and Venezuela, and its solutions have been incorporated into the domestic laws of Venezuela and Paraguay.<sup>3</sup>

3. The Mexico Convention was taken into account by the Hague Conference on Private International Law (“HCCH”) in its preparation of the *Principles on Choice of Law in International Commercial Contracts* (“Hague Principles”), adopted in 2015.<sup>4</sup>

4. It is now over 20 years since the adoption of the Mexico Convention and, given that the Hague Principles incorporated subsequent developments that paved the way for clarification of certain matters and introduction of innovative solutions, the following questions might be considered. What is next for the Americas? Should calls be made only for additional ratifications of the Mexico Convention? Should the Convention be amended in light of new developments? Should a model law, or guidelines for drafting one, be prepared?

5. The CJI reviewed all of these options. It did so also in conjunction with responses to a questionnaire that had been circulated among OAS Member States<sup>5</sup> and recognized specialists in private international law.<sup>6</sup> Responses to that questionnaire reflected the perception that, evidently, the Hague Principles have advanced beyond the Mexico Convention and that the provisions of the former could be useful in amending the Inter-American instrument.

6. But would the process to revise the Mexico Convention be worth the effort? On one hand, an improved document might be better received by the legal community in the Americas and, in addition, would afford an opportunity to correct existing discrepancies between the four official language versions (English, French, Spanish and Portuguese), which have been seriously criticized, particularly by English-speaking jurists at the time of its adoption. On the other hand, negotiation and adoption of a convention is a highly complicated and costly process that requires political will and considerable resources. Other instruments, such as model laws or legislative guidelines, have been shown to be equally effective means of advancing harmonization in private international law.

7. Ultimately, rather than promoting additional ratifications of the Mexico Convention or embarking upon efforts to amend the instrument, the

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<sup>2</sup> *Inter-American Convention on the Law Applicable to International Contracts*. Signed March 17, 1994 in Mexico City at the Fifth Inter-American Specialized Conference on Private International Law, entered into force December 15, 1996. Text accessible at: <https://www.oas.org/juridico/english/treaties/b-56.html>.

<sup>3</sup> Status accessible at: <https://www.oas.org/juridico/english/sigs/b-56.html>.

<sup>4</sup> *Principles on Choice of Law in International Commercial Contracts*. Approved March 19, 2015. Text accessible at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

<sup>5</sup> For the sake of consistency, the terms “Member States” and “States” are capitalized throughout this Guide.

<sup>6</sup> A questionnaire was circulated in 2015 with a request for responses to Part A by OAS Member States and to Part B by academics in those States. 2016 Contracts Paper, *supra* note 1, Appendix A. Responses are discussed later in this Guide.

CJI concluded that at this stage it would be much more effective for States of the Americas to adopt or revise domestic laws for consistency with guidelines endorsed by the OAS, based on international rules and best practices recognized by the HCCH and other relevant international bodies.

## **II. Purpose and Objectives of Guide**

8. The purpose of this Guide on the Law Applicable to International Commercial Contracts in the Americas (“Guide”) is to advance important aspects of the law applicable to international commercial contracts in the Americas, to promote regional harmonization on the subject and thereby to encourage economic integration, growth and development.

9. In achieving that purpose, this Guide has several objectives, as follows:

- a. to propose a current statement of the law applicable to international commercial contracts for the Americas as based on the fundamental principles of the Mexico Convention and with the incorporation of subsequent developments in the field to date, particularly as in the Hague Principles;
- b. to promote greater understanding of the Mexico Convention and the principles on which it is founded, to rectify lack of information and misinformation about the instrument, and to clarify uncertainties and inconsistencies in the various language versions;
- c. to assist OAS Member States that are considering ratification of the Mexico Convention;
- d. to support efforts by OAS Member States to modernize their domestic laws on international commercial contracts in accordance with international standards;
- e. to provide assistance to contracting parties in the Americas and their counsel in drafting and interpreting international commercial contracts;
- f. to provide guidance to judges in the Americas, who may find the Guide useful both to interpret and supplement domestic laws, particularly on matters in international commercial contracts that are not addressed in such laws; and,
- g. to guide arbitrators in the exercise of their particular powers to apply, interpret and supplement the law applicable to international commercial contracts.

10. An explanation of today’s internationally-accepted norms on the subject of international commercial contracts as relevant to the Americas is no small matter; one reason the Mexico Convention had encountered stiff resistance was the lack of information regarding its content and implications. The Guide may contribute towards overcoming this obstacle.

11. This is not a guide to the Mexico Convention, but rather, a *guide to the law applicable to international commercial contracts in the Americas*. However, given that the Mexico Convention as a high-quality instrument advanced by the OAS serves as an important point of departure, and given the close relationship to and relevance of the Hague Principles, both of these instruments will be heavily referenced throughout.

12. This Guide is limited to international commercial contracts; it excludes consumer and labor contracts, which present particular challenges

beyond the scope of this Guide. Additional exclusions are listed and explained below in Part Five.

1.0 The purpose and objectives of this Guide should be taken into consideration by OAS Member States, in particular, by legislators considering reform of the domestic legal regime on the law applicable to international commercial contracts, by adjudicatory bodies in the resolution of disputes involving such contracts, and by contracting parties and their counsel.

## PART TWO CONTEXTUAL BACKGROUND

### I. Introduction

13. Part Two provides the contextual background that has led to many of the legal issues in international commercial contracts that this Guide seeks to address. It begins with an overview of private international law and the complementary approaches of conflict of laws and uniform law. This is followed by a review of key historical efforts to codify conflict of laws rules for international commercial contracts in both Europe and the Americas, beginning with the Montevideo Treaties of 1889 and concluding with more recently adopted instruments. A basic understanding of these developments is important because of the influence of these instruments on each other over time, as is illustrated throughout this Guide. Moreover, these instruments have had significant influence in the development of domestic legislation, as evidenced by the examples in the final section of Part Two and in other parts of this Guide. Therefore, as the jurisprudence on both sides of the Atlantic is also relevant to the interpretation of the various international instruments and domestic legislation, reference to key cases from Europe and elsewhere will be included in the discussions of adjudicative decisions in the Americas.

### II. Private International Law: Conflict of Laws vs. Uniform Law

14. International contracts raise questions such as which law should govern the contract and whether the parties have the freedom or “party autonomy” to make that determination themselves. In a traditional private international law approach known as *conflict of laws*, the prevailing technique is to refer to conflict of laws *rules* or indirect rules to determine “which” law should be applied (i.e., a choice between the domestic laws of different States). Conflict of laws rules are to be contrasted with the *substantive* law applicable to a given legal situation.

15. Unification of private law, also known as the *uniform law method*,<sup>7</sup> seeks to find a solution that would harmonize substantive laws (i.e., so that at least in theory, the same rule would apply in every State that has implemented the uniform law) whereas the conflict of laws method is generally based on situating an international legal transaction within a given domestic legal framework. A uniform law would eliminate the need for conflict of laws rules, at least for those States and for those disputes covered by the uniform law.

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<sup>7</sup> In this Guide, “uniform law method” is used as short-hand for this process of the unification of private law. The key organizations known for this work will be mentioned later in the discussions.

16. However, the problems of conflict of laws are inescapable in a legally parceled world of nation States that will continue as such for some time to come. Therefore, the conflict of laws and the uniform law approach should not be viewed as antagonistic methods, but rather, as complementary. The need for universal substantive law to govern international relationships has gained important recognition but history evidences the difficulty in achieving this objective. Uniform law rules are unlikely to cover all potential problems of an international contract. This Guide addresses primarily conflict of laws matters in international commercial contracts, that is, which law, domestic or foreign, should apply to these contracts. Even though the Guide mentions uniform law initiatives, it does not refer to the substantive solutions therein contained in relation to contract formation, rights and obligations and termination, to name some examples.

### **III. Historical Efforts to Codify Conflict of Laws in International Commercial Contracts**

17. Nationalist movements in Europe and the Americas put a hold on the development of the idea of a uniform or universal civil and commercial law (*ius commune* and *lex mercatoria*), which had gained particular strength during the Middle Ages. Nation States of the civil law tradition adopted civil and commercial codes, whereas those following an Anglo-Saxon tradition consolidated their laws based on legal precedent. This gave particular impetus to the use of conflict of laws rules for solving problems in private international law regarding which law to apply in international private relationships. In the second half of the 19<sup>th</sup> century, discussions were underway in Europe as to how to implement unified solutions by means of an international treaty. However, the Americas took the lead.

#### **A. Montevideo Treaties**

18. In 1889, nine private international law treaties were signed in Montevideo.<sup>8</sup> One of these, specifically the *Treaty on International Civil Law* (“1889 Montevideo Treaty”), addresses the determination of the law applicable to international contracts. However, its provisions regarding applicable law generated controversies and it said nothing about party autonomy, which is now a broadly accepted principle in private international law.

19. These early Montevideo Treaties remain in force for Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay. In 1940, new treaties were signed in Montevideo (“1940 Montevideo Treaty”), but these were ratified only by Argentina, Paraguay, and Uruguay.<sup>9</sup> These treaties

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<sup>8</sup> 1) *Treaty on International Civil Law* of February 12, 1889; 2) *Treaty on International Commercial Law* of February 12, 1889; 3) *Treaty on International Penal Law* of January 23, 1889; 4) *Treaty on International Procedural Law* of January 11, 1889; 5) *Convention on the Exercise of Liberal Professions* of February 4, 1889; 6) *Treaty for the Protection of Literary and Artistic Property* of January 11, 1889; 7) *Convention on Commercial and Industrial Trademarks* of January 16, 1889; 8) *Convention on Letters Patent* of January 16, 1889; 9) *Additional Protocol to Treaties on Private International Law* of February 13, 1889. Information available at: <http://opil.ouplaw.com/page/Treaties-Montevideo>.

<sup>9</sup> 1) *Treaty on Political Asylum and Refugees* of August 4, 1939; 2) *Treaty on Intellectual Property* of August 4, 1939; 3) *Convention on the Exercise of*

reaffirmed the earlier solutions in relation to applicable law. They also provide that each State must determine whether it accepts the principle of party autonomy, a matter which, in the absence of clear provisions thereon in domestic legislation, remained highly controversial for decades in Paraguay and Uruguay.

### **B. Bustamante Code**

20. Other States of the Americas, including Brazil, Chile, and Venezuela, did not join the Montevideo Treaties. Instead, they ratified the *Convention on Private International Law* with annexed *Code of Private International Law* in Havana in 1928.<sup>10</sup> Known as the “Bustamante Code”, it governs various matters of private international law, including the law applicable to international contracts, and sets out a solution regarding applicable law that differs from that of the Montevideo Treaties. The instrument has also raised many questions as to whether it establishes the principle of party autonomy. The Bustamante Code has been ratified by several states in the Americas (albeit with extensive reservations).<sup>11</sup>

### **C. Rome Convention and Rome I**

21. In 1980, almost a century later than the Montevideo Treaties of 1889, a treaty was signed in Europe to regulate conflict of laws in international contracts. The *Convention on the Law Applicable to Contractual Obligations*, known as the “Rome Convention”, accompanied

*Liberal Professions* of August 4, 1939; 4) *Treaty on International Commercial Navigation Law* of March 19, 1940; 5) *Treaty on International Procedural Law* of March 19, 1940; 6) *Treaty on International Penal Law* of March 19, 1940; 7) *Treaty on International Commercial Law* (other than maritime) of March 19, 1940; 8) *Treaty on International Civil Law* of March 19, 1940; 9) *Additional Protocol to Treaties on Private International Law* of March 19, 1940. Information available at:

<http://opil.ouplaw.com/page/Treaties-Montevideo>.

<sup>10</sup> *Convention on Private International Law*, with annexed *Code of Private International Law*. Adopted February 20, 1928 at the Sixth Pan-American Congress held in Havana, Cuba, entered into force November 25, 1928. 86 LNTS 111. Information available at:

[http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-31\\_Bustamante\\_Code\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-31_Bustamante_Code_signatories.asp).

<sup>11</sup> Brazil has ratified this Code; however, according to Brazilian scholars it is virtually ignored and rarely mentioned in judicial decisions. According to Article 2 of the Treaty to which the Code is attached, only certain or special reservations are allowed. Therefore, the generally accepted interpretation by scholars in Venezuela, based on the law of treaties, is that the Code only applies to those states that ratified it without reservation (Cuba, Guatemala, Honduras, Nicaragua, Panama and Peru) and those that ratified it only with certain limited reservations (Venezuela, Brazil, Dominican Republic, Haiti, and Bahamas). Accordingly, it would not apply in Bolivia, Chile, Costa Rica, Ecuador and El Salvador. These latter states ratified the Bustamante Code with generic reservations “as long as not contradicting internal legislation”, which equates to no ratification (although some tribunals, for example in Costa Rica, have been known to apply the Code). In Venezuela, the Bustamante Code is not applied in respect of these states. During the years that followed, some states within the region did make efforts to include in their domestic legislation express recognition of the principle of party autonomy, as occurred, for example, with the rules of private international law of the Peruvian Civil Code of 1984, Article 2095.

by an official report to assist with its interpretation, entered into force in 1991.<sup>12</sup> As of 2008, following the transfer of certain legislative powers to the European Union, with some modifications and additions, the Rome Convention has been substituted by the European Union (“EU”) *Regulation on the Law Applicable to Contractual Obligations*, known as “Rome I”.<sup>13</sup> This regulation covers matters of law applicable to international contracts, outlines the principle of party autonomy and the limits thereof, and also provides criteria to determine the applicable law where no choice of law has been made by the parties.

22. The importance of these two instruments is due not only to their adoption by the EU<sup>14</sup> but also because of the influence in the Americas (in the first configuration as the Rome Convention) on the drafting of the Mexico Convention and, more recently on the preparation of a global instrument, the Hague Principles.

#### IV. Mexico Convention

23. In the Americas in the mid-20<sup>th</sup> century, there were controversies over the Montevideo Treaties and the Bustamante Code. These instruments contained provisions that differed from one another and also raised questions regarding, for instance, party autonomy and absence of choice of law. Moreover, some States of the Americas, including all those of Anglo-Saxon tradition, had not ratified either treaty.

24. Establishment of the OAS in 1948 raised great expectations that this situation would finally be resolved. After careful evaluation, OAS Member States decided against the idea of preparing a general code like the Bustamante Code, and, instead, chose to work towards gradual and progressive codification in specific topics within private international law.

25. The realization of this intent began in 1975 when OAS Member States took steps to harmonize and codify substantive law and choice-of-law rules in a number of different topics in private international law.

26. This was achieved primarily through the Inter-American Specialized Conferences on Private International Law (“CIDIP”), diplomatic conferences organized pursuant to Article 122 of the *Charter of the OAS*. To date seven CIDIPs have been held, which have resulted in the adoption of 26 international instruments (including conventions, protocols, uniform documents, and one model law) on various topics. The instruments were designed to create an effective legal framework for judicial cooperation between States in the Americas and to add legal certainty to cross-border transactions in civil, family, commercial and procedural matters. The most recent of these conferences was CIDIP-VII, held in 2009.

27. In recent years, several matters in the field of private international law have been undertaken by the CJI, which, in turn, has sent any such proposed instrument to the Permanent Council for consideration by that political body and its Committee on Juridical and Political Affairs and eventual consideration and approval by the OAS General Assembly. By this

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<sup>12</sup> *Convention on the Law Applicable to Contractual Obligations*, June 19, 1980, Rome. 19 ILM 1492; [1980] OJ L266/1.

<sup>13</sup> *Regulation of the European Parliament and of the Council on the law applicable to contractual obligations*, June 17, 2008. 593/2008/EC; [2008] OJ L177/6. Rome I is binding on all European Union Member States other than Denmark, where the Rome Convention remains applicable.

<sup>14</sup> *Id.*, see note above with regard to Denmark.

method, without incurring the costly mechanism of a specific diplomatic conference in the form of a CIDIP, the final instrument nevertheless receives endorsement by the Member States by means of a political process.<sup>15</sup>

28. The Mexico Convention was formally adopted in 1994 at CIDIP-V in all four official languages of the OAS (English, Spanish, French and Portuguese), the texts of which are all equally authentic. It was signed by Bolivia, Brazil, Mexico, Uruguay, and Venezuela, ratified by Venezuela and Mexico and entered into force on December 15, 1996.<sup>16</sup> To date, no reservations or declarations have been made.

29. The topic of international contracts had initially been considered in 1979 at CIDIP-II. It was subsequently included on the agenda for CIDIP-IV held in 1989 and was assigned to Committee II, which considered a study prepared by the Argentinian jurist Antonio Boggiano and a draft convention that had been prepared by the delegation of Mexico.<sup>17</sup> As general consensus was not reached on a formal instrument, delegates adopted a set of principles for future deliberation and recommended that the OAS General Assembly convene a meeting of experts. These principles served as the basis for a draft convention and report, which were prepared by the Mexican jurist Jose Luis Siqueiros and approved by the CJI in 1991.<sup>18</sup>

30. This draft convention and report were reviewed at the meeting of experts held in Tucson, Arizona, November 11 to 14, 1993.<sup>19</sup> The meeting resulted in the adoption of a revised new *draft Inter-American Convention on the Law Applicable to International Contracts* (the “Tucson Draft”), which formed the basis for the deliberations at CIDIP-V, held in Mexico City, March 14 to 18, 1994. The preparatory work had included the circulation of a questionnaire to OAS Member States as well as extensive review of other relevant instruments on the topic.<sup>20</sup> As CIDIP-V was attended by 17 Latin American states, and the United States and Canada, the resulting text is said to represent the consensus of a large number of states from both the civil law and common law traditions.

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<sup>15</sup> By way of example, in 2011 the CJI included the topic of simplified companies on its agenda, in 2012 it adopted a resolution by which a draft Model Law on the Simplified Corporation was approved and forwarded to the Permanent Council. Annual Report of the [CJI] to the 43rd Regular Session of the General Assembly, OEA/Ser.G/CP/doc.4826/13, February 20, 2013. Ultimately, in 2017 the OAS General Assembly took note and adopted a resolution on the *Model Law on the Simplified Corporation* (AG/RES. 2906 (XLVII-O/17)).

<sup>16</sup> Status at *supra* note 3.

<sup>17</sup> Informe del Relator de la Comisión II Referente al Tema de Contratación Internacional. CIDIP-IV, Volumen I, Actas y Documentos CIDIP-IV. Secretaria General, OEA, Washington DC 1991, page 447.

<sup>18</sup> Tema 1: Contratación Internacional Proyecto de Convención Interamericana sobre Ley Aplicable en Materia de Contratación Internacional – Comité Jurídico Interamericano. CIDIP-V, OEA/Ser. K/XXI.5 – CIDIP-V/12/93, December 28, 1993.

<sup>19</sup> Tema 1: Contratación Internacional. Informe de la Reunión de Expertos sobre Contratación Internacional. CIDIP-V, OEA/Ser. K/XXI.5 – CIDIP-V/14/93, December 30, 1993 (“Report on Experts’ Meeting”).

<sup>20</sup> Informe del Relator de la Comisión II Referente al Tema de Contratación Internacional, *supra* note 17.

31. The Mexico Convention was approved comprising 30 articles that address party autonomy in the choice of applicable law and the limits thereof, criteria to be used where no choice of applicable law has been made, and public policy, as well as other matters. With the 1980 Rome Convention as a source of inspiration, the Mexico Convention went further in areas such as the admittance of non-State law and openness to the law of a non-contracting State.

32. Although the low rate of ratification (i.e., solely by Mexico and Venezuela) alone is not indicative of its achievements, it was considered worthwhile to examine the possible reasons. Accordingly, when the question was put to States and academics in a survey conducted by the CJI in 2015, a number of responses cited the following reasons, among others:

- a. language inconsistencies between the official texts, particularly in English and Spanish, are problematic;
- b. novel and controversial choice of law principles presented challenges at that time. The first of these, party autonomy, at least in 1994, represented a radical shift from the traditional approach of conflict of laws predominant in several civil law states;
- c. the “closest connection” or “proximity principle” was an unfamiliar concept without clear guidelines as to its application;
- d. the references to “general principles of international commercial law” and “*lex mercatoria*” were problematic as the language was considered too broad and the scope unclear;
- e. lack of local champion or political will; and,
- f. it was perceived that among states there was a general lack of awareness of the Mexico Convention and its potential benefits.<sup>21</sup>

It has also been suggested that perhaps the Mexico Convention made a somewhat forced attempt at synthesis between civil and common law, which did not lead to a satisfactory outcome.

33. Notwithstanding the low levels of ratification, these responses from OAS Member States and academics from within the region confirmed that the Mexico Convention has made valuable contributions to the development of the law of international contracts in the hemisphere. In the more than twenty years since its adoption, many of its principles, in particular the principle of party autonomy, have gained acceptance throughout the region and become enshrined in the domestic laws of a number of OAS Member States. This has been achieved in various ways, consideration of which will be discussed throughout the Guide to assist with decisions regarding the way forward.

## **V. Hague Principles**

34. The Hague Conference on Private International Law (“HCCH”) originated with a first diplomatic conference in 1893. Its history can be divided roughly into two eras: initially, from 1893 until World War II, the Conference met on six occasions. At a seventh session held in 1951, it was established by statute as an intergovernmental organization. Since then, the Conference has met generally every four years in diplomatic sessions and, in addition, occasionally in extraordinary sessions. Although its name would suggest otherwise, the HCCH has become a permanent organization.

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<sup>21</sup> See 2016 Contracts Paper, *supra* note 1.

Its purpose is “the progressive unification of private international law”, which it achieves mainly by negotiating, and servicing, multilateral treaties on issues of jurisdiction of courts and authorities, of applicable law, of recognition and enforcement of foreign decisions, and of cross-border judicial and administrative cooperation.” Its membership of 82 States plus the EU includes 14 OAS Member States.<sup>22</sup> Moreover, several other States of the Americas have joined one or more of the Hague Conventions.

35. The work of HCCH differs from that of other organizations, such as the United Nations Commission on International Trade Law (“UNCITRAL”), in that rather than advancing toward substantive unification, HCCH prepares private international law texts in keeping with the traditional *conflict of laws* approach. It is considered the leading world organization in this field. HCCH works on such varied matters as international protection of children, family law, property rights, international legal cooperation, international litigation, and international commercial and financial law.

36. The suggestion of an instrument on applicable law to international contracts was first proposed at the HCCH by the delegation of the United States in 1972. The 1955 *Convention on the Law Applicable to International Sales of Goods*, the 1986 *Convention on the Law Applicable to Contracts for the International Sale of Goods* (“Hague Sales Conventions”)<sup>23</sup> and the 1978 *Convention on the Law Applicable to Agency* (“Hague Agency Convention”)<sup>24</sup> had limited success based on the number of ratifications. Yet their impact on other instruments – for example, through the acceptance of freedom of choice of law by the parties (party autonomy) – has been significant on instruments such as the Rome Convention and Rome I, addressed below.

37. Feasibility studies carried out between 2005 and 2009 indicated that perhaps a different type of instrument might be successful. Accordingly, it was decided to prepare a non-binding instrument, i.e., a *soft law* instrument,<sup>25</sup> whose primary purpose would be to promote party autonomy as a criterion for choice of applicable law.

38. To prepare such an instrument, a working group was created in 2009, composed of 15 experts and observers from public and private international institutions, which included UNCITRAL, International Institute for the Unification of Private Law (“UNIDROIT”) and the International Chamber of Commerce (“ICC”).<sup>26</sup> Among the members of the

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<sup>22</sup> Argentina (1972), Brazil (2001), Canada (1968), Chile (1986), Costa Rica (2011), Ecuador (2007), Mexico (1986), Panama (2002), Paraguay (2005), Peru (2001), Suriname (1977), United States (1964), Uruguay (1983) and Venezuela (1979). Current status of HCCH membership is accessible at: <https://www.hcch.net/en/states/hcch-members>.

<sup>23</sup> *Convention on the Law Applicable to International Sales of Goods*. Adopted June 15, 1955, entered into force September 1, 1964. 510 UNTS 147; *Convention on the Law Applicable to Contracts for the International Sale of Goods*. Adopted December 22, 1986, not yet entered into force. (1985) 24 ILM 1575.

<sup>24</sup> *Convention on the Law Applicable to Agency*. Adopted March 14, 1978, entered into force May 1, 1992. (1977) 16 ILM 775.

<sup>25</sup> For discussion on soft law, see para. 57 below.

<sup>26</sup> ICC is a global network of over 6 million members in more than 100 countries. Members include many of the world’s largest companies, SMEs, business associations, banks, law firms and local chambers of commerce. It

working group were six jurists from or working in the Americas. In 2012, the Council on General Affairs and Policy established a Commission to review the working group's proposals and make recommendations. In November 2012, a Special Commission, a conference with over 100 national experts, proposed the draft Hague Principles and delegated to the working group responsibility for the preparation of a commentary and illustrations.

39. In March 2015, the final version of the *Principles on Choice of Law in International Commercial Contracts* ("Hague Principles") was formally adopted. It is the first global legal instrument on choice of law in international contracts. The particular significance of the Hague Principles is that it broadly establishes within a global instrument the principle of party autonomy and also accords status to non-State law in a text on conflict of laws. As noted above, HCCH membership includes 14 OAS Member States, many of them represented at the Special Commission meeting,<sup>27</sup> and the working group included representatives from the region; accordingly, it can be said that the Hague Principles reflect incorporation of the positions of many States from the Americas. The Hague Principles have received endorsement by UNCITRAL<sup>28</sup> and by nongovernmental organizations such as the ICC.<sup>29</sup>

40. The Hague Principles apply only to choice of law in international commercial contracts; they do not cover cases where no choice has been made. The preamble describes and explains the spirit of the instrument and is followed by 12 principles, or "black-letter" rules, each of which is accompanied by explanatory commentaries with illustrations where necessary. These 12 principles address scope of application, party autonomy in choice (express or tacit) of applicable law (whether or not the law is of the State of the contracting parties or that of a third State), formal validity of that choice, and public policy as overriding freedom of choice, among other matters.

41. Given the difficulties of drafting an international convention, the Hague Principles follow the same soft law approach and drafting technique of the *UNIDROIT Principles of International Commercial Contracts* ("UNIDROIT Principles").<sup>30</sup> And, as with that instrument, the Hague Principles are intended to serve as a model for legislators and those who

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works "to promote international trade, responsible business conduct and a global approach to regulation." <https://iccwbo.org/about-us/>.

<sup>27</sup> The first meeting of the Special Commission on the Choice of Law in International Contracts took place on November 16, 2012. The report is accessible at: <https://assets.hcch.net/docs/735cb368-c681-4338-ae8c-8c911ba7ad0c.pdf>.

<sup>28</sup> Endorsement of texts of other organizations: Principles of Choice of Law in International Commercial Contracts, in Report of [UNCITRAL], 48<sup>th</sup> Session June 29-July 16, 2015, A/70/17, at page 45. See also: UNCITRAL Endorses the Hague Principles. <https://www.hcch.net/en/news-archive/details/?varevent=414>.

<sup>29</sup><https://iccwbo.org/media-wall/news-speeches/icc-appeals-to-authorities-to-strengthen-legal-certainty-for-international-contracts-by-implementing-the-newly-approved-hague-principles/>.

<sup>30</sup> *2016 UNIDROIT Principles of International Commercial Contracts*. Text accessible at: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. See discussion below at Part Three, Section III.B on the progressive development of these principles.

draft contracts and as a guide for use in judicial and arbitral interpretation. The two instruments are, in fact, complementary: while the UNIDROIT Principles address substantive matters of contract law (such as contract formation, interpretation, effects, and termination), the Hague Principles address matters relevant to the choice of law (such as the law of one or more States, or a choice of non-State law).

#### **VI. Recent Legislation in the Americas on Conflict of Laws in International Commercial Contracts**

42. This Guide does not address the numerous ways by which international law is incorporated into a domestic regime as this varies significantly from one State to another; moreover, some States, such as Venezuela, do not incorporate (or “implement”) international law into their domestic law. Generally speaking, however, States seeking to harmonize their domestic law with the Mexico Convention and the Hague Principles may incorporate these provisions either into general laws on private international law or into laws that specifically govern the law applicable to international contracts.

43. One option is recourse to “*material incorporation*,” which entails full transcription of the treaty into a domestic legal text as was done by Paraguay. Its Law No. 5393 of 2015, “Law Applicable to International Contracts” has 19 articles. Articles 1 to 10 and Articles 13 and 14 on choice of law basically reproduce the Hague Principles with small modifications. Articles 11, 12, 15, and 16 address primarily those situations where a choice of law has not been made and reproduce almost verbatim the corresponding provisions of the Mexico Convention. Lastly, Article 17 on public policy is aligned with the solution provided by the Hague Principles and Article 18 addresses the legislation that must be revoked as a result of this law.

44. Another option is recourse to legislative “*incorporation by reference*.” This is the route that was taken by Uruguay when in a domestic law it adopted the rules of interpretation of different articles of the Montevideo Treaty on International Civil Law.<sup>31</sup>

45. A third option was taken by *Venezuela*, which ratified the Mexico Convention<sup>32</sup> and, in 1998, enacted a Law on Private International Law in force since February 6, 1999.<sup>33</sup> This law includes three Articles (29 to 31) which replicate the main contents of the Mexico Convention and provide that possible lacunae be supplemented by its principles.

46. *Mexico* has ratified the Mexico Convention, which is considered part of the internal rules of private international law that govern international contracts by States not parties to that Convention, even though there is no specific legislative or jurisprudential indication in this regard. Venezuela

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<sup>31</sup> In regard to that particular treaty, there had been consensus between academia and parliamentarians on the benefits of its provisions. By contrast, as regards the Mexico Convention, the situation in Uruguay has been different; no similar consensus exists and as a result, parliamentary approval of the instrument has been rejected twice. Furthermore, a draft General Law on Private International Law also has failed to gain parliamentary approval, the main reason being its incorporation of party autonomy following the Mexico Convention.

<sup>32</sup> Published in Special Official Gazette No. 4.974, September 22, 1995.

<sup>33</sup> Official Gazette No. 36.511, August 6, 1998.

took a different approach and incorporated the content of the Mexico Convention directly into its domestic rules of private international law.

47. *Argentina*, the *Dominican Republic* and *Panama* very recently modified their legislation governing international contracts. Argentina has substituted its Civil Code and its Commercial Code by a new unified Civil and Commercial Code (CCC), which contains an entire chapter on private international law that includes several provisions on international contracts.<sup>34</sup> In November, 2018, a commission created by the government submitted a draft proposal to the Ministry of Justice for the reform of the CCC. Significantly, the draft proposes to substitute the current text of Article 2651(d) with the following: “the choice of law may include a choice of non-State law generally accepted as a neutral and balanced set of rules.”<sup>35</sup> In the Dominican Republic, its new Private International Law contains provisions on international contracts.<sup>36</sup> In Panama, the new Code of Private International Law also contains provisions on the matter.<sup>37</sup> Among these texts, that of the Dominican Republic appears to have been most influenced by the Mexico Convention, although it departs from fundamental aspects, such as determination of applicable law in the absence of choice of law by contracting parties.

2.0 OAS Member States, regardless of whether they have or have not ratified, or do or do not intend to ratify the Mexico Convention, are encouraged to consider its solutions for their own domestic legislation, whether by material incorporation, incorporation by reference, or other mechanisms as applicable to their own domestic legal regimes, taking into consideration subsequent developments in the law applicable to international commercial contracts as expressed in the Hague Principles and as described in this Guide.

### **PART THREE**

#### **ADVANCES IN THE UNIFORM LAW METHOD IN RECENT DECADES**

##### **I. New Scenario in Favor of the Uniform Law Method**

48. Until recently, in the field of international commercial contract law, conflict of laws instruments were overwhelmingly prevalent; today, however, the uniform law method is gaining ground. Many factors are contributing to this trend. For example, party autonomy, or the ability of the parties to choose the law that will govern in the event of a dispute, is being consolidated as a principle of the law applicable to international commercial contracts. This often leads parties to seek to avoid the conflict of laws mechanism through detailed stipulations in their agreements or clear choices as to the governing law even at times where these laws are not

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<sup>34</sup> The CCC has been approved by Law 26.994 of October 7, 2014 and entered into force August 1, 2015.

<sup>35</sup> The proposal is still under discussion. Text of the proposal accessible at: <http://www.pensamientocivil.com.ar/system/files/2018/11/Legislacion3875.pdf>.

<sup>36</sup> Law 544 of 2014.

<sup>37</sup> Law 61 of 2015 (replaced Law 7 of 2014). Official Gazette, October 8, 2015. No 27885-A.

part of domestic law; frequently, these are references to uniform law instruments.

49. Various efforts today at the global, regional and local levels in both the public and private spheres are resulting in an ever-expanding web of instruments, all with the shared aim to develop uniform law. This phenomenon is not limited to normative rules; efforts are also underway to create uniformity among interpretative techniques and to reconcile understandings of the technical operation of different legal systems.

50. In addition, arbitration is being consolidated as an accepted method of resolving commercial disputes that provides arbitrators with suitable tools for reaching appropriate solutions to cross-border problems, beyond mere concern for mechanical application of domestic laws in accordance with a conflict of laws system.

## II. Tools Used to Achieve Unification and Harmonization

51. The terms *unification* and *harmonization* are often used interchangeably. Strictly speaking, unification implies the adoption of common legal norms by more than one State or region, whereas harmonization denotes greater flexibility; it does not necessarily refer to uniform texts, but rather, to the alignment of legal criteria based on common foundations, model laws, or uniform principles. Both conflict of laws rules and substantive laws can be subject to unification and harmonization.

52. The *international treaty* or *convention* is the instrument traditionally used by States to adopt common standards in an effort towards unification by building upon existing solutions or creating new ones.<sup>38</sup> Indeed, there have been many successful treaty instruments, several of which will be discussed in this Guide. But a drawback of the treaty format is the difficulty in securing ratification. Difficult negotiations between States of different legal traditions or with divergent policy objectives often require compromise and concessions that result in a final text that is less than apt or even inoperable, which unsatisfied parties ultimately refuse to ratify. In an effort to obtain ratifications, mechanisms such as *reservations* are often used, which foster the illusion of unity while ultimately subverting unification. Moreover, drafters usually exclude those issues on which there is no consensus. Although treaties continue to abound, they have their limitations.

53. The international treaty may pose limitations due to the relative inflexibility of this form in responding to changes in commercial practices, which often evolve quite rapidly, or when the treaty has not been drafted to account for such changes.

54. Conventions on commercial law subjects frequently seek to codify as law certain commercial usages, customs, or practices. But when conventions are drafted by State governments rather than by members of the community whose practices are supposedly thereby to be established, sometimes such conventions fail to gain acceptance precisely because they do *not* reflect community practices or perceptions. At the same time, however, the role of the State is also to safeguard the interests and rights of

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<sup>38</sup> An example is the term “party autonomy” which can be found in the 1955 Hague Sales Convention and thereafter gained considerable use such that it became a common term to express the principle in many subsequent instruments.

those who are not part of the dominant voice within the mercantile community.

55. Another mechanism was devised - still within the context of international treaties – of *uniform laws*, examples of which include the *Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes* (Geneva, 1930) and the *Convention Providing a Uniform Law for Cheques* (Geneva, 1931).<sup>39</sup> These two conventions set out uniform laws that the contracting states agreed to introduce into their legislation. Today this mechanism has been largely discarded; since a uniform law is designed to be incorporated in its entirety into domestic law, it is seen to impinge on the sovereign authority of a state to legislate.

56. To remedy this difficulty, the concept of the *model law* was devised - an instrument drafted by an eminent organization that subsequently recommends its adoption. The *UNCITRAL Model Law on International Commercial Arbitration* (“UNCITRAL Model Law”) is an example here.<sup>40</sup> However, meaningful unification often is not achieved by this method either, since national legislators may revise, adapt, or even disregard the provisions within a model law. The more general the subject matter, the greater is the likelihood that this will occur.

57. Additional *soft law* methods exist the aim of which is harmonization. *Soft law* is an expression used to refer to a wide variety of materials that, contrary to *hard law* texts, are not necessarily expected to be formally adopted by States via treaty ratification or legislation, but nonetheless can have great influence on the practice and development of the law. One such method might be referred to as a type of *statement of the law*, also called “*principles*.” Soft law also includes *legislative guides* that offer examples of draft text in the form of rules and regulations; it also includes other types of *guides* and similar instruments.

58. In summary, the law of international commercial contracts may derive from State or non-State law and within the latter category, the source may include various types of soft law instruments. State (or “domestic”) law, in accordance with the internal regime of each individual State for the implementation or application of international law, may also include or refer to soft law instruments.

### **III. Relevant Global Instruments of Uniform Law for International Commercial Contracts**

59. The following section will review two of the main global instruments of uniform law for international commercial contracts, the *UN Convention on Contracts for the International Sale of Goods* (“CISG”)<sup>41</sup> and the UNIDROIT Principles, as well as regional efforts to develop

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<sup>39</sup> *Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes*, June 7, 1930, Geneva. 143 UNTS 257; and *Convention Providing a Uniform Law for Cheques*, Jan. 1, 1934, Geneva. 143 UNTS 355.

<sup>40</sup> *UNCITRAL Model Law on International Commercial Arbitration*. Adopted June 21, 1985, with amendments adopted in 2006. Text accessible at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

<sup>41</sup> *United Nations Convention on Contracts for the International Sale of Goods*. Concluded April 11, 1980, entered into force January 1, 1988. 1489 UNTS 3.

uniform laws on the subject, private sector initiatives, and influences from the world of arbitral instruments.

#### **A. UN Convention on Contracts for the International Sale of Goods**

60. Known widely by its English acronym, UNCITRAL was established in 1966 with its object being “the promotion of the progressive harmonization and unification of the law of international trade.” Its general mandate is to reduce and eliminate barriers created by disparities in domestic laws that govern international trade and commerce.

61. One of its well-known products, the CISG, was adopted in 1980 and entered into force in 1988. The CISG unifies the substantive law on the international sale of goods of its contracting states and covers aspects of the formation of contracts for the international sale of goods, substantive rights of the buyer and seller, and matters related to fulfillment and non-fulfillment of those obligations. Many of these issues are common to contracts in general; in fact, many provisions applicable to contracts governed by the civil codes of several states are drawn from the provisions of the CISG.

62. The CISG is widely accepted with current membership at 89 States worldwide. It is in force across much of Latin America, with the exception of Bolivia, Belize, Guatemala, Nicaragua, Panama, Suriname and Venezuela. In the Caribbean, it is in force in Cuba and the Dominican Republic.<sup>42</sup>

63. Despite wide acceptance of the CISG, parties to a contract may exclude its application or, subject to limitations, abrogate or vary the effect of its provisions (Article 6).<sup>43</sup> As the CISG recognizes the principle of party autonomy, this exclusion or variation of CISG provisions may be achieved by choosing the law of a non-contracting State or the internal domestic

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<sup>42</sup> Status of CISG Membership accessible at:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>43</sup> Some commentators have stated that contracting parties often do exclude application of the CISG. The actual rate of parties’ opting out of the CISG has been the object of several investigations with different results obtained in light of different methodologies. Recent comprehensive studies have been carried out by Gustavo Moser. (See: Moser, Luiz Gustavo Meira. Inside contracting parties’ minds: the decision-making processes in cross-border sales, (2017) *J. Int. Disp. Settlement* 8 (2) 250-279; Parties’ preferences in international sales contracts: an empirical analysis of the choice of law. (2015) 20 *Uniform L. Rev.* 19-55, <https://academic.oup.com/ulr/article/20/1/19/1617663#>; Rethinking choice of law in cross border sales, international commerce and arbitration, Vol. 27, Ingeborg Schwenzer (ed.), Eleven International Publishing, The Hague 2018, p. 25-32.) Moser states: “Whilst the rate of CISG opt-out cannot be overlooked and should be further discussed and investigated, a commonality to note among all these studies is that such rate appears to be linked to ‘lack of familiarity’ with the CISG and perhaps a ‘fear of the unknown’. However, the claim that the CISG is ‘widely excluded’ is not supported by empirical evidence.” (page 31 – footnotes omitted). Anecdotal evidence indicates that opting out is often related to dependency patterns without full consideration of the underlying reasons. The current general trend appears to be towards more use of the CISG and less opting out.

substantive law of a contracting State (for example, the Civil and Commercial Code).

64. Conversely, even if it has not been ratified by the State of the contracting parties involved in a dispute, the CISG may be applied as an expression of non-State law when adjudicators are authorized to apply uniform law.<sup>44</sup> However, this is a debated issue.

65. In addition to its wide adoption as a binding international convention and source of non-State law, the CISG has also inspired legislative initiatives to further the development of contract law at the nation State level. In the Americas, a prime example is Argentina.<sup>45</sup> In addition, in some States such as Brazil<sup>46</sup> and El Salvador<sup>47</sup>, the CISG has been used by judges as a source to interpret domestic law.

66. Judicial and arbitral interpretations of the CISG also serve to advance its influence. Hundreds of cases, including judicial decisions and arbitral awards, have been made available on the UNCITRAL website.<sup>48</sup>

### **B. UNIDROIT Principles of International Commercial Contracts**

67. Known also as the “Rome Institute”, UNIDROIT was created in 1926 under the auspices of the League of Nations. Its purpose is to modernize and harmonize the framework of private law, with a primary focus on commercial law. UNIDROIT currently has 63 Member States, including 13 from among the OAS membership.<sup>49</sup>

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<sup>44</sup> The CISG can be applied as an expression of “general principles of international trade” (see, for example, *Steel Bars Case*, ICC Arbitration Case No. 6653, March 26, 1993, text accessible at: <http://cisgw3.law.pace.edu/cases/936653i1.html>). It can also be applied as an expression of “general standards and rules of international contracts” (see, for example, *Printed Banknotes Case*, ICC Arbitration Case No. 9474, February 1999, <http://cisgw3.law.pace.edu/cases/999474i1.html>). Moreover, the CISG can be applied as an expression of “trade usages” (see, for example, *Cowhides Case*, ICC Arbitration Case No. 7331, 1994, <http://cisgw3.law.pace.edu/cases/947331i1.html>; *Hotel Materials Case*, ICC Arbitration Case No. 7153, 1992, <http://cisgw3.law.pace.edu/cases/927153i1.html>). Originally cited in Emery, Cyril Robert and Salasky, Julia, *Arbitration and UNCITRAL's Sales Conventions* (March 1, 2013). *Slovenska arbitražna praksa*, Vol. 2, No. 1, pp. 28-34, 2013, <https://ssrn.com/abstract=2394516>.

<sup>45</sup>[http://www.sbm.com.ar/assets/pdf/prensa/nuevo\\_codigo/final\\_the\\_new\\_CC\\_iv\\_com\\_Argentina\\_and\\_the\\_cisg4.pdf](http://www.sbm.com.ar/assets/pdf/prensa/nuevo_codigo/final_the_new_CC_iv_com_Argentina_and_the_cisg4.pdf).

<sup>46</sup> See: *Diário de Justiça do Estado do Rio Grande do Sul* (DJE), Appellate Court of the State of Rio Grande do Sul, Case No. 70072362940, 12th Chamber, February 16, 2017.

<sup>47</sup> See: *Juzgado Segundo de lo Civil y Mercantil de San Salvador*, Second Civil and Commercial Court of San Salvador, February 28, 2013, Ruling No. PC-29-12.

<http://www.cisgspanish.com/wp-content/uploads/2013/08/ElSalvador28feb2013.pdf>.

<sup>48</sup> See discussion below in Part Four, Uniform Interpretation, and the Appendix, Databases and Electronic Sources.

<sup>49</sup> Argentina (1972), Bolivia (1940), Brazil (1940), Canada (1968), Chile (1951), Colombia (1940), Cuba (1940), Mexico (1940), Nicaragua (1940), Paraguay (1940), United States (1964), Uruguay (1940), Venezuela (1940).

68. UNIDROIT's efforts are directed towards development of material solutions, i.e., a quest for *uniform substantive law*, and only exceptionally towards *conflict of laws rules*. During its existence of over 90 years, UNIDROIT has generated over 60 texts that include conventions and draft model laws or guides that result from "studies", as they are officially known, on a wide range of subjects.

69. From among these efforts, the UNIDROIT Principles constitute one of its most significant accomplishments. They were first published in 1994, although work on the subject had begun in the 1970s. The 1994 edition consists of a preamble and rules (or articles) on general contract provisions, contract formation, validity, interpretation, content, performance and non-performance. These rules are accompanied by detailed commentary, including illustrations, all of which form an integral part of the whole. Given that the same 13 OAS Member States were members of UNIDROIT at the time of the adoption of the UNIDROIT Principles in 1994, that work can be assumed to reflect the consensus reached with direct or indirect involvement of these States.

70. In 2004, a revised and enlarged version was published, with the addition of five chapters on agents, third party rights, damages, assignment of rights, transfer of obligations, assignment of contracts, and limitation periods. The 2010 edition, in turn, addressed new topics on joint and several obligations and the invalidity of contracts covering unlawful or immoral subject matter. The most recent version is the 2016 edition that better takes into account matters on long-term contracts, which may be relevant in both international commercial contracts and foreign investment contracts.

71. To support the use of the UNIDROIT Principles, in 2013 UNIDROIT approved *Model Clauses for the Use of the UNIDROIT Principles*. They are "primarily based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice, i.e. they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators" and are offered as model clauses for parties wishing to make reference to the UNIDROIT Principles in different contexts: as the rules of law governing the contract; as terms incorporated into the contract; as a tool to interpret and supplement the CISG when the latter is chosen by the parties; as a tool to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law.<sup>50</sup>

72. Judicial and arbitral interpretations of the UNIDROIT Principles also serve to advance their influence. Many of these court decisions and arbitral awards have been compiled in the UNILEX database.<sup>51</sup>

73. In their drafting technique, the UNIDROIT Principles were influenced by the "Restatements" prepared by the American Law Institute ("ALI"), an organization of eminent jurists in the United States of America ("United States") that organizes, summarizes, and "restates" predominant

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Current UNIDROIT Membership accessible at:  
<https://www.unidroit.org/about-unidroit/membership>.

<sup>50</sup> *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*. <https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses>.

<sup>51</sup> See discussion below in Part Four, Uniform Interpretation, and the Appendix, Databases and Electronic Sources.

trends in jurisprudence in various fields of domestic law. Although similar in appearance to the rules contained in codes of civil law jurisdictions, these Restatements do not share that same legal status in the United States.<sup>52</sup>

74. Therefore, rather than the word “*Restatement*”, the term “*Principles*” was selected to thereby capture the non-State character of the instrument. Evidently, the drafters wished to immunize the UNIDROIT Principles from possible semantic connotations suggestive of the world’s predominant civil law and common law systems. Hence, they did not refer to them as a Code, which denotes legislative sanction, nor as a Restatement. Taking advantage of the vagueness of the term, they referred to them as “*Principles*.” Technically, however, most of the legal norms are expressed as precise rules, not principles in a broader and more general sense.

75. The UNIDROIT Principles aim to play a fundamental role in various contexts. For legislators, they may be a source of inspiration for reforms in the area of contract law. In fact, the UNIDROIT Principles were taken into account in the revision of the Argentine Civil and Commercial Code, the law of obligations in Germany, and contract law in the Republic of China and in African countries, among others.<sup>53</sup>

76. For contracting parties subject to different legal systems or who speak different languages, the UNIDROIT Principles can serve as guidelines for drafting their contracts and as a neutral body of law (akin to a “*lingua franca*”). This may be done in different ways. For instance, the UNIDROIT Principles may serve as a terminological source. In civil law systems, the terms *debtor* and *creditor* are used, whereas in common law, the terms *obligor* and *obligee* are preferred with the terms *debtor* and *creditor* used only when monetary payments are involved. To bridge this gap, the UNIDROIT Principles use the terms *obligor* and *obligee* “to better identify the party performing and the party receiving performance of obligations...irrespective of whether the obligation is nonmonetary or monetary.”<sup>54</sup> Also, the UNIDROIT Principles may serve as a checklist for parties to ensure that they have included in their international contracts all provisions that may be relevant.

77. Moreover, parties to international contracts may refer directly to the UNIDROIT Principles as applicable law. The choice of the UNIDROIT Principles may be combined with the choice of domestic law to cover supplementary issues, considering that the Principles may not alone be sufficient in all instances and may need to be complemented by a more comprehensive regime as is usually provided by the national law. But the reverse is also possible: the UNIDROIT Principles can serve as “means of interpreting and supplementing domestic law.” If entitled to do so, adjudicators may also apply the UNIDROIT Principles in situations in which the parties have not made a choice of law, rather than having recourse to the conflict of laws mechanism.

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<sup>52</sup> However, although the aim is to describe rules adopted by courts, at times they also offer suggestions that would amount to changes in the law.

<sup>53</sup> See: Estrella Faria, J.A., *The Influence of the UNIDROIT Principles of International Commercial Contracts on National Laws*. (2016) 21 *Uniform L. Rev.* 238.

<sup>54</sup> UNIDROIT Principles, Article 1.11, Comment 3.

<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/414-chapter-1-general-provisions/873-article-1-11-definitions>.

78. For some legal theorists, the UNIDROIT Principles are considered as the centerpiece in the debate on *lex mercatoria*. Others consider them a codification of general principles and the *lex mercatoria*. In fact, this was an intended use of the Principles as contemplated by their drafters, who anticipated that they would be used by judges or arbitrators called upon to make determinations based on indefinite “international uses or customs” or “general international commercial principles.”<sup>55</sup>

79. For courts and arbitral tribunals, the UNIDROIT Principles may provide the necessary criteria to interpret and supplement existing international instruments, such as the CISG, as well as national laws both in the international and domestic contexts.

### C. Unification of Contract Law within the Process of Regional Integration

80. Over roughly the same period, a group of academics known as the Commission on European Contract Law – many also involved in drafting the UNIDROIT Principles – began efforts to develop a uniform law instrument; although nongovernmental, the group included representatives from all Member States of the EU. Its efforts have resulted in a body of work known generally as the *Principles of European Contract Law* (“PECL”).<sup>56</sup> Several provisions of the PECL are identical or very similar to those of the UNIDROIT Principles. In addition to rules, commentary, and illustrations, the PECL contain valuable notes on European comparative law. The PECL have now been invoked by many courts and arbitration tribunals but have not received any formal recognition by the EU.<sup>57</sup>

81. Another academic initiative has resulted in the *soft law* instrument known as the *Draft Common Frame of Reference* (“DCFR”), the drafting technique of which was very similar to that used for the PECL.<sup>58</sup> The European Parliament welcomed the presentation of the DCFR in 2008 and, while recognizing it as “merely an academic document” with the next steps as “a highly political exercise”, pointed out that in the future, the document may range “from a non-binding legislative tool to the foundation for an optional instrument in European contract law.”<sup>59</sup>

82. These two initiatives, the PECL and the DCFR, may lead to the development of additional instruments in the future that might include the possibility of choosing the PECL as the applicable law, which Rome I does not currently permit. In its preamble, Rome I acknowledges the possibility

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<sup>55</sup> *Lex mercatoria* and general principles is discussed below in Part Six on non-State law.

<sup>56</sup> <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>; Cf. Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law Parts I and II*. Kluwer Law International, 2000.

<sup>57</sup> See discussion in, Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11.07.201. COM(2001) 398 Final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0398>.

<sup>58</sup> Von Bar, Clive, Schulte-Nölke et al. (eds.), *Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference (DCFR)*, 2008.

<sup>59</sup> European Parliament resolution of September 3, 2008 on the common frame of reference for European contract law. Official Journal of the European Union, C 295 E/91. 4.12.2009.

of incorporation by reference and, should the [EU] adopt rules of substantive law, the possibility to choose those rules.<sup>60</sup>

83. In the Americas, by comparison, efforts towards a process of regional integration have not advanced any uniform law initiatives, although some efforts have been made.<sup>61</sup> Noteworthy is Article 1 of the *Treaty of Asunción* (which establishes the Southern Common Market - “MERCOSUR”), which contains text that aims in this direction but to date has not been realized.<sup>62</sup>

#### D. Private Sector Harmonization Initiatives

84. Harmonization is promoted not only by public organizations; many initiatives in the private sector also contribute towards this end.

85. One type of instrument is referred to as *standardized terms*. Notably, the ICC advances several normative instruments that can be incorporated into agreements by reference.<sup>63</sup> Examples include the *International Commercial Terms* or “INCOTERMS”<sup>64</sup> and the *Uniform Customs and Practice for Documentary Credits* or “UCP”.<sup>65</sup> Although instruments such as these are usually satisfactory and sufficiently neutral in form and substance, they provide only a partial solution due to their limited scope. Moreover, they presume the existence of an overarching legal framework that governs the contract. Nonetheless, both the INCOTERMS and the UCP are considered by many to be highly successful, in part, because they are specialized and narrowly focused, and in part, because the organization that promulgates them has the ability to modify them in response to changed commercial circumstances.

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<sup>60</sup> Perambulatory paragraphs 13 and 14, respectively. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final - 2011/0284 (COD). Text accessible at:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52011PC0635>.

<sup>61</sup> Examples include the *Principles of Latin American Contract Law*, an initiative that involves jurists from the region; text accessible at: <http://pldc.uexternado.edu.co/>. A recent newcomer to the field of codification is the Organization for the Harmonization of Business Law in the Caribbean (“OHADAC”), whose work to prepare *OHADAC Principles on International Commercial Contracts* could contribute towards garnering support from Caribbean states; text accessible at: <http://www.ohadac.com/>.

<sup>62</sup> *Treaty establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay* (Common Market of the South “MERCOSUR”) 2140 UNTS 257. Article 1 refers to the commitment by States Parties “to harmonize their legislation in relevant areas in order to strengthen the integration process.”

<sup>63</sup> For information on the ICC, see *supra* note 26 and see: <https://iccwbo.org/about-us/>.

<sup>64</sup> For information on INCOTERMS, see: <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/>.

<sup>65</sup> For information on the UCP, see: <http://store.iccwbo.org/icc-uniform-customs-and-practice-for-documentary-credits>.

86. Another tool is the *standard contract* accepted within a specific economic sector. One example thereof is the *Conditions of Contract for Works of Civil Engineering Construction* (1987), prepared under the auspices of the International Federation of Consulting Engineers (“FIDIC”), commonly known as the “FIDIC Contract.” Another example includes the standard international forms of contract from the Grain and Feed Trade Association (“GAFTA”), which are widely used in international trade for agricultural products. In the financial field, the use of the *Global Master Repurchase Agreement* published by the International Capital Market Association stands out internationally, as does the *ISDA Master Agreement for Derivative Contracts* published by the International Swaps and Derivatives Association.<sup>66</sup>

87. Model contracts also are developed by intergovernmental and nongovernmental organizations; one example is the *Model Contract for the International Commercial Sale of Goods*, prepared by the International Trade Centre.<sup>67</sup>

88. These standard contracts may present problems within a general framework of contract law. As they usually are prepared by or for business entities operating in the world’s largest commercial centers, they may be of limited use in other applications. Moreover, in most cases the content is unilaterally formulated, of unilateral benefit and the drafting is inevitably influenced by legal concepts of the respective countries of origin.

89. Also available are various “*codes of conduct*,” prepared either by private entities or intergovernmental organizations and that constitute compilations of rules in specific subjects or industries. They are characterized by flexibility, voluntary compliance and self-governance, rather than state regulation. An example here is the *International Code of Advertising and Marketing Communication Practice* also developed by the ICC.<sup>68</sup> An example from Factors Chain International is the *Code of International Factoring Customs*.<sup>69</sup>

90. Bar associations, such as the International Bar Association (“IBA”), the American Bar Association (“ABA”), and the Union Internationale des Avocats (“UIA”), also formulate “*private soft law rules*.” An example thereof is the IBA’s *Rules on the Taking of Evidence in International Arbitration*, which are used worldwide.<sup>70</sup>

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<sup>66</sup> See <http://fidic.org/>; <https://www.gafta.com>; <https://www.icmagroup.org>; <https://www.isda.org>.

<sup>67</sup> International Trade Centre, Geneva 2010. *Model Contracts for Small Firms: Legal Guidance to Doing International Business*. Chapter 3. *International Commercial Sale of Goods*. <http://www.intracen.org/itc/exporters/model-contracts/>.

<sup>68</sup> *Advertising and Marketing Communication Practice* (Consolidated ICC Code) 2011. Text accessible at: <https://iccwbo.org/publication/advertising-and-marketing-communication-practice-consolidated-icc-code>.

<sup>69</sup> Sommer, H.J., *Factoring, International Factoring Networks and the FCI Code of International Factoring*, in (1998) 3 *Uniform L. Rev* 685-691. <https://doi.org/10.1093/ulr/3.2-3.685>; <https://fci.nl/en/solutions/factoring/model-law-for-factoring>.

<sup>70</sup> International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 2010 edition. [https://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx).

91. Other nongovernmental organizations such as the American Law Institute, the European Law Institute, the European Group of Private International Law (“EGPIL/GEDIP”) and the American Association of Private International Law (“ASADIP”) together with the academic community, have also collaborated in various codification efforts that have been undertaken over the years by UNCITRAL, UNIDROIT, HCCH and the OAS. Some have even advanced their own soft law proposals, such as the ASADIP *Principles on Transnational Access to Justice* (“Transjus”).<sup>71</sup>

#### **E. Arbitral Texts and Law Applicable to International Commercial Contracts**

92. The 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”) was concluded within the United Nations framework and now has 159 State parties from across all continents.<sup>72</sup> Although the instrument antedates the establishment of UNCITRAL, it is now within the scope of the Commission’s Working Group on international arbitration. The New York Convention does not directly address the matter of the law applicable to an international contract submitted to arbitration; however, it does recognize the parties’ choice of law governing the validity of the arbitration clause, as well as that governing the arbitration procedure. It also establishes that, in the absence of a choice of law by the parties, the law of the seat of the arbitration will be the “law of the arbitration.”

93. Moreover, UNCITRAL has issued the *Secretariat Guide on the Convention on the Recognition and Enforcement of Arbitral Awards* (2016) and a *Recommendation* regarding the interpretation of Article II, paragraph 2 and Article VII, paragraph 1 of [said convention].<sup>73</sup> These soft law instruments are useful tools to interpret and supplement the New York Convention.

94. The UNCITRAL Model Law (1985), with amendments as adopted in 2006, was inspired by the New York Convention. It establishes a regime to govern the various stages of an arbitration: from the agreement; to the composition, competence, and scope of intervention by the arbitration tribunal; to recognition and execution of the arbitral award. Amendments were introduced in 2006 that relaxed the formalities of the arbitration agreement for provisional or interim measures. The Explanatory Note by the UNCITRAL Secretariat is a useful tool to interpret and supplement the UNCITRAL Model Law.

95. Unlike the New York Convention, the UNCITRAL Model Law specifically does address the substantive law applicable to contracts submitted to arbitration. Article 28 endorses the principle of party autonomy as to “such rules of law as are chosen by the parties” including “any designation of the law or legal system of a given State.” It also addresses situations where no choice of law has been made and includes a

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<sup>71</sup>Text approved by the ASADIP Assembly in Buenos Aires on November 12, 2016. [http://www.asadip.org/v2/?page\\_id=231](http://www.asadip.org/v2/?page_id=231).

<sup>72</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Signed June 10, 1958, entered into force June 7, 1959. 330 UNTS 3. Current status accessible at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>73</sup> Text of UNCITRAL arbitral documents accessible at: [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html).

general statement that refers to the necessity of arbitrators to apply the terms of the contract and to take into account, in all cases, relevant usages.

96. The New York Convention has been ratified or acceded to by nearly all States of the Americas<sup>74</sup> and the UNCITRAL Model Law has promoted harmonization by inspiring legal reforms throughout the continent.<sup>75</sup> Through the creation of a common legal framework, UNCITRAL has encouraged various States to incorporate these model provisions into their domestic legislation as well as to modernize arbitration practice in accordance with international standards. This effort has contributed significantly towards advancing acceptance of the principle of party autonomy throughout the region and recognition of the utility of global instruments of uniform law for international commercial contracts.

3.0 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the advances that have been made in the uniform law method and to consider the use of uniform law instruments together with conflict of laws rules as supplementary and complementary in the application and interpretation of private international law.

## **PART FOUR UNIFORM INTERPRETATION**

### **I. Conflict of Laws and Uniform Law Texts**

97. Many resources and considerable efforts are required to develop harmonized conflict of laws and uniform law texts. But it is not enough for international and domestic provisions to be similar. The intended goal of harmonization by means of international instruments may be defeated if provisions are interpreted solely from a domestic and not from a comparative perspective.

98. To address this challenge, in recent years there has been an increase in the practice of including instructions in uniform law instruments whereby courts are encouraged to take into account their international nature and the need to promote their uniform enforcement. One example of this is Article 7.1 of the CISG, which states that “(i)n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good

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<sup>74</sup> The exceptions are Belize, Grenada, Saint Kitts and Nevis, Saint Lucia and Suriname.

<sup>75</sup>UNCITRAL Model Arbitration Law. Current status accessible at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html). According to the website, legislation based on the Model has been adopted in the following OAS Member States: Canada (federally and all provinces and territories), Chile, Costa Rica, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Peru, United States (certain states only), and Venezuela. Argentina has also advanced new legislation (Arbitration Law, enacted July 26, 2018). Apparently, Uruguay has also approved legislation to adopt the Model Law. <http://ciarglobal.com/uruguay-aprobado-por-el-senado-el-proyecto-de-ley-de-arbitraje-comercial-internacional/>.

faith in international trade.” That provision, in turn, inspired Article 1.6 of the UNIDROIT Principles, which contains similar language.

99. Various conflict of law instruments also refer to the need to take into account their international nature and the desire to ensure uniform interpretations. An example is the Rome Convention (Article 18). Although Rome I contains no such provision, since it is a regulation, its uniform interpretation is obligatory, based on Article 288 of the *Treaty on the Functioning of the European Union* (“TFEU”). This is an important difference from uniform interpretation in other regions. In this regard, the Court of Justice of the EU contributes towards uniform interpretation of Rome I through its so-called “preliminary rulings” made at the request of a court of an EU Member State.

100. In the Mexico Convention, the preamble expresses the desire to “continue the progressive development and codification of private international law” and the “advisability of harmonizing solutions to international trade issues,” and that, in light of the need to foster economic interdependence and regional integration, “it is necessary to facilitate international contracts by removing differences in the legal framework for them.”

101. The objectives expressed in these perambulatory statements can be realized in those States that decide to ratify the instrument or, alternatively, incorporate its solutions into their domestic laws. But such formal acts alone are not enough; there must also be uniform interpretation of the formally adopted provisions. By way of guidance in that regard, Article 4 of the Mexico Convention provides as follows: “For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.”

102. Although the Hague Principles do not contain a provision similar to that of the Mexico Convention, given the soft law nature of the former instrument, the harmonization objective is evident throughout the document in that it contains provisions that can be adopted by parties around the world in the exercise of party autonomy. Furthermore, paragraphs 2, 3, and 4 of the preamble state that “they may be used as a model for national, regional, supranational or international instruments” and “may be used to interpret, supplement and develop rules of private international law” and “may be applied by courts and by arbitral tribunals.” It is anticipated that widespread use of the Hague Principles will thereby lead to uniformity of interpretation in accordance with its rules. As the word “develop” used by the Hague Principles is not found in other texts such as the CISG (Article 7(1), the UNCITRAL Model Law (Article 2(A)(1) or the Mexico Convention (Article 4), its use suggests the possible impact of the Hague Principles on archaic and unpredictable domestic rules of private international law, a statement which may be considered “revolutionary.”

103. Uniform interpretation of international texts is also facilitated through the collection and dissemination of judicial decisions and arbitral rulings.<sup>76</sup>

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<sup>76</sup> For discussion regarding online databases, see Appendix, Databases and Electronic Sources.

## II. Domestic Laws

104. The matter of uniform interpretation is usually not dealt with expressly in domestic private international laws. However, in *Venezuela*, Article 4 of the Mexico Convention is recognized as a generally accepted principle of private international law, which also has been replicated in the Venezuelan domestic legislation on private international law. In *Argentina*, Article 2595 of the new Civil and Commercial Code makes a reference to the “dialogue among sources” which involves an effort in comparative law.

105. Legislators can acknowledge and foster the objective of harmonization, either by means of the inclusion of perambulatory language or adoption of an express rule to that effect. An example of the first method would be the law of Paraguay, which, in its “Statement of Motives” expressly notes that the final text of the Hague Principles “was reproduced almost entirely by the law.” An example of the second method would be the introduction of text in line with Article 4 of the Mexico Convention, such as a provision similar to Article 2.A of the UNCITRAL Model Law, as amended in 2006, which provides: “(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

4.1 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the overarching goal of unification and harmonization of law within the process of global and regional integration.

4.2 Adjudicators, both in the public realm of the judiciary and in the realm of arbitration, are encouraged to consider the advantages of uniform interpretation in the international legal instruments that are used in the settlement of disputes concerning international commercial contracts and to take into account the development and dissemination of international jurisprudence in this regard.

4.3 Contracting parties and their counsel should remain informed of developments regarding uniform interpretation that may be applicable to their international contracts.

4.4 Contracting parties and their counsel should take into consideration that instruments applicable to their specific case may provide a different solution from those recommended in this Guide and that adjudicators in some jurisdictions may not follow the recommended liberal interpretation.

**PART FIVE**  
**SCOPE OF APPLICATION OF GUIDE**

**I. Applicable Law<sup>77</sup>**

106. One of the key questions in the course of any private cross-border transaction is which substantive law will apply thereto. The scope of this Guide extends to international commercial contracts in which parties have made a choice of applicable law and where they have not made a choice (or their choice has been ineffective). This is consistent with the scope of the Mexico Convention, which addresses both situations, by comparison with the Hague Principles, in which the scope of application is limited only to those situations where a choice of law has been made.

107. Choice of forum (or a “forum selection clause”), which is distinct from the choice of law applicable to the contract, is not within the scope of this Guide. In the field of arbitration, forum selection is addressed by the New York Convention, while in disputes before courts, the Hague *Convention on Choice of Court Agreements*<sup>78</sup> may provide guidance.

**II. “Contract” in Comparative Law**

108. The concept of “contract” is not homogenous across the world. Yet despite the conceptual differences between various substantive laws, in the context of conflict of laws rules, the concept of “contract” (or “contractual obligations”) is universally used and generally understood as referring to a voluntary arrangement between two or more parties that is enforceable by law as a binding legal agreement (or a binding legal obligation).

109. Certain relationships that would generate contractual responsibilities under some legal regimes would be considered beyond the contractual sphere in other regimes. This can be illustrated with the example of free-of-charge transport of persons. In some legal systems, the driver’s responsibility for the safety of these persons is a non-contractual duty, while in others it constitutes a contractual obligation. Another example is that of commonly used instruments of foreign trade – such as bills of exchange and unilateral promises – which are deemed to be contractual in some states including the United States, but not in others. Moreover, in some legal systems, responsibility in certain matters such as these can be both contractual and non-contractual at the same time.

110. The issue of the concept of “contract”, rather than being merely academic, is eminently practical; it determines the situations that are or are not covered by the legal provisions governing international contracts. This problem can be addressed in two ways. Using the traditional conflict of

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<sup>77</sup> The expression “*derecho aplicable*” is used in the Spanish version of the Mexico Convention, rather than “*ley aplicable*”, which would be the literal translation of the English expression “*applicable law*.” In English, “*law*” is a broader term than the Spanish “*ley*” in that, in addition to legislation, it also includes judicial precedent, custom and other manifestations. When the HCCH Secretariat discussed this topic and offered an unofficial translation of the Hague Principles, it concluded that the term “*ley aplicable*” was more widespread in Spain, while in most other Spanish-speaking countries “*derecho aplicable*” is more commonly used.

<sup>78</sup> *Convention on Choice of Court Agreements* (June 30, 2005). Text accessible at: <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

laws approach, the solution would be found within the applicable domestic law. But this approach presents insurmountable disadvantages when the results are incompatible.

111. The alternative approach is to turn to uniform law for a solution. Although the UNIDROIT Principles provide no guidance on this issue, the PECL state in Article 1:107 that the Principles are applicable by analogy to agreements to amend or terminate contracts, to unilateral promises, and to all other statements and actions that denote intent. Neither the Rome Convention nor Rome I is clear on the point.<sup>79</sup>

112. This is in part because donations are considered contracts in civil law states but not under common law systems. However, under the law in the United States a promise can generate obligations if there has been reliance on the promised donation under certain circumstances and with exceptional consequences.<sup>80</sup> The Rome Convention includes donations not made under family law, as noted in the official commentary.

113. During negotiations of the Mexico Convention, it was agreed that the term “international contracts” included the concept of “unilateral declarations of intent.”<sup>81</sup> However, under Article 5 of the final text, unilateral acts – such as debt securities, for example – are not included.

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<sup>79</sup> For example, both exclude bills of exchange, checks, and promissory notes. They also exclude negotiable instruments to the extent that the obligations under such instruments arise out of their negotiable character, which is determined by the law of the forum. However, they can be taken into consideration in interpreting the tacit or implicit intent of the parties in order to determine the applicable law (Article 1, paragraph 2.d, of Rome I; and Article 1, paragraph 2.c, of the Rome Convention). The official commentary also states that the Rome Convention covers the offers, acceptances, promises of contracts, notifications of contract termination, cancellations of debt, denunciations, and declarations of termination. Not addressed is a unilateral commitment that is not related to a contract, such as the recognition of non-contractual debt, or a unilateral act constituting, transferring, or extinguishing a real right. The CJEU has stated that “...the concept of ‘contractual matter’, which appears in Article 5 (1) of the Rome Convention, cannot be understood as referring to a situation in which there is no commitment that has been freely assumed by one party vis-à-vis the other..” (in reference to the criterion of jurisdiction in contractual matters in Reg. 44/2001). *Frahuil SA v Assitalia SpA*, CJEU, February 5, 2004, Case C-265/02. It has also stated that “... a legal obligation [is] freely consented to by one person with respect to another ...”. *Petra Engler v. Janus Versand GmbH*, CJEU, January 20, 2005, Case C-27/02. Text of cases accessible at: <https://eur-lex.europa.eu>.

The underlying relationship to the promise in a letter of exchange may be of contractual origin, but even the law applicable to a negotiable instrument should not be confused with the law applicable to the underlying contract. The distinction between contractual and negotiable aspects of a juridical relationship is used to illustrate the exclusion made by Article 1(2)(b) of the Rome I instrument to differentiate negotiable aspects of the obligations evidenced in a letter of exchange, cheque or promissory note (which are not governed by Rome I) and contractual aspects (which are so governed).

<sup>80</sup> The doctrine known as “promissory estoppel”, explained in section 90 of the Restatement (Second) of Contracts.

<sup>81</sup> Report on Experts’ Meeting, *supra* note 19.

Non-commercial contracts, such as donations, are also excluded, given that the inter-American text only addresses commercial undertakings.<sup>82</sup>

### III. International “Commercial” Contract

114. The scope of this Guide is limited to international *commercial* contracts. Although in some legal systems a distinction is made between “civil” and “commercial” types of activities, that is not the intention here; rather, it is to exclude “consumer contracts”, which are frequently subject to mandatory rules within the ambit of consumer protection legislation, and “employment contracts”, which are usually subject to special rules under labor laws.

### IV. “International” Commercial Contract

#### A. Background

115. The determination of when a contract is international presents challenges that have been addressed in different ways. (1) One approach considers whether or not the contracting parties habitually reside or are domiciled or established in different States.<sup>83</sup> (2) An alternative focus is on the transfer of goods from one State to another or that the offer and acceptance take place in two different States, or that the place of formation of the contract takes place in one State and performance in another. (3) A broader position considers that the existence of any foreign element internationalizes the contract. There are also mixed criteria, such as those followed, for example, in *the Convention relating to a Uniform Law on the International Sale of Goods*.<sup>84</sup>

116. Recent regulatory instruments for both international commercial contracts and international arbitration use the word *international* in a very broad sense. In general, it is enough for the parties to be established or to have residence in different jurisdictions, or for the place of performance or of the purpose of the contract to be outside the State where the parties are established (but see discussion below, concerning “establishment”). The international classification generally only excludes those arrangements in which all the relevant elements are connected to a single State. A similar approach is taken by the Hague Principles, discussed below.

117. Neither the Montevideo Treaties nor the Bustamante Code address this issue. Similarly, neither the Rome Convention nor Rome I address this issue, at least not directly; both instruments merely refer, in Article 1.1, to contractual obligations in situations involving a conflict of laws.

#### B. Mexico Convention

118. The inter-American instrument does expressly state “that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party” (Article 1, paragraph 2). Thus, the Mexico Convention offers two alternative approaches: one relating to the place of residence or establishment of the *parties*, and another focused on the *contract* itself and on its *objective connections* with more than one State.

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<sup>82</sup> These and other exclusions are considered below in Section V.

<sup>83</sup> Article 4, Rome I, *supra* note 13.

<sup>84</sup> *Convention relating to a Uniform Law on the International Sale of Goods*. Concluded July 1, 1964, entered into force August 18, 1972. 834 UNTS 107. Text accessible at: <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>.

Given that the two possibilities are connected by the conjunction “or,” the contract is considered international if either condition is met. The definition includes three terms that are examined in the following paragraphs.

### 1. “Habitual Residence”

119. The Mexico Convention uses the term “*habitual residence*” rather than other terms that have created controversies in international contracting. One such problematic term is “*domicile*”, which in some systems demands an *animus* or intent to establish oneself in the place in addition to the habitual nature of the residence.

120. The Mexico Convention does not address particular situations, such as an alternative residence in a different State or a change of residence after entering into a contract.<sup>85</sup> The Hague Principles do expressly address this issue; Article 12 states that the relevant establishment “is the one which has the closest relationship to the contract at the time of its conclusion.”

### 2. “Establishment”

121. For corporate entities, the Mexico Convention uses the word “*establishment*” but fails to make clear whether this refers to the *main* establishment. The English translation of Article 1 has been criticized because here the term “*establishment*” was used as a direct translation of the Spanish “*establecimiento*” instead of “*principal place of business*”, which is the concept generally known in English-speaking legal systems and which was used in Article 12.

122. The challenge of finding an appropriate term arises out of differences between legal traditions. The debate has been ongoing for some time in different forums and during the drafting of various international instruments. In some legal systems, the place where a business is incorporated may be chosen for specific reasons such as, for example, tax-planning purposes. Under such circumstances, although the place of incorporation could be considered the business *establishment*, it may not necessarily correspond to the *principal* place of business.

123. According to the report from the Tucson meeting that had preceded CIDIP-V and adoption of the Mexico Convention, it was requested that the text address those situations in which one party had commercial establishments in more than one State, in which case the international status of the contract would be determined on the basis of the establishment with the closest connections to the contractual obligation for which the applicable law was being determined.<sup>86</sup> However, the proposal was not included in the final text.

124. Twenty years later, the suggestion has been expressly endorsed in Article 12 of the Hague Principles (see discussion below). This could serve as interpretative assistance or as a model for legislators in light of the silence of the inter-American instrument on this point.

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<sup>85</sup> However, those issues may be resolved by reference to other instruments. For example, Rome I which uses the expression “habitual residence” for both natural persons and corporate entities, states that the relevant point is “the time of conclusion of the contract” (Article 19 (3)). As regards the habitual residence of a natural person acting in the course of his business activity, it is “his principal place of business” (Article 19(1)).

<sup>86</sup> Report on Experts’ Meeting, *supra* note 19.

### 3. “Objective Ties/ Closest Connections”

125. The Mexico Convention states that a contract is considered international “if the contract has *objective ties* with more than one State Party” (Article 1, paragraph 2). This was a direct translation of the Spanish term “*contactos objetivos*” and here again there are language problems; as has been suggested, the expression “closer/closest connection” should have been used to remain consistent with the English terminology of other international instruments (for example, the Rome Convention). Objective ties exist when a contract is concluded (signed) in one jurisdiction and performed in another or when the goods are located in different jurisdictions.

#### C. Hague Principles

126. The instrument provides that “a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State” (Article 1.2).

127. Thus, the Hague Principles adopt an approach opposite to that of the Mexico Convention. Here a contract is considered international *unless* the stipulated provisions are met, whereas under the Mexico Convention, the contract is considered international *if* the stipulated provisions are met. Although the definitions and approach are inverse, the result is (or should be) the same.

128. Although the Hague Principles also use the term “*establishment*”, in the accompanying commentaries, (“HP Commentary”) (12.3) clarifies that this refers to any place “in which the party has more than a fleeting presence” and that the term includes “a center of administration or management, headquarters, principal and secondary places of business, a branch, an agency, and any other constant and continuous business location. The physical presence of the party, with a minimum degree of economic organization and permanence in time, is required to constitute an establishment. Hence, the statutory seat of a company alone does not fall within the notion of establishment.” The HP Commentary (12.3) further clarifies that a party with its main establishment in a State and business activities in another State that are carried out exclusively over the internet is not to be considered established in the latter location.

129. As explained in the HP Commentary (12.4), the Hague Principles do not use the term *habitual residence* to include natural persons acting within their sphere, especially consumers and employees. For natural persons who pursue commercial or professional activities, the criterion to determine establishment is the same as is used for corporate entities.

130. As already noted above, the Hague Principles provide that “If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion” (Article 12). That provision applies to both natural persons and corporate bodies and is in line with the solution offered by Article 10(a) of the CISG.

131. Moreover, the establishment of a business is determined *at the time the contract is concluded*. According to the HP Commentary, this respects the legitimate expectations of the parties and provides legal certainty.

#### **D. Relevance of Parties' Choice to Internationality**

132. Uncertainty remains with regard to the effect of a choice of law by the parties on the determination of the internationality of the contract. The preliminary work for the Mexico Convention discarded the idea that such a choice could alone determine “internationality.”<sup>87</sup> However, the final text of the Mexico Convention has given rise to doubts on that point. Some experts are of the opinion that the choice of the parties alone is enough to internationalize a contract. Others consider that the reference in Article 1, paragraph 2 to “objective ties” to more than one State Party was made in order to prevent such a choice by the parties alone from rendering an agreement “international.”

133. The HP Commentary explains that the negative definition in Article 1.2 excludes only purely domestic situations, in order to confer the broadest possible scope of interpretation to the term “international.” However, it also states that “the parties’ choice of law is not a relevant element for determining internationality” and that “the parties may not establish internationality solely by selecting a foreign law.” By contrast, Rome I does allow the internationalization of a contract simply by reason of the parties’ choice. However, that choice may not contravene the mandatory law of the state where all the relevant elements of the contract are located (Article 3.3). That solution makes sense in that it respects both principles – party autonomy and mandatory law – with emphasis on the former but also recognition of the constraint imposed by the latter.

134. An overarching approach to the determination of whether a contract is considered “international” would be to adopt the criterion set out in Comment 1 to the Preamble of the UNIDROIT Principles. Although the term “international” is not defined, the comment states that “the concept of ‘international’ contracts” must be interpreted in the broadest sense possible. Moreover, this interpretation is to be done in such a way “so as ultimately to exclude only those situations where no international element at all is involved, i.e., where all the relevant elements of the contract in question are connected with one country only.” This approach, consistent with that taken in the Hague Principles as noted above, appears to be an emerging trend as evidenced also in both domestic law and commercial arbitration as discussed below.

135. When no international element is present, the justification for party autonomy in respect of domestic contracts is not present (because there is no uncertainty regarding applicable domestic law, or no need for a neutral third law). The approach in Rome I (and in Quebec, for example) is to allow the designation of a foreign law but essentially only for non-mandatory issues.

#### **E. Internationality in Domestic Laws**

136. *Argentina’s* new Civil and Commercial Code, in force since August 2015, does not define international contracts in its provisions on private international law. Judicial interpretation in cases decided prior to the new Code considered a contract international “if its function is to bring into contact two or more national markets, or if there exists a real connection of

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<sup>87</sup> Report on Experts’ Meeting, *supra* note 19. The original proposal had followed the European approach that any contract involving a conflict of laws was international, which was rejected at the Tucson Meeting of Experts; a choice of law was not enough to internationalize a contract – it had to have “objective ties” to more than one state. (See also CJI/SO/II/doc.6/91).

signing or performance abroad”<sup>88</sup> and, that “a contract is national when all its elements are in contact with a specific legal system, whereas for our private international law of domestic origin, a contract is international when it is signed and carried out in different States.”<sup>89</sup>

137. Similarly in *Brazil*, the relevant legislation has no general definition for international contracts, with the exception of the CISG. Judicial interpretations on the issue vacillate.

138. *Chilean* legislation adopts a more restrictive approach to internationality. A literal interpretation of Article 16 of Chile’s Civil Code and Article 113 of its Commercial Code would lead to the result that a contract would [only] be considered international if it had been signed in another State and by its terms was to be carried out in Chile. By analogy, a contract signed in one State for implementation in another would also be international, even in the absence of a definition of internationality in the contract. However, the judiciary has opted for a broader interpretation. According to recent judgments from Chilean courts, a contract would also be international if it was concluded between parties domiciled or with establishments in various States,<sup>90</sup> if the goods or property object of the contract are located in another State, or “in which the parties are of different nationalities and the merchandise will transit between two States”.<sup>91</sup>

139. The new *Panamanian* Code of Private International Law (2015) includes economic criteria to determine the international status of a contract.

140. *Paraguay* took the approach imbued by the UNIDROIT Principles. Article 2 of the Paraguayan Law Applicable to International Contracts provides that “the applicability of this law to international contracts shall be interpreted in the broadest fashion possible, and only those in which all the relevant elements have ties to a single State shall be excluded.” Given the breadth of that language, it is necessary to ask whether the choice of the

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<sup>88</sup> The phrase is a quotation by the court from the author, Boggiano, in *Private International Law* (1978), pp. 471 and 517, in *Sagemüller, Francisco v. Sagemüller de Hinz, Liesse et al.* Second Bench of the Second Civil and Commercial Chamber of Paraná (Entre Ríos), August 10, 1988, cited in Fallos DIPr, Jurisprudencia Argentina de Derecho Internacional Privado, May 18, 2007. <http://fallos.diprargentina.com/2007/05/sagemller-c-sagemller-de-hinz.html>. The case concerned sale of shares of a corporation incorporated in Argentina, by a contract of sale executed (signed) in Germany with payment made in Switzerland.

<sup>89</sup> Third Bench of the National Commercial Chamber, October 27, 2006.

<sup>90</sup> *Marlex v. European Industrial Engineering*, Supreme Court, July 28, 2008, Ruling No. 2026-2007; *Exequatur Cubix v. Markvision*, Supreme Court, August 20, 2014, Ruling No. 10890-2014.

<sup>91</sup> *Cruz Barriga v. Integral Logistics Society*, Supreme Court, August 25, 2010, Ruling No. 1699-2009. Decree Law 2.349, which establishes rules on international contracts for the public sector, defines the international nature of the contracts in relation to the main business center of the contractual counterpart of the State of Chile, without requiring that the contract has been concluded abroad: The cited standard refers to the “... international contracts related to business and operations of patrimonial character that the State or its organisms, institutions and companies celebrate with organisms, institutions or international or foreign companies, whose main center of business is abroad.”

parties alone is enough to “internationalize” the contract. Although that would appear to be permissible under the Paraguayan law, if there are no other international elements, *ordre public* would be used to assess potential constraints on that choice so that the contract would be considered as domestic.

141. The *Venezuelan* Law on Private International Law stipulates in Article 1, in addition to its sources, the scope of its application, which is limited to “factual situations related to foreign legal provisions.” The law does not qualify the type of connections the undertaking may have with foreign legal systems, therefore, some scholars have suggested that *any* foreign element is sufficient for a contract to be considered international, including the nationality of the parties. Economic criterion have also been considered acceptable; a 1997 decision by the Political and Administrative Chamber of the then Supreme Court of Justice states that “the international nature of the agreement must be established in its broadest sense. Thus, attention must be paid to all the possible factors – both objective and subjective – relating to the parties and the relationship that is in dispute, be they legal (nationality, domicile, place of signature) or economic (overseas transfers of money, conveyance of goods and services).”<sup>92</sup> Most Venezuelan scholars have discarded the possibility of internationalizing the contract by the mere selection of foreign law; on the contrary, it has been understood that internationality is a requisite for the exercise of party autonomy.

#### **F. Internationality in Commercial Arbitration**

142. The international character of an arbitration may lead to the internationalization of a contract if the ample powers of the arbitrators regarding the applicable law to the substance of the dispute are considered.

143. The UNCITRAL Model Law stipulates in Article 1 (3) that “An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.”

144. These provisions combine the criteria of the international status of the contract and the international status of the parties and adds a third criterion, whereby the parties are given the freedom to mutually decide that the matter covered by the arbitration agreement is “international.” Thus, the internationalization of the arbitration (and hence of the underlying contractual relationship) at the decision of the parties is permitted by the UNCITRAL Model Law. However, this issue seems to be more theoretical than emerging in practice.

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<sup>92</sup> *Embotelladoras Caracas et al. v. PepsiCola Panamericana*, Political and Administrative Chamber of the Supreme Court of Justice, October 9, 1997.

145. A total of 82 States have enacted legislation based on the UNCITRAL Model Law, including 13 OAS Member States.<sup>93</sup> Most of those States have included the definition contained in Article 1(3).

146. Some States have what may be referred to as “dual arbitration legislation”; one set of rules to govern domestic arbitration that differs from those applicable to international arbitration. Care should be taken to review both the domestic and international arbitration rules to see if the parties are permitted to choose the international rules by agreement.<sup>94</sup> *Paraguay, Chile, Costa Rica*<sup>95</sup> and *Colombia* are examples of States with such dual regimes. *Colombia* has gone beyond the internationality criteria of the UNCITRAL Model Law and has included an economic criterion according to which the arbitration is understood to be international when “the controversy submitted to arbitration affects the interests of international trade” (Article 62(c) of Law 1563 of 2012). This is no longer based on the UNCITRAL Model Law but on the procedural code of French Civil Law (Article 1504). Other States, too, such as *Peru*, have not excluded that internationality could be determined by sole will of the parties (Decree 1071 of 2008).

#### **G. Trend in Favor of a Broad Interpretation of Internationality**

147. Both the Mexico Convention and the Hague Principles contain ample criteria to determine internationality. This is also the case with the UNIDROIT Principles. Consistent with this trend, many States in the region have already enacted arbitration laws with a similarly broad concept of internationality.

5.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to its scope of application and the determination of internationality, should incorporate solutions in line with the Mexico Convention, the Hague Principles and the UNIDROIT Principles, thereby excluding consumer and labor contracts while adopting a broad concept of internationality, and may further stipulate that the sole agreement of the parties may internationalize a contract, but that if no other international element is present, internal *ordre public* will prevail.

5.2 The domestic legislation may also replicate the provisions of the PECL, Article 1:107 and thereby make applicable by analogy agreements to amend or terminate contracts and unilateral promises and all other statements and actions that denote intent in a commercial setting.

#### **V. Exclusions**

148. International instruments on the law of international commercial contracts vary considerably as to the matters excluded from their scope of application. The Mexico Convention and the Hague Principles exclude

<sup>93</sup> See *supra* note 75.

<sup>94</sup> The UNCITRAL Model Law provides in Article 3 (c) that an arbitration is international if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Whether or not the state in question has enacted similar provisions is the first question, but even so, such a declaration would not circumvent public policy.

<sup>95</sup> In recent arbitral jurisprudence of Costa Rica, there has emerged a tendency to apply as a supplementary source to the domestic law, Alternative Conflict Resolution and Promotion of Social Peace (Law 7727 of 1997), principles from the Law on International Commercial Arbitration (Law 8937 of 2011), which is based on the UNCITRAL Model Law.

similar matters but they do so in different ways. The Mexico Convention expressly excludes from its scope of application the matters listed in Article 5.<sup>96</sup> By comparison, by the language of its title and in its preamble, the Hague Principles are limited to international *commercial* contracts and further delimited by language in Article 1; they do not apply to consumer transactions or employment contracts.

### **A. Capacity**

149. By operation of Article 5(a), the Mexico Convention does not determine the law applicable to “questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties.”<sup>97</sup>

150. The terms “status” and “capacity” are treated differently in comparative law. Some systems use the word “status,” while others use the term “*de facto* capacity.” In this regard, private international law generally applies the law of persons (on the basis of domicile or nationality) or the law of the venue (*lex fori*).

151. There are also differences regarding “*de jure* capacity.” This terminology, which is unknown in some systems, is related to what under other legal regimes is referred to as restrictions or bans on the disposal of property. This matter is subject to the regime of the person (nationality, domicile or other applicable). This regime establishes restrictions for arbitrary, discriminatory or similar reasons.

152. Article 1.3(a) of the Hague Principles excludes matters related to “the capacity of natural persons.” As the HP Commentary (1.25) explains, this exclusion means that the provisions “determine neither the law governing the capacity of natural persons, nor the legal or judicial mechanisms of authorization, nor the effects of a lack of capacity on the validity of the choice of law agreement.”

### **B. Family Relationships and Succession**

153. Article 5(b) of the Mexico Convention excludes “contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships.”

154. The Hague Principles contain no such similar exclusion as the instrument applies exclusively to international commercial contracts; scope of the instrument is limited by the language of its title and preamble, and is further delimited by Article 1 to apply “to international contracts where each party is acting in the exercise of its trade or profession.”

### **C. Securities and Stocks**

155. Article 5, paragraphs (c) and (d), of the Mexico Convention exclude obligations deriving from securities and from securities transactions. Some, but not all, legal systems deem these obligations to be contractual in

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<sup>96</sup> In addition, Article 6 of the Mexico Convention expressly provides that its provisions “shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.”

<sup>97</sup> Similarly, Article 4(a) of the CISG provides that the CISG does not govern the validity of the contract or of any of its provisions. It also does not govern the validity of any usage.

nature.<sup>98</sup> Moreover, there are inter-American conventions on the subject of securities (bills of exchange, promissory notes, checks, invoices).<sup>99</sup> The Hague Principles do not contain a similar provision.<sup>100</sup>

#### **D. Arbitration and Forum-Selection Agreements**

156. Article 5(e) of the Mexico Convention excludes “the agreements of the parties concerning arbitration or selection of forum.” Moreover, there are inter-American conventions on international commercial arbitration and validity of arbitral awards.<sup>101</sup>

157. Similarly, Article 1.3(b) of the Hague Principles states that “these Principles do not address the law governing arbitration agreements and agreements on choice of court.” The HP Commentary (1.26) explains that this exception primarily refers to material validity or contractual aspects of such agreements, which include questions concerning fraud or mistake, among others. It is further noted that “in some States these questions are considered procedural and governed by the *lex fori* or *lex arbitri* [while] in other States these questions are characterized as substantive issues to be governed by the law applicable to the arbitration or choice of court agreement.”

#### **E. Questions of Company Law**

158. Article 5(f) of the Mexico Convention excludes from its scope of application “questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.” There is an inter-American convention also on this topic.<sup>102</sup>

159. Likewise, Article 1.3(c) of the Hague Principles provides that they do not address the law governing “companies or other collective bodies and trusts.” The HP Commentary (1.27) explains that the term “collective bodies” is used “in a broad sense so as to encompass both corporate and unincorporated bodies, such as partnerships or associations.” The HP Commentary (1.29) emphasizes that the exclusion is confined to internal matters (such as organization, administration and dissolution) and does not extend to contracts that these entities conclude with third parties or agreements between shareholders.

#### **F. Insolvency**

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<sup>98</sup> Examination of the treatment of this subject in other legal systems is beyond the scope of this Guide.

<sup>99</sup> *Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices*, adopted at CIDIP-I in 1975; *Inter-American Convention on Conflict of Laws concerning Checks*, adopted at CIDIP-I in 1975; and another adopted at CIDIP-II in 1979. Text and status of these conventions is accessible at:

[http://www.oas.org/en/sla/dil/private\\_international\\_conferences.asp](http://www.oas.org/en/sla/dil/private_international_conferences.asp).

<sup>100</sup> Article 2(d) of the CISG excludes from its scope sales of stocks, shares, investment securities, negotiable instruments or money.

<sup>101</sup> *Inter-American Convention on International Commercial Arbitration*, adopted at CIDIP-I in 1975; *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, adopted at CIDIP-II in 1979. Text and status of these conventions accessible at aforementioned website, *supra* note 99.

<sup>102</sup> *Inter-American Convention on Conflict of Laws concerning Commercial Companies*, adopted at CIDIP-II in 1979. Text and status of these conventions accessible at aforementioned website, *supra* note 99.

160. The Mexico Convention contains no provisions on this matter. Article 1.3(d) of the Hague Principles expressly excludes its application to the law governing insolvency. According to the HP Commentary, the term is to be interpreted broadly, encompassing liquidation, reorganization, restructuring, or administration proceedings. The exclusion refers to the effects that the initiation of insolvency proceedings may have on contracts such as specific provisions for invalidating certain contracts or giving specific powers to the administrators of collective processes.<sup>103</sup>

### **G. Proprietary Effects**

161. The Mexico Convention contains no provisions on this matter. The scope of application of the Hague Principles excludes the law governing the proprietary effects of contracts. As explained in the HP Commentary (1.31), the Hague Principles “only determine the law governing the mutual rights and obligations of the parties, but not the law governing rights in rem” i.e., they do not address matters such as whether the transfer actually conveys property rights without the need for further formalities, or whether the purchaser acquires ownership free of the rights and claims of third parties. Such matters are typically governed by domestic laws specific to conveyances.<sup>104</sup>

### **H. Agency**

162. Article 1.3(f) of the Hague Principles excludes “the issue of whether an agent is able to bind a principal to a third party.” As noted in the HP Commentary (1.32), the exclusion “refers to the *external* aspects of the agency relationship, i.e., to issues such as whether the principal is bound on the grounds of an implied or apparent authority or on the grounds of negligence, or whether and to what extent the principal can ratify an act of the agent” [emphasis added]. Therefore, the Hague Principles are applicable to *internal* aspects of the agency – in other words, “to the agency or mandate relationship between the principal and the agent, if it otherwise qualifies as a commercial contract.”

163. The Mexico Convention leaves this topic open to interpretation. Article 15 of the Convention states: “The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.” As will be seen below in Part Six, Article 10 of the Mexico Convention affords a high level of interpretative flexibility in searching for fair solutions in specific cases according to internationally accepted usage, practices, and principles.

5.3 The domestic legal regime on the law applicable to international commercial contracts may expressly exclude from its scope of application:

- family relationships and succession, arbitration and forum selection, and questions of company law, in accordance with the relevant provisions of the Mexico Convention and the Hague Principles;
- securities and stocks, in accordance with the relevant provisions of the Mexico Convention;
- capacity, insolvency, proprietary effects and agency, in accordance with the relevant provisions of the Hague Principles.

<sup>103</sup> Treatment of this subject under the Mexico Convention is beyond the scope of this Guide.

<sup>104</sup> Similarly, Article 4(b) of the CISG provides that the CISG does not govern the effect which the contract may have on the property in the goods sold.

**PART SIX**  
**NON-STATE LAW IN INTERNATIONAL COMMERCIAL**  
**CONTRACTS**

**I. The Terms “Non-State Law” and “Rules of Law”**

164. The term “*non-State law*” is often used in a very broad sense that covers a variety of principles and rules that range from universal principles on human rights and general principles of law, to customs, usages and practices, standard definitions of trade terms (for example, INCOTERMS), private law codifications or restatements (for example, the UNIDROIT Principles) and *lex mercatoria* (however defined), all of which have little if anything in common except that they do not emanate from any source from within the State itself to create binding or “positive” law within their respective ambit.

165. More importantly, most of these products are, by their very nature (such as customary law) or because of their subject (such as principles on human rights) or their limited scope (such as usages and practices), incapable of serving as applicable law of a contract (or *lex contractus*). Yet in a discussion over the possibility of choosing as the law governing international contracts, non-State “rules of law”<sup>105</sup> in lieu of a particular national “law”, it seems preferable to resort to the less all-embracing term of “rules of law” which has the advantage of being used already in the arbitral world.

166. An early example of the use of the term *rules of law*, is the 1965 *Convention on the Settlement of Investment Disputes between States and Other Nationals* (“ICSID Convention”).<sup>106</sup> It states that the tribunal “shall decide a dispute in accordance with such rules of law as may be agreed by the parties” (Article 42). Several states in the region are parties to the ICSID Convention and accept the Centre’s jurisdiction. Subsequently, the term “rules of law” has been incorporated into other arbitration laws and regulations, for example, the UNCITRAL Arbitration Rules (Article 33 in the 1976 version; Article 35 as revised in 2010).<sup>107</sup> The expression has also been used in Article 28(1) of the UNCITRAL Model Law, which has been adopted or used as the basis for arbitral legislation in numerous States of the Americas. According to the UNCITRAL commentary on this Article, “rules of law” is understood more broadly than “law” and includes rules “that have been elaborated by an international forum but have not yet been incorporated into any national legal system.”<sup>108</sup>

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<sup>105</sup> Non-State rules of law as used herein could be considered as a type of “sub-set” of non-State law.

<sup>106</sup> *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 18, 1965, Washington DC. 17 UST 1270; TIAS 6090; 575 UNTS 159.

<sup>107</sup> *UNCITRAL Arbitration Rules (1976)*, adopted by the UN General Assembly on December 15, 1976. UN Doc. A/RES/31/98; *UNCITRAL Arbitration Rules (as revised in 2010)*, adopted by the UN General Assembly on December 6, 2010. UN Doc. A/RES/65/22; Texts accessible at: <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

<sup>108</sup> As stated therein, it is not an official commentary and was prepared by the UNCITRAL Secretariat for information purposes only.

## II. Types of Non-State Law

### A. Customs, Usages and Practices

167. Comparative law also uses other terms to refer to non-State law, such as customs, usages and practices, principles and *lex mercatoria*. These terms are far from being homogeneous.

168. The term “customs” is generally reserved these days for use in public international law so as to avoid confusion with the legal term of art – “customary international law”, although in the Mexico Convention, “customs” was included in a series along with and alternate to “usage” (Article 10). In many legal systems of Latin America, following the French, Italian and Spanish approach, a distinction is made between *customs* (with normative force and the source of rights to fill in gaps where the law is silent) and *usages* (which serve to interpret or clarify the will of the parties, with normative force only in some cases). The difference in this nomenclature is that it is not necessary to prove the normative force of usages, as is required for customs.

169. Commercial understandings arising from contractual practices that had traditionally been called “customs” are now, in some recent instruments of uniform law, called “usages.” According to this emerging nomenclature, “customs” arise from state practice while “usages” emerge from private action; however, some jurisdictions still adhere to the traditional approach. “Usages” is also broader than “customs,” in that it covers not only practices that are generally accepted in a particular trade or sector, but also those considered by the parties as presumed expectations.<sup>109</sup>

170. In many jurisdictions while “usages” refers to conduct established by third and other parties of international commerce, the term “practices” is limited to past conduct of the contracting parties themselves. In some jurisdictions these terms are defined by legislation.<sup>110</sup>

171. “Usage” is used in uniform law instruments, such as the CISG (Articles 8(3) and Article 9) and the UNIDROIT Principles. This is also the case with the term “practices”. Thus, for example, Article 1.9 of the UNIDROIT Principles states that “the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.” This language is identical to that of the CISG (Article 9(1)) and in line with the subjective approach proposed in Article 8(3) thereof.

172. Although usages can be proven, institutionalization by an organization – whether governmental or otherwise – helps to establish a common understanding of expressions that are frequently used in international commercial contracts. One well-known example emanates from the ICC, a global association that has institutionalized usages in several of its own regulatory instruments, the most recognized of which are the INCOTERMS, a set of rules that cover standard terms used in international trade, such as the

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<sup>109</sup> As the element of obligation required in customary public international law (known as *opinio juris*) is not necessary, presumed expectations of the parties are enough for the emergence and observation of “usages.”

<sup>110</sup> For example, the US Uniform Commercial Code, Section 1-303 distinguishes between *course of performance* (a term that is not easy to translate into Spanish, but which is closely linked to the contract and prevails over the following two terms), *course of dealing* or prior practices between the parties and *usage of trade* or uses.

abbreviations FOB and CIF.<sup>111</sup> Many of the INCOTERMS have become “part of the daily language of commercial trade” and are regularly incorporated into international contracts.

173. Sometimes these terms are also referenced by other international instruments. For example, the Treaty of Asunción that created MERCOSUR uses the terms FOB and CIF (Annex 2, General Regime of Origin, Articles 1 and 2). Although the Treaty does not define these terms, their meaning is sufficiently clear as common terms that have become institutionalized by the ICC. In this way, this international treaty offers formal recognition of the non-legislated source.

174. Moreover, INCOTERMS have been incorporated into various domestic laws.<sup>112</sup>

### B. Principles

175. Usage is specific to the activity at hand but, once it acquires general acceptance, it becomes a *general principle* or *principle*. As a usage becomes more widespread, it will have greater affinity with general principles with the result being a reduction in the burden of proof that is generally required for a usage.

176. The concept of *general principles of law* appears in early texts such as the Austrian Civil Code of 1811 and other legal texts to codify private law in both Europe and Latin America. Numerous contemporary judgments by the Court of Justice of the European Communities (“CJEC”), and now the Court of Justice of the EU (“CJEU”), also refer to “general principles of *civil law*” [emphasis added].<sup>113</sup>

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<sup>111</sup> FOB is the abbreviation of “Free on Board”, which refers to the point after which the seller is no longer responsible for the goods (the risk of loss of or damage to the goods and the responsibility for cost of transport passes when the goods are “on board the vessel.” INCOTERMS 2010). CIF stands for “Cost, Insurance, Freight”, which means that the seller must pay these costs up to the named destination.

<sup>112</sup> For instance, Article 51 of the Venezuelan law of DIPr of 1998; Article 2651 of the Argentine Civil and Commercial Code; Article 51 of the Draft Law of DIPr of Uruguay; Articles 852 et seq. of the Commercial Code of Bolivia (which refer to INCOTERMS) and Article 1408 (which refers to Documentary Credits); and Article 3 of Resolution 112/2007 of the Directorate of National Taxes and Customs of Colombia.

<sup>113</sup> Possible examples: *Audiolux SA e.a. v. Groupe Bruxelles Lambert SA*, CJEU, October 15, 2009, Case C-101/08; *Federal Republic of Germany v. Council of the European Union*, CJEU, October 5, 1994, Case C-280/93. In another case, the European Court of Justice (“ECJ”) utilized “a general principle of civil law” that “each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder.” *Société Thermale d’Eugénie-Les Bains*, ECJ, July 18, 2007, Case C-277/95. In yet another, the Court mentioned that “one of the general principles of civil law,” the principle of “full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract.” *Annelore Hamilton v Volksbank Filder eG*, ECJ, April 10, 2008, Case C-412/06, at para. 42. In another, the Court invoked “the principles of civil law, such as those of good faith or unjust enrichment.” *Pia Messner v Firma Stefan Krüger*, ECJ, September 3, 2009, Case C-489/07, at para. 26. Text of cases accessible at: <https://eur-lex.europa.eu>.

177. Of course, principles are recognized by Article 38 of the Statute of the International Court of Justice (“ICJ”) as a source of international public law, using the expression “the general principles of law recognized by civilized nations.” But the expression also has been adapted for use in international commercial contracts, such as those governing oil and gas investments in the Middle East, some of which have been the subject of landmark arbitrations in the course of the past century.<sup>114</sup>

178. In those and other cases settled through arbitration, similar expressions have also been used, including the following: general principles of private international law; generally admitted principles; general principles of law and justice; general principles of law that should govern international transactions; broadly accepted general principles that govern international commercial law; general principles of law applicable to international economic relations; general principles of law included in the *lex mercatoria*; and rules of law. Likewise, the Institute of International Law (“IIL”) at its meeting in Athens in 1979 to consider the *Proper Law of the Contract in Agreements between a State and a Foreign Private Person* used expressions such as the following: general principles of law, common principles of domestic laws, principles applicable to international economic dealings, and international law, without expressing any preference.<sup>115</sup>

179. The expression *general principles* is also used in this sense in certain uniform law instruments. As provided in Article 7(2) of the CISG, matters are to be settled “in conformity with the general principles on which it is based.” On occasion it is used as a synonym for “rules without the force of law”, as in the UNIDROIT Principles.

180. The term *principles* may refer, broadly, to public law, to both public and private law and, specifically, to private or civil law. *Principles* is also used to refer to concepts of a more general nature (such as contractual freedom or good faith) and, on occasion, is qualified by the word “fundamental,” which suggests ties to abstract basic values, such as those enshrined in the national constitutions of various States. Despite this terminological divergence, at present the term *principles* is the one used most often in various contexts and with different connotations.

### C. *Lex Mercatoria*

181. In international trade, principles arise from the generalization of usages by traders after which these usages become institutionalized in rules prepared by public and private international organizations. In turn, these

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<sup>114</sup> “General principles of private international law” (*Saudia Arabia v Arabian American Oil Co. (ARAMCO)*, 1958); “general principles of law” (*Libya v Texaco and Liamco*, 1977; *Aminoil v Kuwait*, 1982; *Framatome v Iran*, 1982); “generally admitted principles” (ICC Case 2152/1972); “general principles of law and justice” (ICC Case 3380/1980); “general principles of law that govern international transactions” (ICC Case 2291/1975); “general principles adopted by international arbitral jurisprudence” (ICC Case 3344/1981); “amply admitted general principles that govern international commercial law” (ICC Case 3267/1979); “general principles of law applicable to international economic relationships” (ICSID Case, *Asia v Republic of Indonesia*, 1983); “general principles of law comprised within” (ICC Case 3327/1981); “rules of law” (ICC Case 1641/1969).

<sup>115</sup> IIL, Session of Athens 1979, *The Proper Law of the Contract in Agreements between a State and a Foreign Private Person* (September 11, 1979).

norms ultimately become recognized by various state and arbitral entities charged with conflict resolution. The result is referred to as *lex mercatoria*, or *new lex mercatoria*, emulating the law of merchants which emerged in the Middle Ages.

182. A landmark decision by the House of Lords in the United Kingdom established that *lex mercatoria* (or the “new” *lex mercatoria* as invoked therein) constituted general principles of law.<sup>116</sup> Recent relevant decisions from the Americas include a ruling by the Appellate Court of Rio Grande do Sul, a Brazilian state court, which referred to non-State law such as *lex mercatoria*<sup>117</sup> and another ruling by the Supreme Court of Justice in Venezuela.<sup>118</sup> Nevertheless, deliberations over *lex mercatoria* continue, with intense debates over terminology, its sources, and whether it constitutes an autonomous legal regime that is independent of domestic legal systems.

### III. Non-State Law in the Mexico Convention and the Hague Principles

#### A. Background – the Rome Convention

183. Doubts existed as to whether under the Rome Convention (Article 3), in accordance with party autonomy, the options available to the parties included the choice of non-State law. Thus, in the draft Rome I that was presented by the European Commission, it was proposed that non-State law could be chosen. In particular, the proposed language was intended to authorize choice of the UNIDROIT Principles, the PECL, or a possible future instrument on the topic.<sup>119</sup> Nevertheless, the legislature ultimately decided to reject that proposed wording, perhaps envisaging a future European instrument in this regard. Instead, perambulatory paragraph 13 states that Rome I “does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention” (consider also perambulatory paragraph 14). This means that such choice must be embedded in, if permitted under, the chosen State law. Accordingly, Rome I only allows *incorporation by reference* and does not permit choice of non-State law. That applies at least in proceedings before state courts, given that arbitration is subject to its own rules, which are normally open to non-State law.

184. Incorporation by reference allows the chosen rules – in this case, the non-State law – to be considered, but with domestic law as a backdrop at all times, to be determined, as applicable, through the conflict provisions of

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<sup>116</sup> *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH and Others v. Shell International Petroleum Company Limited* (H. L.) (July 1988). 27 ILM 1032.

<sup>117</sup> Proceedings No. 70072362940, Judgment of February 2017. As to the law governing the contract, the Court of Appeal noted that according to Art. 9(2) of the Introductory Law to Brazilian Civil Code, Danish law as the law of the place of the conclusion of the contract would be applicable. However, the Court held that, whenever as in the case at hand the contract is pluriconnected, the traditional *lex loci celebrationis* rule should be disregarded in favor of a more flexible approach leading to the application of the CISG and the UNIDROIT Principles as an expression of the so-called “new *lex mercatoria*”. Text accessible at <http://www.unilex.info>.

<sup>118</sup> Supreme Court of Justice on *lex mercatoria*. Text accessible at: <http://www.tsj.gov.ve/decisiones/scc/diciembre/172223-RC.000738-21214-2014-14-257.HTML>.

<sup>119</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) /\* COM/2005/0650 final - COD 2005/0261.

private international law. The provisions of that domestic law, even when limited to the internal *ordre public*, shall have prevalence when there is a mere incorporation by reference.

### B. Mexico Convention

185. The Mexico Convention went beyond the Rome Convention. It shows an openness toward non-State law that can be traced back to the preparatory work.<sup>120</sup> Although the instrument is not explicit on this point, Jose Luis Siqueiros, who prepared the early draft, wrote in a subsequent article that the instrument speaks of *derecho aplicable* rather than *ley aplicable*, not because it is a better expression, but essentially to make it clear that the intention is to cover international usages, principles of international trade, *lex mercatoria*, and similar expressions.<sup>121</sup> Siqueiros's opinion is backed by other renowned jurists who participated in the negotiations of the Mexico Convention, including the United States delegate Friedrich Juenger and the Mexican Leonel Pereznieta Castro.<sup>122</sup>

186. However, the inter-American instrument is not free of the terminological chaos that characterized the time during which it was drafted. Its Article 9, paragraph 2, refers to “the general principles of international commercial law recognized by international organizations.” Similarly, Article 10 refers to “the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted.” The scope of those Articles is explained later in this Guide.<sup>123</sup>

187. Several of the terms used in those articles are problematic. It is unclear which “international organizations” are being referred to in Article 9 and whether the term is intended to be restricted to intergovernmental organizations, such as UNCITRAL or UNIDROIT, or to include nongovernmental entities like the ICC. Other expressions used in Article 10, such as customs, usage, and practices, also are undefined.

### C. Hague Principles

#### 1. Terminology

188. Article 3 of the Hague Principles uses the expression *rules of law* to refer to non-State law. This decision was made by the working group that drafted the instrument with the deliberate goal of capitalizing on extensive developments in the doctrine, jurisprudence, and legislation that had taken

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<sup>120</sup> OEA/Ser. K/XXI.5, CIDIP-V/doc.32/94 rev. 1, March 18, 1994, p. 3; OEA/Ser.K/XXI.5, CIDIP V/14/93, December 30, 1993, pp. 28, 30.

<sup>121</sup> José Luis Siqueiros, *Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales*, in *Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT*, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 222.

<sup>122</sup> List of Participants. OEA/Ser.K/XXI.5/ CIDIP-V/doc.31/94 rev. 1, March 16, 1994. See: Friedrich K. Juenger, *The UNIDROIT Principles of Commercial Contracts and Inter-American Contract Choice of Law*, in: *Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales*, in *Contratación Internacional*, *id.*, at p. 235. Leonel Perenznieta Castro, *Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos*, in *Contratación Internacional*, *id.*, at pp. 210-212.

<sup>123</sup> See discussion in Part Thirteen.

place in connection with the expression since its initiation in the sphere of arbitration, as described above.

189. But the text of Article 3 that was ultimately adopted further specifies that the rules of law that are chosen must be “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules.”

190. This is a change from the proposal by the working group, which had chosen not to restrict the scope of the expression *rules of law* and to leave it to the discretion of the parties or, as applicable, the interpreting body. It had also been agreed that the parties would be allowed to select, when available, rules of a specific sector that could cover the parties’ legitimate expectations. The suggestion that the rules chosen would have to pass an “examination of legitimacy” to assess their nature and characteristics had been rejected.

## **2. Criteria to Determine the Legitimacy of Non-State Law**

191. In a decision that has not escaped criticism, Article 3 was finally approved with changes to the working group’s proposal and the introduction of criteria to determine the legitimacy of non-State law. The HP Commentary indicates that the criteria should be jointly understood in relation to one another, as explained below.

### **a. Neutral and Balanced Set of Rules**

192. The requirement for a *neutral and balanced set of rules* attempts to address the concern that unequal negotiating power could lead to the imposition of unfair or unequal rules. Thus, the HP Commentary (3.11) states that the source must be “generally recognized as a neutral and impartial body, one that represents diverse legal, political, and economic perspectives.”

193. The HP Commentary (3.10) notes that they must be a set of rules “that allow for the resolution of common contract problems in the international context” and not merely a small number of provisions.

194. The chosen rules of non-State law must be distinguished from individual rules made by the parties themselves. The HP Commentary (3.4) explains that the parties cannot make a conflicts choice by merely referring to a set of rules contained in the contract itself, or to one party’s standard terms and conditions, or to a set of local industry-specific terms. For example, if a group of banks agree on certain general conditions to govern particular services that the banks provide, those conditions cannot be chosen as the applicable rules of law. According to those attributes (that the rules of law be a set of rules, that the set must be neutral and must be balanced), an instrument such as the UNIDROIT Principles or the CISG would qualify to be chosen as non-State law.<sup>124</sup> By contrast, unilaterally drafted contractual clauses or conditions clearly do not qualify as non-State law that can be chosen as applicable law. Examples such as the FIDIC Contract or GAFTA Rules (explained above) constitute non-State law that gather together usages

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<sup>124</sup> This could lead to an interesting situation; a possible conflict between the CISG and the Mexico Convention may arise when, while the relevant jurisdiction has excluded the application of the CISG by virtue of rules of private international law according to articles 1(1)(b) and 95 of the CISG, application of the Mexico Convention, namely its article 9, would lead to CISG application. The CISG Digest 2016 Edition refers to a few possibly relevant cases on article 95, although a clear interpretative trend has yet to be established. See:

[http://www.uncitral.org/pdf/english/clout/CISG\\_Digest\\_2016.pdf](http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf).

and principles in specific commercial sectors but that nevertheless fail to meet the requirement of constituting a sufficiently complete and appropriate body of rules for choice as applicable law through exercise of party autonomy.

### **b. Generally Accepted Set of Rules**

195. The requirement of a *generally accepted set of rules* is intended to dissuade the parties from choosing vague or unclear categories as rules of law. Examples of generally accepted sets of rules include the UNIDROIT Principles and the CISG, when not ratified or applicable *per se*. Examples of regional instruments that meet the criteria for a set of rules as established by the Hague Principles include the PECL. There have been interesting initiatives in the Americas undertaken by academics that, if generalized acceptance thereof is gained, may eventually also qualify.<sup>125</sup>

### **3. Choice of Non-State Law and Gap-filling**

196. The need for “gap-filling” may arise when parties have chosen a law or set of rules that do not address a particular matter. The HP Commentary (3.15) clearly states that while other instruments such as the UNIDROIT Principles and the CISG may address gap-filling, the Hague Principles “do not provide gap-filling rules.” The HP Commentary therefore cautions parties designating certain rules of law to govern their contract to “be mindful of the potential need for gap-filling and [that they] may wish to address it in their choice of law.” For example, parties may choose the UNIDROIT Principles and, for all unforeseen matters, the application of a domestic law.

## **IV. Non-State Law in Domestic Laws**

197. In *Brazil* there have been various attempts to introduce reforms over the years. The most recent proposal to reform the Introductory Law to the Provisions of Brazilian Law (“LINDB”) would include a new Article 9, the first paragraph of which would acknowledge party autonomy (discussed below in Part 7) and the second paragraph of which would recognize non-State law. The proposed Bill 4905 remains at an impasse in the Congress.<sup>126</sup>

198. *Panama* recognizes non-State law and even refers to the UNIDROIT Principles as a complementary source. The Code of Private International Law provides that: “The parties may use the principles on international commercial contracts regulated by [UNIDROIT] as complementary provisions to the applicable law or as a means of interpretation by the judge or arbiter, in contracts or undertakings of international commercial law” (Articles 79, 86 of Law 61 of 2015).

199. The *Paraguayan* Law Applicable to International Contracts openly allows the use of non-State law. Its Article 5 (titled “rules of law”), is based

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<sup>125</sup> Examples include the *Principles of Latin American Contract Law*, and the *OHADAC Principles on International Commercial Contracts*, *supra* note 61.

<sup>126</sup> Article 9. The international contract between professionals, businessmen and traders is governed by the law chosen by the parties, and the agreement of the parties on this choice must be express. 1. The choice must refer to the entire contract, but no connection between the law chosen and the parties or the transaction is required.

2. In the lead sentence (“caput”), the reference to the law also includes the indication, as applicable to the contract, of a set of international, optional or uniform legal rules, accepted internationally, supranational or regional as neutral and fair, including *lex mercatoria*, provided they are not contrary to public policy [unofficial translation from the Portuguese].

on Article 3 of the Hague Principles and provides “in this Law, references to law include rules of law of non-State origin that are generally accepted as a set of neutral and balanced rules.” It does not include the requirement in the Hague Principles that the rules of law must enjoy a general level of international, supranational, or regional acceptance to avoid controversies over which sets of rules of law would meet that requirement. Its Article 12 echoes the language of Article 10 of the Mexico Convention and thereby offers the court broad powers of interpretation in this regard.

200. In *Uruguay*, the draft amendments regarding private international law provide that these are open to non-State law (Articles 13 and 51).<sup>127</sup> These provisions would incorporate an approach accepted not only in doctrine but also in practice. For example, the UNIDROIT Principles are well-known, taught in schools, used in the negotiation of international contracts and are on occasion referred to in the jurisprudence.

201. The *Venezuelan Law on Private International Law* includes in Articles 30 and 31 rules similar to Articles 9 and 10 of the Mexico Convention. Under these provisions as interpreted, it is possible to apply non-State law either as selected by the parties or in the absence of choice. However, this is only applicable in disputes before courts; the law does not apply to arbitration. Relevant to court adjudication is the aforementioned decision of the Supreme Court of Justice of Venezuela that expressly invoked *lex mercatoria*.<sup>128</sup> More broadly, Articles 10 and 15 of the Mexico Convention are applicable in Venezuela as generally accepted principles of private international law.

202. In addition to the foregoing, in several other States of the Americas, non-State law has been called upon in the interpretation or reinterpretation of domestic laws. For example, the UNIDROIT Principles have been cited for that purpose in important decisions that have been issued by the judiciary in Argentina, Brazil, Colombia, Paraguay, Venezuela, and others.<sup>129</sup>

#### V. Non-State Law in Arbitration

203. In arbitration, the expression *rules of law* is used in the UNCITRAL Model Law in Article 28(1), the 1976 UNCITRAL Arbitration Rules (Article 33), and the current 2010 Rules (Article 35); similar expressions are used in other sets of arbitral rules. The domestic laws on arbitration in a number of Latin American States also use the expression “rules of law.”<sup>130</sup> The

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<sup>127</sup> The Draft General Law on Private International Law was approved by the House of Representatives (956 of 2016) October 7, 2016 but has not yet achieved approval by the Senate.

<sup>128</sup> Supreme Court of Justice on *lex mercatoria*. <http://www.tsj.gov.ve/decisiones/scc/diciembre/172223-RC.000738-21214-2014-14-257.HTML> (also cited earlier above).

<sup>129</sup> See UNILEX database ([www.unilex.info](http://www.unilex.info)). The matter has been dealt with on a world-wide basis by the Academy of Comparative Law at its Fukuoka Congress in 2018; acting as General Reporters were Professors Alejandro Garro and José A. Moreno Rodríguez (The UNIDROIT Principles as a common frame of reference for the uniform interpretation of national laws, <https://aidc-iacl.org/general-congress>).

<sup>130</sup> For example, see the following: In *Brazil*, Article 2 of Law 9307 of 1996 on Arbitration; in *Colombia*, Article 208.1 of Law 1818 of 1998 - Conciliation and Arbitration (possibly superseded by Law 1563 of 2012); in *Costa Rica*, Article 22 of Law 7727 of 1997 - Alternative Conflict Resolution and Promotion of Social Peace and Article 28 of Law 8937 of 2011 - Law of International Commercial Arbitration; in *Chile* Article 28.4 of Law 19.971 of

consequence of these provisions, generally speaking, is that if contracting parties choose arbitration as a dispute settlement mechanism, they may choose as the governing law “rules of law”, which include soft law instruments such as the UNIDROIT Principles. On the other hand, with the exception of Panama, Paraguay, and Venezuela, if the contracting parties have not selected arbitration and the dispute is before the courts, the choice of law can only be from among the domestic law of States and cannot include reference to such “rules of law” or non-State law.

204. From among Latin American domestic laws, that of Panama deserves special mention: not only is it open to non-State law, it also provides that in international arbitration, account must be taken of “the UNIDROIT Principles” thereby legitimizing that body of non-State provisions.<sup>131</sup>

205. A unique aspect of the Peruvian arbitration legislation is its provisions that in the event of gaps, the arbitral tribunal may resort, at its discretion, to principles as well as uses and customs in the field of arbitration (Article 34(3)); even in procedural matters, the law provides for the possibility of the application of non-State law.

6.1 The domestic legal regime on the law applicable to international commercial contracts should recognize and clarify choice of non-State law.  
 6.2 Legislators, adjudicators and contracting parties are encouraged, in relation to non-State law, to read the Mexico Convention in light of criteria offered in the Hague Principles and HP Commentary, and to recognize, in light of the latter instrument, the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

206. The *Inter-American Convention on International Commercial Arbitration* (“Panama Convention”), adopted at CIDIP I in Panama City in 1975,<sup>132</sup> states in Article 3 that when no agreement exists between the parties, reference should be made to the *Rules of Procedure of the Inter-American Commercial Arbitration Commission* (“IACAC Rules”).<sup>133</sup> Those rules, in turn, provide in Article 30(3) that in all such cases the arbitration tribunal is to take into account “usages of the trade applicable to the transaction.” Thus, the application of these rules regarding procedural aspects of arbitration

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2004 - International Commercial Arbitration; in *El Salvador*, Articles 59 and 78 of Legislative Decree 914 of 2002 - the Law on Mediation, Conciliation, and Arbitration; in *Guatemala*, Article 36.3 of Law 67 of 1995 - Law of Arbitration; in *Nicaragua*, Article 54 of Law 540 of 2005 - Mediation and Arbitration; in *Peru*, Article 57.2 of Law 1071 of 2008 - Law of Arbitration; in the *Dominican Republic*, Article 33.4 of Law 489 of 2008 - Commercial Arbitration; in *Paraguay*, Article 32 of Law 1879 of 2002 - Arbitration and Mediation; and in *Venezuela*, the last part of Article 8 of the Law of Commercial Arbitration of 1998.

<sup>131</sup> National and International Arbitration in Panama, Law 131 of 2013.

<sup>132</sup> *Inter-American Convention on International Commercial Arbitration*, adopted at CIDIP I in Panama City, signed January 1, 1975 and entered into force June 16, 1976.

<sup>133</sup> *Rules of Procedure of the Inter-American Commercial Arbitration Commission*. As amended and in effect April 1, 2002. Text accessible at: <https://www.adr.org/sites/default/files/Inter-American%20Commercial%20Arbitration%20Commission%20Rules-%20English.pdf>.

influences the application of substantive rules such as those mentioned above.

207. Also, MERCOSUR's Arbitral Agreement of 1998, ratified by Argentina, Brazil, Paraguay and Uruguay, recognizes in Article 10 the applicability of "private international law and its principles" and of the "law of international trade."<sup>134</sup> The latter expression has been understood by scholars as an acceptance of non-State law.

208. Cases in which non-State law has been invoked in arbitration in the Americas can be found in the UNILEX database.<sup>135</sup>

## PART SEVEN

### PARTY AUTONOMY IN CHOICE OF LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS

#### I. General Considerations

209. The principle of party autonomy accords to the parties to an international commercial contract the freedom to choose the law by which the contract shall be governed. This Guide does not address the parties' power to select the arbitral or state jurisdiction that would have competence in the event of a dispute, in accordance with another application of the principle of party autonomy (at the global level, the matter is addressed by the New York Convention and the Hague Choice of Court Convention). The focus of this Guide is on the problems of applicable law.

210. Party autonomy is one of the pillars of the modern law of contract and enjoys a high level of acceptance in private international law. The basis for this principle is that the parties to a contract are in the best position to determine which law is the most suitable to govern their transaction instead of leaving that determination to the adjudicator, should a dispute arise. That strengthens the legal certainty that is required to encourage commercial transactions and is also intended to reduce state interventionism in favor of private initiative.

211. Party autonomy includes choice of substantive law (material autonomy) and choice of conflict of laws rules (conflictual autonomy). In some systems the first depends on the law chosen; in other words, the choice of law determines whether parties may (or may not) exercise material autonomy.

212. Although party autonomy is perhaps the most widely-accepted principle in contemporary private international law, disagreements still exist regarding its modalities, parameters, and limitations. These include, for example, as regards the method of choice – which could be explicit or tacit – whether a connection is required between the chosen law and the domestic laws of the State of the parties to the contract; whether non-contractual issues can be included in the choice of law; which State, if any, can impose limitations on choice; and whether non-State rules can be chosen. Those issues are addressed at different points in this Guide.

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<sup>134</sup> *Acuerdo Sobre Arbitraje Comercial Internacional del MERCOSUR*. Decision by MERCOSUR Council No. 03/98 of July 23, 1998. Spanish text accessible at: <http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec0398.asp>.

<sup>135</sup> See UNILEX database ([www.unilex.info](http://www.unilex.info)).

## II. Evolution of the Principle of Party Autonomy

213. The principle of party autonomy was not expressly included in the rules for private international law contained in the European codes of the nineteenth-century. In South America, Chile's Civil Code of 1857 and Argentina's of 1869 were among the first in the world to include rules for private international law; both are silent on the matter of party autonomy in international contracts<sup>136</sup> which is understandable since, at the time, the principle was not yet widely accepted. The Montevideo Treaties raise multiple questions regarding party autonomy. The 1889 Treaty is silent on the subject, which has led some commentators to claim – highly questionably – on that basis that party autonomy is accepted. The principle is generally expressed in Article 166 but only refers to “*derecho dispositivo*” (supplementary rules) and does not preclude application of mandatory rules. But the Treaty does not recognize the principle, as evidenced in Articles 185 and 186, which only apply “in the absence of express or implied choice.”

214. In the negotiations that preceded the 1940 Treaty there were clashes between the delegation of Argentina, which supported the express admission of party autonomy, and that of Uruguay, which called for its rejection. The text of the 1940 Treaty reflects a compromise; although party autonomy ultimately was not included, Article 5 of the additional protocol reads as follows: “The applicable jurisdiction and law according to the corresponding Treaties may not be modified by the parties’ wishes, except to the extent authorized by that law.” Thus, the solution of the 1940 Treaty is to allow each State, in the exercise of its sovereignty, to determine on an independent basis the jurisdiction and law applicable to international contracts. If the State whose law is applicable recognizes party autonomy, it will be accepted. Thus, by granting the parties the right to select the jurisdiction where the contract is performed, the parties are indirectly permitted to choose the governing law.

215. By comparison, party autonomy does not appear to be included in the articles of the Bustamante Code, even though its drafter stated, in a later doctrinal work, that the Code did recognize the principle.<sup>137</sup> The discussion on this issue remains open.

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<sup>136</sup> Article 1545 of the Chilean Civil Code accepts party autonomy in contractual matters in general. It does not specify if the acceptance refers to international contracts. In recent years the leading interpretation has been that it does. On the other hand, although Article 1462 states that a promise to submit, in Chile, to a jurisdiction not recognized by Chilean laws is null due to malpurpose (“la promesa de someterse en Chile a una jurisdicción no reconocida por las leyes chilenas, es nula por el vicio del objeto”), years ago the jurisprudence has determined that the law refers solely to choice of forum agreements and not the laws themselves. In any case, it would only exclude the jurisdiction of States that are not recognized as such by Chile and not all foreign States. As an example: *Exequátur State Street Bank and Trust Company*, Supreme Court, May 14, 2007, Ruling No. 2349-05; or *Mauricio Hochschild S.A.C.I. v Ferrostaal A.G.*, Supreme Court, January 22, 2008, Ruling No. 3247-2006. The new Argentinean Civil and Commercial Code expressly recognizes party autonomy in international contracts (Article 2651).

<sup>137</sup> Sánchez de Bustamante, Antonio, *Derecho internacional privado*, La Habana, Cultural, S.A., 3a. ed., 1947, Tomo II, pp. 188 y 196-197. The Bustamante Code does recognize the possibility of choice of law in adhesion contracts and in the interpretation of the contract. In the first of these, such recognition has been made in a “timid and inexplicable” manner. See, Romero, Fabiola, *Derecho aplicable al contrato internacional*, en: *Liber amicorum*, Homenaje a la obra

216. Meanwhile, the principle of party autonomy was included in various other treaties on private international law. As further evidence of its international recognition, the IIL at its meeting in Basel in 1991 adopted a resolution favoring party autonomy in matters of private international law.<sup>138</sup> Article 2.1 of that resolution provides that parties are free to agree on the law that is to apply to their contracts, while Article 3.1 states that the applicable law derives from the consent of the parties. Within the EU, party autonomy has been enshrined in several instruments, such as the Rome Convention, since superseded by Rome I (Article 3.1).

217. The principle has also been considered by some to be covered by the provisions of several charters and declarations setting out fundamental human rights, such as Article 17 and Article 29.1 of the 1948 *Universal Declaration of Human Rights*, although this position has not been generally accepted.

### III. Party Autonomy in the Mexico Convention and the Hague Principles

218. Despite the reticence toward the principle that existed at that time in some states of the Americas, party autonomy was broadly endorsed by the Mexico Convention. It is expressly stated in Article 7, paragraph 1, that: “The contract shall be governed by the law chosen by the parties” and in Article 2 that: “The law designated by the Convention shall be applied even if said law is that of a State that is not a party.”

219. The Hague Principles also expressly endorse party autonomy in Article 2.1 which states that “A contract is governed by the law chosen by the parties.” Already during the preparatory work, HCCH had determined that the chief aim of the document would be to promote the dissemination of the principle of party autonomy around the world, something that had been identified as “a need” by organizations such as UNCITRAL and UNIDROIT. As noted in the HP Commentary (2.3), “Article 2 reflects the Principles’ primary and fundamental purpose of providing for and delineating party autonomy...” General recognition of the principle is evidenced by answers to the questionnaire that had been circulated by HCCH in 2007, results of which also recorded the existence of anachronisms in some regions of Africa and Latin America.<sup>139</sup>

#### A. Main Contract, Choice of Law and Choice of Forum

220. Assuming acceptance of the autonomy of parties to make a choice of law, the question arises as to “where” they may make that choice. Parties may make a choice of law either within the “main contract” or they may enter into a separate agreement for that purpose.

221. The HP Commentary (1.6) uses the term “main contract” to refer to the primary contractual agreement between the parties. Examples thereof include a contract for the sale of goods, the provision of services, or a loan. As noted in the HP Commentary, the parties’ choice of law agreement must be distinguished from that main contract.

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científica y académica de la profesora Tatiana B. de Maekelt, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Fundación Roberto Goldschmidt, 2001, Tomo I, pp. 203 at p. 243.

<sup>138</sup> International Law Institute, Session of Basel, 1991. The Autonomy of the Parties in International Contracts Between Private Persons or Entities. Seventh Commission Rapporteur, Eric Jayme.

[http://www.idi-iil.org/app/uploads/2017/06/1991\\_ba1\\_02\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/1991_ba1_02_en.pdf).

<sup>139</sup> See questionnaire at: <https://assets.hcch.net/docs/20c08e8a-3055-472c-ab7d-1665551705c2.pdf>

222. The “choice of law” agreement should also be distinguished from the “choice of forum” agreement. As described in the HP Commentary (1.7), these include clauses or agreements on jurisdiction, forum selection, choice of venue, or choice of court of law, all of which are synonymous for agreements between the parties on the venue (generally a court of law) that would resolve any conflict that may arise out of the main contract.

223. The “choice of law” agreement and “choice of forum” agreement should also be distinguished from agreements on arbitration. These are agreements between the parties to submit their conflicts to an arbitral tribunal. As noted in the HP Commentary (1.7) although such clauses or agreements (collectively known as “dispute-resolution agreements”) are often combined in practice with choice of applicable law agreements, their purpose is different.

### **B. Choice of Non-State Law**

224. Assuming acceptance of the autonomy of parties to make a choice of law, the question arises as to “what” they may choose and whether this includes “non-State law.” The Mexico Convention clearly permits the use of non-State law if no choice has been made. In the absence of a choice or if the choice proves ineffective, under Article 9 a court shall also take into account “the general principles of international commercial law recognized by international organizations.” These would include, for example, the UNIDROIT Principles.

225. However, the Mexico Convention does not provide that parties may choose non-State law. In the absence of a specific provision, one school of thought considers that such a choice would not be viable. That position is based on Article 17, which states that: “For the purposes of this Convention, ‘law’ shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.” According to that interpretation, the chosen law must be that of a State, even one that is not a party to the Mexico Convention, as long as the choice is one of “State” law. Another school of thought, including those that adhere to the opinions of drafters Siqueiros and Juenger, is that under Article 7 parties can choose non-State law on the basis of Articles 9 and 10.<sup>140</sup>

226. By contrast, the Hague Principles provide in Article 3 that the parties may choose non-State law, if it meets certain requirements.

227. In the discussions of the Working Group that prepared the draft Hague Principles, three options for the choice of non-State rules were considered: (1) reserving it for the arbitral venue, (2) allowing the choice of non-State law regardless of the dispute settlement mechanism, (3) omitting all references to non-State law, thereby leaving it open to interpretation by judges and arbiters. The first option would have equated to maintaining the status quo. Indeed, although most current arbitration rules provide the option of choosing non-State law as the legal framework for an international contract (for examples, see the discussion above on non-State law, arbitration), by contrast, most courts of law do not allow the choice of non-State law. In other words, unless the parties choose to include an arbitration clause in the contract, they will be subject to the law of a specific State. The third option would have permitted the arbitration tribunal or courts of the State to make the determination. On one hand, it could be argued that this option is most consistent with the principle of party

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<sup>140</sup> Those who adhere to the first school question the veracity of that interpretation and maintain that Articles 9 and 10 do not apply in cases where there has been a choice, but rather, to assist courts in the determination of applicable law in the absence of an effective choice. They also maintain that Article 7 does not include the choice of non-state law among possible options because under Article 17, “law” is defined “to mean the law current in a State.”

autonomy. However, this would mean that the court or arbitral tribunal would be interpreting the Hague Principles to determine whether the parties' choice of law (or choice of rules of law) clause complied with Article 3, an interpretative process that would not involve recourse to party autonomy. On the other hand, absence of a concrete response to the problem would give rise to uncertainties. Ultimately, the Working Group chose the second option. In other words, the Hague Principles allow the choice of non-State law, regardless of the method of conflict resolution.

### **C. The Hague Principles as a Tool for Interpreting the Mexico Convention in Choice of Non-State Law**

228. As outlined above, the Mexico Convention embraces the principle of party autonomy quite broadly. It has also been noted that the Mexico Convention clearly permits a court to take non-State law into account in the absence of an effective choice, but that it stops short of providing that a party may choose non-State law. As noted above, one school of thought is that, therefore, under the principle of party autonomy, non-State law could be chosen as the applicable law.

229. In that regard, the Hague Principles provide major interpretative assistance in determining what is meant by non-State law for it to be eligible to be chosen as the applicable law. As was explained above, the law must be a set of rules, the set must be neutral and must be balanced (e.g., UNIDROIT Principles or the CISG). By contrast, unilaterally drafted contractual clauses or conditions clearly do not qualify (e.g. FIDIC Contract or GAFTA Rules, explained above).

230. This does not mean that international usages, practices, and principles cannot be taken into account in interpreting or supplementing the contract. But this is a separate topic from that of the applicable law that may be chosen by reason of the principle of party autonomy. In other words, one issue is the use of non-State law as an interpretive tool; the other is choice of non-State law as the law that shall govern the contract. In the latter case, the Hague Principles offer helpful criteria on eligibility.

### **IV. Party Autonomy in Domestic Laws**

231. This next section includes a brief overview of party autonomy in the domestic laws of the region, intended not to interpret but simply to report on the present status. Currently, it seems that there is only one State where the principle is rejected outright (Uruguay, although the matter is not free from controversy) and one where its admissibility is still somewhat unclear (Brazil). Insofar as the inclusion in domestic law of specific provisions to permit parties to choose non-State law, this still appears to be the exception; to date it would appear that only Mexico, Panama and Paraguay have taken such steps.

232. In *Argentina*, the new Civil and Commercial Code expressly recognizes party autonomy in international contracts (Article 2651). Subparagraph (d) of the aforementioned Article allows incorporation by reference of non-State law.

233. The *Bolivian* Civil Code (Article 454) enshrines the principle of freedom of choice. This principle is accepted in Bolivia as confirmed in a recent ruling by the Bolivian Constitutional Court.<sup>141</sup> Although the case concerned a domestic contract, the ruling affirmed the right of parties to choose the law that best suits their juridical relationship as long as it does not conflict with public order.<sup>142</sup> The

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<sup>141</sup> Constitutional judgment 1834/2010-R, October 25, 2010.

<sup>142</sup> The Tribunal cites Article 454 of the Civil Code and the comment on this article by Carlos Morales Guillén, a renowned Bolivian Civil Code commentator,

interpretation that would appear to follow is that this right is applicable also in the case of international contracts with certain exceptions, such as contracts with the Bolivian government or contracts by international investors.<sup>143</sup>

234. In *Brazil*, the LINDB currently contains no express provision on this matter. There have been efforts over the years to introduce changes; the latest proposal to amend the LINDB, Bill 4.905, is currently at an impasse in the Congress. It would introduce a new Article 9 the first paragraph of which would acknowledge party autonomy.<sup>144</sup> It is allowed in arbitration or whenever the CISG – which was ratified and is in force in Brazil – is applied. Judicial decisions are contradictory, with some accepting party autonomy and others rejecting it.<sup>145</sup>

235. *Canada* recognizes party autonomy. In the province of Quebec (Canada’s only civil law jurisdiction), the principle is codified within Article 3111 of the Civil Code of Quebec (“CCQ”). The principle is also recognized in Canada’s common law jurisdictions. There are limitations relating to consumer rights and employment contracts in both Quebec and common law jurisdictions.<sup>146</sup>

236. In *Chile*, some uncertainty surrounds the recognition of party autonomy; however, a systematic reading of certain provisions of the Civil and the Commercial Codes,<sup>147</sup> has led to a doctrinal position that the principle is accepted and judicial interpretations have confirmed it.<sup>148</sup> On the other hand,

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who in turn cites other authors. The doctrine of the basic principles of party autonomy, which stems from consent, can be summarized as follows: “1) Individuals are free to contract and discuss, on an equal basis, the conditions of the agreement; determine the content of its purpose; combine different types of contracts provided by law or create completely new ones; 2) they can choose the most convenient [law] (original Spanish is “legislación”) to their legal relationship; or they can discard the application of any [law] (original in Spanish is “ley”) of a supplementary nature; 3) the ritual forms are not recognized and the solemn forms are to be exceptional; 4) the effects of the contract are those that the parties have wanted to give to it, and the rules of interpretation do not give the judge the power to impose his criterion over the intention of the parties (*sic*)” (Morales Guillén, Carlos, Civil Code, 1997, citing Planiol and Ripert and Pérez Vives).

<sup>143</sup> 2016 Contracts Paper, *supra* note 1, response from Bolivia.

<sup>144</sup> Article 9. The international contract between professionals, businessmen and traders is governed by the law chosen by the parties, and the agreement of the parties on this choice must be express. 1. The choice must refer to the entire contract, but no connection between the law chosen and the parties or the transaction is required.

<sup>145</sup> It has been accepted, for example, in the following: TJSP, DJe 30 nov.2011, Apel. Cív. 9066155-90.2004.8.26.0000; TJSP, j. 06 jun.2008, Apel. Cív. 9202485-89.2007.8.26.0000; and rejected in others, for example: TJSP, j. 19 fev.2016, Apel. Cív. 2111792-03.2015.8.26.0000; TJSP, DJe 09 jan.2012, Apel. Cív. 0125708-85.2008.8.26.0000.

<sup>146</sup> For example, Quebec’s CCQ, Articles 3117-18; Saskatchewan’s Consumer Protection and Business Practices Act, SS 2014, c. C-30.2, sections 15 and 101(2); and Ontario’s Employment Standards Act, 2000, SO 2000, c. 41, s. 5.

<sup>147</sup> Such as Article 113 of the Commercial Code and Article 16 of the Civil Code, together with Article 1545 of the Civil Code (“all contracts legally entered into are law for the parties...”).

<sup>148</sup> For example: *Raimundo Serrano Mac Auliffe Corredores S.A*, Supreme Court, November 30, 2004, Ruling No. 868-2003; *Exequatur Cubix v. Markvision*, Supreme Court, August 20, 2014, Ruling No. 10890-2014.

although Article 1462 says that a promise to submit, in Chile, to a jurisdiction not recognized by Chilean laws is null due to malpurpose (“*vicio del objeto*”), the judiciary has understood that this rule refers to jurisdiction and not to applicable law.<sup>149</sup> Party autonomy in the choice of law has also been validated in the rules that govern international contracting within the public sector.<sup>150</sup> This legal validation of choice of law for the public sector, has in turn, reinforced its judicial recognition in relation to private entities, which are governed by the principle of party autonomy.

237. In *Colombia*, in the matter of international arbitration, with the exception of contracts involving the State (Article 13 of Law 80 of 1993), parties are free to choose the law applicable to the merits (Article 101 of Law 1563 of 2012). Outside of this scope, in matters governed by domestic law, parties have the freedom to choose foreign law to govern their contractual relationship so long as this is not contrary to domestic *ordre public*. In cases of *exequatur*, judicial interpretations have been more flexible and courts have found that the conflict of laws rules are not “obligatory binding guidelines.”<sup>151</sup>

238. In the *Dominican Republic*, its recently adopted Private International Law acknowledges party autonomy in Articles 58 to 60 (Law 544 of 2014).

239. In *El Salvador*, the principle of party of autonomy is recognized by the judiciary and has been upheld by the Supreme Court, particularly by its Constitutional Chamber on the basis of Article 23 of the Constitution, which guarantees freedom of contract.<sup>152</sup> Courts have also relied on Civil Code provisions that state “Every contract legally concluded, is mandatory for the contracting parties and only cease their effects between the parties by the mutual consent or for legal reasons” (Article 1416).

240. In *Guatemala*, Article 31 of the Law on the Judicial Branch provides that: “Legal undertakings and businesses shall be governed by the law to which the parties have submitted themselves, except when that submission is contrary to express prohibitive laws or to the *ordre public*.” Although this provision does not specify whether it applies to domestic or international contracts, as in other Latin American States, in the absence of special rules for international contracts, in certain cases the rules for domestic contracts are applied. Use of the term “law” (*ley*) suggests that the choice of non-State law is disallowed.

241. *Jamaica* follows the common law it inherited from the United Kingdom. According to case law, international contracts are governed by the law that the parties choose.<sup>153</sup>

242. *Mexico* signed and ratified the Mexico Convention; however, the principle of party autonomy was already enshrined in its domestic legislation beforehand (Article 13, Section V of the Federal Civil Code).

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<sup>149</sup> For example: *Exequatur State Street Bank and Trust Company; Mauricio Hochschild S.A.C.I. v. Ferrostaal A.G.*, *supra* note 136.

<sup>150</sup> Article 1 of Decree Law 2.349 of 1978.

<sup>151</sup> Supreme Court of Justice, Civil Chamber, Judgment of November 5, 1996, Exp. 6130, M. P.: Carlos Esteban Jaramillo Schloss.

<sup>152</sup> Diario Oficial No. 50, Tomo 394, March 13, 2012. Accessible at: <http://www.jurisprudencia.gob.sv>.

<sup>153</sup> *Vita Foods Products Inc. v. Unus Shipping Co. Ltd.*, [1939] 1 All E.R. 513; and *DYC Fishing Limited v. Perla Del Caribe Inc.*, [2014] JMCA Civ. 26, §§ 42-44, citing *R. v. International Trustee for the Protection of Bondholders*, [1937] 2 All E.R. 164 and *Bonython v. Commonwealth of Australia*, [1951] AC 201.

243. In *Panama*, the new Code of Private International Law (Law 61 of 2015) provides in Article 72 as follows: “The parties’ autonomy of choice regulates and governs international contracts, with the sole limitation of the *ordre public* and violations of the applicable law (*fraude a la ley applicable*).” However, non-State law may only be incorporated by reference. This is because Article 80 provides: “It is valid for the parties to agree on, in commercial contracts, the general usages and customs within commercial activity and the regular international practices known to the parties as commercial operators or economic agents within their international relations. The usages, customs, and practices of international trade are a source of law and are binding as of the time of the agreement or of the natural activity of trade.” Likewise, Article 79 stipulates: “The parties may use the principles on international commercial contracts regulated by [UNIDROIT] as complementary provisions to the applicable law or as a means of interpretation by the judge or arbiter, in contracts or undertakings of international commercial law.”

244. In *Paraguay*, given the deficiencies between the texts of the Civil Code and the Montevideo Treaties used as its source, doubts existed regarding the admissibility of the principle of party autonomy until 2013, when the Supreme Court of Justice ruled favorably on it.<sup>154</sup> To ensure greater certainty, however, it was necessary to enact a law to settle the issue definitively. Accordingly, the first part of Article 4 of Paraguay’s new Law Applicable to International Contracts, which copies almost verbatim Article 2 of the Hague Principles and echoes Article 7 of the Mexico Convention, provides that “a contract is governed by the law chosen by the parties...” (Article 4.1). Furthermore, Article 5, based on Article 3 of the Hague Principles, expressly recognizes non-State law.

245. In *Peru*, the most relevant rule is perhaps Article 2095 of the Civil Code, which establishes that contractual obligations are governed by the law expressly chosen by the parties. Thus, although party autonomy is recognized whereby parties can choose a foreign law, they cannot make a choice of non-State law (see also Article 2047).

246. In the *United States*, the principle of party autonomy was initially rejected in the First Restatement of Conflict of Laws of 1934 (as noted above, although the Restatement is not a “code”, it is a highly persuasive academic text), despite court decisions to the contrary. It was included eventually in the Second Restatement of 1971 (section 187(2)). Around the same time, the Supreme Court of the United States clearly acknowledged the principle in the case of *Bremen v. Zapata*, although that case dealt with selection of forum, not choice of law.<sup>155</sup> However, the status of the principle across the United States is not as simple as it might appear. The rules of the First Restatement continue to be applied in a number of United States domestic states. Even when, in those domestic states in which the party autonomy rules of the Second Restatement have been adopted, their precise application requires an understanding of First Restatement methods.<sup>156</sup> Moreover, it should be noted that a new draft Restatement of

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<sup>154</sup> Acuerdo y Sentencia No. 82 of March 21, 2013, in *Reconstitución del Expte. Hans Werner Bentz v. Cartones Yaguareté S.A. s/ Incumplimiento de contrato*.

<sup>155</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907 (1972). As the case has had “negative treatment” by some, its authority has been questioned.

<sup>156</sup> More detailed analysis is required, which is perhaps beyond the scope of this Guide; it would require a description of Section 187 and 188, since 187 in many cases involves a prior determination of the state whose law would be chosen under 188. This is because section 188 provides that the jurisdiction whose law will be selected is determined on the basis of an analysis of the jurisdiction which has the most significant relationship to the transaction and the parties,

Conflict of Laws is currently underway.<sup>157</sup> In addition, for sales of goods not governed by the CISG, Article 2 of the Uniform Commercial Code (“UCC”), as supplemented by Article 1 thereof, will apply. Under the UCC, the parties are free to choose the domestic state or sovereign nation whose laws will govern their transaction, as long as the transaction bears a reasonable relation to the state or country selected: “Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.”<sup>158</sup>

247. In *Uruguay*, Article 2399 of the Appendix to the Civil Code provides as follows: “Juridical undertakings are governed, as regards their existence, nature, validity, and effects, by the law of the place where they are executed (i.e., performed), and additionally in accordance with the rules of interpretation set forth in Articles 34 to 38 of the Civil Law Treaty of 1889.” Pursuant to that Article, whether or not party autonomy will be respected will be determined in accordance with the law of the place of execution of the international contract in question. In addition, Article 2403 of that same Appendix provides that: “the

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taking into account the contacts of each potentially relevant jurisdiction (such as place of negotiation, place of contracting, place of performance, location of the subject matter of the contract, and the place of incorporation, domicile, residence or nationality of the parties). These contacts are to be evaluated in light of a set of factors found in Section 6 of the Second Restatement, which include interstate or international interests, individual governmental interests, justified expectations of the parties, common basic policies of the field of law, and procedural and other administrative concerns of the parties and the court. The determination of the jurisdiction with the most significant relationship then plays a role in the evaluation of a choice of law agreement. In particular, only the fundamental interests of the state whose law would otherwise be applicable is capable of invalidating party autonomy on the ground of what other jurisdictions might view as overriding public policy. In addition, section 187 purports to limit party autonomy where the state of the chosen law bears no substantial relation to the parties or the transaction.

The Second Restatement reflects a shift in U.S. practice during the 1960’s-1980’s. Territorial conceptions based on where “vested rights arose” dominated U.S. choice-of-law thinking before the 1960’s. Since then, a majority of states for transitory actions (e.g., contracts, et al) have adopted multifactorial methodologies that focus on state interests, multilateral order policies, and justified individual expectations, among other things. The complexity of these new systems and their indeterminate results, coupled with the direct attention that gives to the justified expectation of parties, may have created support for recognition of party autonomy in the U.S. To fully understand U.S. law and practice requires a deeper explanation of common law, the Restatements (as noted above), and the historical trajectory of the so-called “choice-of-law revolution” in the U.S. It should also be noted that for international cases, the principles of the Restatement 3rd of Foreign Relations Law are also relevant, although Section 6 of the Restatement 2nd of Conflict of Laws expressly refers to “international” order policies and thus intersects with the Restatement of Foreign Relations Law. So a foreign lawyer would need to be aware of this intersection as well. As both of these Restatements are in the process of review, the concepts as summarized in these decades-old U.S. documents are not set in stone.

<sup>157</sup> American Law Institute, Restatement of the Law Third Conflict of Laws (Preliminary Draft No. 3) October 3, 2017.

<sup>158</sup> UCC § 1-301(a).

rules of legislative and judicial competence contained in this title may not be modified by the will of the parties. That may only be exercised within the margin established by the applicable law.”

248. In *Venezuela*, the Law on Private International Law merely states that a contract shall be subject to the law chosen by the parties, without indicating the time and method of that choice.<sup>159</sup> That gap is filled by the provisions of the Mexico Convention, pursuant to which, within the Venezuelan system of private international law, party autonomy enjoys a broad framework of application.

#### **V. Party Autonomy in Arbitration**

249. As was noted above, this Guide does not address the power of the parties to choose the arbitral or State jurisdiction that would have competence in the event of a dispute (forum selection); however, that is a separate matter from and does not preclude the matter of a choice by the parties of the applicable law to the substance of a contract with an arbitration clause.

250. The principle of party autonomy underlies the New York Convention, Panama Convention, and the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (“Montevideo Convention”).<sup>160</sup> Of the 35 OAS Member States, nearly all have ratified or acceded to the New York Convention,<sup>161</sup> 19 have ratified the Panama Convention,<sup>162</sup> and 10 have ratified the Montevideo Convention.<sup>163</sup>

251. Although none of these instruments directly address the question of applicable law, party autonomy is recognized both regarding the validity of the arbitral clause, the arbitral process itself and the recognition of the award, particularly given that one of the grounds for nullity is that the arbitration was not carried out in accordance with the agreement of the parties. It is also understood or may be inferred that clauses regarding the choice of law applicable to the merits of the matter must be respected.

252. By contrast, the 1961 *European Convention on International Commercial Arbitration* (“European Convention”) does provide expressly in Article VII that “the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute.”<sup>164</sup> Similarly, MERCOSUR’s Arbitral Agreement of 1998, ratified by Argentina, Brazil, Paraguay, and Uruguay, expressly provides that “the parties may choose the law that is to apply in resolving the controversy.”<sup>165</sup>

253. In investment arbitration, the principle of party autonomy has been enshrined in the ICSID Convention, which has been ratified by several states in the Americas. By the provisions of Article 42, parties may agree on the “rules of law” that they wish, but in the absence of such an agreement, the arbitral tribunal shall apply the law of the State and the rules of international law that it deems applicable.

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<sup>159</sup> Venezuelan Law on Private International Law (1998).

<sup>160</sup> *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, adopted at Montevideo at CIDIP-II, signed May 8, 1979 and entered into force June 14, 1980.

<sup>161</sup> See *supra* note 72.

<sup>162</sup> <http://www.oas.org/juridico/english/sigs/b-35.html>.

<sup>163</sup> <http://www.oas.org/juridico/english/Sigs/b-41.html>

<sup>164</sup> *European Convention on International Commercial Arbitration*, concluded April 21, 1961 and entered into force January 7, 1964. Text accessible at: [https://www.arbitrationindia.com/geneva\\_convention\\_1961.html](https://www.arbitrationindia.com/geneva_convention_1961.html).

<sup>165</sup> Article 10, *supra* note 134.

254. In turn, the UNCITRAL Model Law includes the principle of party autonomy (Article 28(1)) and the commentary notes that this is important, given that several domestic laws do not clearly or fully recognize that power. Consistent with that recommendation, throughout Latin America today there are numerous arbitral laws that do provide for party autonomy, both in the choice to submit to international arbitration and to choose the law that will apply to the resolution of their dispute through that mechanism.<sup>166</sup>

7.0 The domestic legal regime on the law applicable to international commercial contracts should affirm clear adherence to the internationally-recognized principle of party autonomy as iterated in the Mexico Convention and the Hague Principles and other international instruments.

## PART EIGHT

### CHOICE OF LAW: EXPRESS OR TACIT

#### I. Express Choice of Law

255. Parties may choose the law applicable to their contracts expressly or tacitly. Party autonomy assumes that the parties have effectively exercised their desire to make that choice.

256. Express choice clearly arises from the agreement and may be verbal or written. Sometimes express choice is made with reference to an external factor, such as the location of the establishment of one of the parties. The HP Commentary to Article 4 of the Hague Principles provides the example of parties entering into a contract that “shall be governed by the law of the State of the establishment of the seller.”

#### II. Tacit Choice of Law

##### A. Formulas in Comparative Law

257. At times, a choice of law may not be so clear. The intention is not to try to ascertain the hypothetical will of the parties. A restrictive interpretation suggests that the adjudicator should be limited to verifying the choice of law as reflected in the contractual terms, excluding any inquiry into other outside circumstances. This is how Article 2(2) of the 1955 Hague Sales Convention is interpreted.<sup>167</sup>

258. Under a broad interpretation, the judge will not only examine the express terms of the contract but will also take into account the circumstances of the case or “the conduct of the parties.” This is provided for in the 1978 Hague Agency Convention (Art. 5 (2)) and the 1986 Hague Sales Convention (Art.7 (1)).<sup>168</sup>

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<sup>166</sup> This is the case, for example, in *Chile* (Article 28 of Law 19.971 of 2004 on international commercial arbitration); in *Colombia* (Article 101 of Law 1563 on national and international arbitration); in *Guatemala* (Article 36.1 of the Arbitration Law); in *Panama* (Article 3 of Decree Law 5 of 1999, establishing the general regime of arbitration, conciliation, and mediation), replaced by Law 131 of 2013; in *Peru* (Article 57 of Decree 1071, which regulates arbitration; in Peru for contracts with the State, arbitration is mandatory (Article 45.1 of the Law of State Contracting, Law 30225).); in *Brazil* (Article 2 of Law 9307 of 1996); in *Costa Rica* (Article 28 of Law 8937 on international commercial arbitration); in *Mexico* (Article 1445 of the Commercial Code); and in *Paraguay* (Article 32 of Law 1879 of 2002, on arbitration and mediation).

<sup>167</sup> *Supra* note 23.

<sup>168</sup> *Supra* notes 24 and 23.

259. The Rome Convention followed almost verbatim the Hague Agency Convention by providing in Article 3(1) that the choice “must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.” In their official commentary to the Rome Convention, Giuliano and Lagarde stated that tacit intent is certain, for example, when the parties choose a contract type governed by a particular legal system, or when there is a previous contract specifying the choice of law, or when there is reference to the laws or provisions of a specific country, or when a contract forms part of a series of transactions and a system of law was chosen for the agreement on which the others rest.<sup>169</sup>

260. Rome I continues to allow tacit choice (despite some proposals to eliminate it), provided that it is “expressly or clearly demonstrated by the terms of the contract or the circumstances of the case” (Article 3.1). The change in terminology from that of the Rome Convention has to do, above all, with strengthening the English version (as well as the German version), with the requirement that a tacit choice must be “clearly demonstrated,” and not just “demonstrated with reasonable certainty.” This does not aim to change the spirit of the prior rule; rather, it is simply to bring the English and German versions into line with the French text of the Rome Convention.

### **B. Tacit Choice in the Mexico Convention**

261. Article 7, paragraph 1, of the inter-American instrument states that “The parties’ agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties’ behavior and from the clauses of the contract, considered as a whole.” Toward that end, all of the contract’s points of contact must be considered, such as place of formation and performance, language, currency, and forum or place of arbitration—to cite a few examples.

262. The issue of the choice of applicable law was subject to intense debate in the discussions leading up to the Mexico Convention. It is clear from the language of the Article that the conduct of the parties and the clauses of the contract are indices to be considered cumulatively by the court and that they must enable the court to reach a conclusion that is “evident.” Otherwise, Article 9 will be applied as if there had been an absence of choice. That is, the Mexico Convention does not accept a hypothetical choice; a clear and obvious intention to choose the applicable law is required. For example, if the parties to the contract refer to the specific rules of a particular state in the choice of law clause and their behavior is consistent with the content of that clause, the court may consider that the choice of the law of that State is “evident.”

### **C. Tacit Choice in the Hague Principles**

263. According to Article 4 of the Hague Principles, “A choice of law [...] must be made expressly or appear clearly from the provisions of the contract or the circumstances.” This allows for the choice of law to be express or tacit, so long as it is clear.

264. The issue was subject to intense scrutiny also during discussions of the Hague Working Group.<sup>170</sup> Given the lack of consensus in comparative law, it was thought that parties should be encouraged to be explicit in their choice of

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<sup>169</sup> Report on the Convention on the law applicable to contractual obligations (Rome Convention) by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, accessible at: [http://aei.pitt.edu/1891/1/Obligations\\_report\\_\\_Guiliano\\_OJ\\_C\\_282.pdf](http://aei.pitt.edu/1891/1/Obligations_report__Guiliano_OJ_C_282.pdf).

<sup>170</sup> *Supra* note 27.

law. For greater certainty, the decision was made to adopt the formula that the choice of law “should be made expressly, or follow clearly from the provisions of the contract or the circumstances.” Most of the experts expressed concern that the standard of “manifestly clear intentions” would be very high, in particular for certain States that require lower standards for other substantive aspects of the contract. Therefore, if there has been no express indication, a choice may be inferred if it appears “clearly from the provisions of the contract or from the circumstances.”

265. The HP Commentary (4.13) explains that the specific circumstances of the case may indicate the parties’ intent with respect to the choice of applicable law. Their behavior and other factors related to the conclusion of the contract may be particularly relevant. This principle may also be applicable in the case of related contracts. Thus, if the parties have systematically made an express choice to use the law of a particular State to govern their contracts in prior dealings and the circumstances do not indicate any intention to change this practice, the adjudicator may conclude that the parties had the clear intent for the contract under consideration to be governed by the law of that same State, even though an express choice does not appear therein.

266. The HP Commentary (4.14) also says that tacit choice must be clear from the provisions of the contract or from the circumstances, and therefore the choice must be clear from the existence of conclusive evidence. The HP Commentary (4.9) states that it is widely accepted that the use of a model form used generally in the context of a specific legal system may signal the parties’ intent for the contract to be governed by that system, although there is no express statement to that effect. The example provided is a marine insurance contract in the form of a Lloyd’s policy. Given that this contract model is based on English law, its use by the parties may indicate their intent to subject the contract to that legal system. The same occurs when the contract contains terminology characteristic of a specific legal system or references to domestic provisions evidencing that the parties had that legal system in mind and intended to subject the contract to it (4.10).

### **III. Forum Selection and Tacit Choice of Law**

267. According to Article 7, paragraph 2 of the Mexico Convention, “Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.” In the deliberations leading up to the Mexico Convention, the U.S. delegation—whose standing on this point did not prevail—advocated that the choice of forum should be considered a tacit choice of applicable law. This position coincides with a solution historically enshrined in the common law and, in argument it can be advanced that, even if the rules state otherwise, there is a *domestic tendency* of the courts to apply their own law. Obviously this could be an important element, but, ultimately, the *choice* of forum should not be the determining factor in deciding that the *law* of the forum should be applied.

268. The solution of the inter-American instrument coincides with that of the second sentence of Article 4 of the Hague Principles. According to the HP Commentary (4.11) on that provision, “the parties may have chosen a particular forum for its neutrality or specialization.” In this regard, a Luxembourg court ruled, in application of Article 3.1 of the Rome Convention, that “The selection of Luxembourgian courts, in the absence of any other connection to this country, is not sufficient to infer a tacit reference to Luxembourgian law”. Obviously, the parties’ agreement to select a forum in order to attribute jurisdiction to a specific court may be one of the factors that should be taken into account in determining whether the parties wished for the contract to be governed by the law of that forum, especially where that forum has been given exclusive jurisdiction. By

contrast, non-exclusive jurisdiction clauses must surely be given less weight in determining the law which the parties ‘tacitly’ have chosen to govern their contract because bringing proceedings in the forum named in a non-exclusive clause is merely optional. Although perambulatory clause 12 of Rome I refers to exclusive jurisdiction clauses, the Hague Principles do not, leaving open the possibility that non-exclusive clauses will be given disproportionate weight in determining a tacit choice of law.

#### **IV. Tacit Choice of Law and Domestic Laws**

269. In *Argentina*, according to Article 2651 of the Civil and Commercial Code, choice of law may be express or be certain and evident from the terms of the contract or the circumstances of the case. In other words, tacit choice requires reasonable certainty or “evidence” that that choice is real, according to the circumstances of the case. Subparagraph (g) of that Article provides that “The selection of a certain national forum does not necessarily entail choice of the applicable domestic law of that country,” which is consistent with the provisions of the Mexico Convention (Article 7) and the Hague Principles (Article 4) discussed above.

270. In *Canada*, in the province of Quebec, the CCQ takes the terms of the contract as the sole indicator of tacit choice. Certainty is required so that it can be determined that a tacit but true choice has been made (Article 3111).

271. In *Chile*, Article 1560 of the Civil Code recognizes tacit choice in the absence of an express choice and requires that “the intention of the contracting parties must be established by or evidenced from more than the literal words.”

272. In *Paraguay*, Article 6 (express or tacit choice) of the Law Applicable to International Contracts transcribes Article 4 of the Hague Principles in this regard.

#### **V. Arbitration and Tacit Choice of Law**

273. Article 28(1) of the UNCITRAL Model Law provides that, “The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.” The UNCITRAL Arbitration Rules of 2010 refer to the rules of law “designated by the parties” as applicable to the substance of the dispute.

274. It follows from these texts that the express designation of applicable law is not required. Nevertheless, because the new rules use the word “designate,” the expectation is that there is an unambiguous choice of law.

275. The reference to “the rules of law designated by the parties” prior to the “agreement” on the applicable law, is an invitation for the arbitral tribunals to see whether there has been any indirect indication by the contracting parties as to the governing rules. For instance, even if the parties have not expressly agreed on the law applicable to their contract, there may be references to various provisions of a legal system, which could indicate that they were choosing it as the applicable law. In Peru, this matter has been clarified in Article 57 of Legislative Decree No. 1071, which delves into the meaning of the term “designate” (*indicar*) as follows: “(...) It will be understood that any designation of the law or legal order of a particular State, unless otherwise expressed, refers to the substantive laws of that State and not to its conflict of laws rules.” According to this provision, a designation by the parties in their contract permits an interpretation such that there has been tacit agreement on the application of the substantive law of the referenced State. In such a case, the law of that State will be applied without reference to its conflict of laws rules. In addition, depending on the wording of the clause, it may be that it does not govern extra-contractual claims, in which case the tribunal must determine the applicable law.

276. The Hague Principles also address the issue in the context of arbitration. According to the second sentence of Article 4, the selection of an arbitral tribunal is not sufficient to indicate, by itself, that the parties have made a tacit choice of applicable law. The HP Commentary (4.11) states that the parties may have chosen a tribunal because of its neutrality or specialization. Nevertheless, an arbitration agreement that refers disputes to a clearly specified forum may be one of the factors in determining the existence of a tacit choice of applicable law.

8.1 The domestic legal regime on the law applicable to international commercial contracts should provide that a choice of law, whether express or tacit, should be evident or appear clearly from the provisions of the contract and its circumstances, consistent with the provisions of Article 7 of the Mexico Convention and Article 4 of the Hague Principles.

8.2 Adjudicators and contracting parties and their counsel are also encouraged to take these provisions into account in the interpretation and drafting of international commercial contracts.

## PART NINE FORMAL VALIDITY OF CHOICE OF LAW

277. The choice of applicable law may be made by the parties within the “main” contract or by a separate agreement (see above in Part Seven, III.A.) Either way, according to Article 5 of the Hague Principles, “a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.” Thus, it is not necessary for the choice to be made in written form, before witnesses, or using specific language, unless the parties have otherwise so agreed, which they may do, for instance, in a memorandum of understanding.

278. The HP Commentary (5.3) states that “Article 5 is not a conflict of laws rule (which refers to a domestic legal system), but rather a substantive rule of private international law [that] can be justified on several grounds. First, the principle of party autonomy indicates that, in order to facilitate international trade, a choice of law by the parties should not be restricted by formal requirements. Secondly, most legal systems do not prescribe any specific form for the majority of international commercial contracts, including choice of law provisions (see Article 11 of the CISG; Articles 1(2) (first sentence) and 3.1.2 of the UNIDROIT Principles). Thirdly, many private international law codifications employ comprehensive result-oriented alternative connecting factors in respect of the formal validity of a contract (including choice of law provisions), based on an underlying policy of favoring the validity of contracts (*favor negotii*).”

279. Although the Mexico Convention does not contain a specific provision similar to that of the Hague Principles, its Article 13 recognizes the principle of *favor negotii* (favoring the validity of contracts); accordingly, on this issue, it can be concluded that the same result follows from the inter-American instrument. The same interpretation is affirmed by Rome I, Article 11(1) of which contains a provision similar to that of Article 13 of the Mexico Convention.

280. The HP Commentary (5.4) also states that “the fact that the Principles are designed solely for commercial contracts obviates the need to subject the choice of law to any formal requirements or other similar restrictions for the protection of presumptively weaker parties, such as consumers or employees.” However, a weaker party includes anyone who lacks bargaining power, which can also include merchants and small businesses. This is especially true in the case of adhesion contracts that include predetermined choice of law clauses; the situation

is compounded in cases of a monopolistic offer where there is no freedom to consent to a choice of law clause included at the behest of one party.

281. The HP Commentary (5.5) makes it clear that Article 5 of the Hague Principles “concerns only the formal validity of a choice of law. The remainder of the contract (the main contract) must comply with the formal requirements of at least one law whose application is authorized by the applicable private international law rule.” Thus, if the parties enter into a contract and agree for that contract to be governed by the law of a State under which the main contract is formally valid, the contract will be valid if the applicable private international law provisions recognize the principle of party autonomy.

282. The Hague Principles constitute strong advocacy for change. This is particularly true in Latin America, where written form is a requirement in many domestic laws. Generally, no distinction is made between the formal requirement for the main contract and that for the choice of laws clause. The Paraguayan law on international contracts is an exception. Its Article 7 is an exact replication of Article 5 of the Hague Principles.

9.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to formal validity of choice of law, should not contain any requirements as to form unless otherwise agreed by the parties, consistent with the provisions of Article 5 of the Hague Principles.

9.2 Adjudicators, in determining the formal validity of a choice of law, should not impose any requirements as to form, unless otherwise agreed by the parties or as may be required by applicable mandatory rules.

9.3 Contracting parties and counsel should take into account any mandatory rules as to form that may be applicable.

## PART TEN

### LAW APPLICABLE TO THE CHOICE OF LAW AGREEMENT

#### I. The Problem

283. An international contract sets out the parties’ rights and obligations. A choice of law may or may not be made by the parties, whether in the main contract or separately. When a choice of law is made, the law governing the main contract is derived from the parties’ choice but the question arises as to which law will serve as the basis to assess the validity and consequences of that choice of law agreement.

#### II. Alternative Solutions

284. Various alternatives have been proposed to address this issue. One option is to apply the *lex fori* (law of the place of litigation) to the choice of law clause, which may, nevertheless, frustrate the parties’ intent. Another option is to apply the law that would have governed in the absence of a choice. But this raises the very uncertainties that the parties intended to avoid by including the choice of law clause in the contract. A third option is to apply the law selected in the choice of law clause. The latter is the solution proposed by Article 10(1) of the Hague Sales Convention and Article 116(2) of the *Swiss Private International Law Act*,<sup>171</sup> to cite two examples. Nevertheless, this solution creates problems in those cases where the choice was not properly agreed upon.

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<sup>171</sup> Switzerland’s Federal Code on Private International Law (CPIL), December 18, 1987.

285. Article 3.5 of Rome I provides that consent is determined by the law that would be applied if that agreement existed (the third option). This is consistent with the aim of giving the greatest possible effect to the intent of the parties; presupposing that the agreement exists is in line with respect for the principle of party autonomy. See also the Mexico Convention, Article 12, paragraph 1.

286. A similar approach is taken by Article 6.1 of the Hague Principles, given that as a rule it accepts that “whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to...”. Nevertheless, Article 6.2 provides that “The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in [this Article].” As noted in the HP Commentary (6.4), this is similar to Article 12, paragraph 2 of the Mexico Convention, which states “...to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business.” This corresponds to Article 10.2 of Rome I.

287. The HP Commentary (6.7) on this last provision underscores its exceptional nature. Duress, fraud, mistake, or other defects of consent are some of the grounds parties can invoke to demonstrate the absence of an “agreement.” But it is pointed out (6.28) that this requires that two concurrent conditions be met: first, “under the circumstances, it would not be reasonable to make that determination under the law specified in Article 6.1”; and second, “no valid agreement on the choice of law can be established under the law of the State in which a party invoking this provision has its establishment.” This can occur in cases of duress or fraud, as well as in situations of silence in the formation of the contract. To illustrate the latter, the example is given of an offer stipulating that the law of a specific state will govern. If silence equals acceptance according to the law of that state but not under the law of the place where the party receiving the offer has its establishment, it would not be reasonable for that party to be bound by the contract.

### **III. The “Battle of Forms” Problem**

288. The Hague Principles constitute the first international instrument to address the issue known as the “battle of forms” regarding choice of law (Articles 2.1.19 to 2.1.22 of the UNIDROIT Principles do so in relation to substantive law.) It is common for parties to international contracts to use standard forms or general conditions. The Hague Principles do not contain any restrictions in this regard. On the contrary, they do not require that the parties’ choice of law agreement comply with any particular formalities (see Part Nine, above).

289. If the standard forms used by both parties designate a law, or if only one such form includes a choice of law clause, Article 6.1(a) can be used to determine whether there has, in fact, been an “agreement” on the matter.

290. As the HP Commentary (6.10) indicates, it frequently happens that the standard forms used by each party are different and they can also differ with respect to the choice of law. This situation is commonly referred to as a “battle of forms.” In such cases, the tribunals often avoid or circumvent this issue, or simply apply the law of the forum (*lex fori*).

291. The question is answered in Article 6.1(b) of the Hague Principles, which states the following: “If the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms

prevail, there is no choice of law.” This approach, known as the “Knock-out Rule”, is also reflected in the UNIDROIT Principles, whereas the CISG leaves interpretive discretion to judges and arbitrators on how to best address a battle of the forms scenario (the UCC does the same.)

292. In any case, the exception established in Article 6.2 always governs. Under this provision, the law of the State in which one of the parties has its establishment prevails if, in view of the circumstances, it would not be reasonable to find consent according to the aforementioned rules.

#### **IV. Under Domestic Laws**

293. Article 8 of the *Paraguayan Law Applicable to International Contracts* replicates the provisions offered by the Hague Principles. Generally, domestic laws of other States do not contain provisions that specifically address this issue.

10.1 The domestic regime on the law applicable to international commercial contracts should provide that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties, consistent with Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

10.2 Adjudicators, in determining whether parties have agreed to a choice of law, should take into account Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

## **PART ELEVEN**

### **SEVERABILITY OF THE CHOICE OF LAW CLAUSE**

294. The term *severability*, in the within context, refers to the concept whereby the invalidity of an international contract does not necessarily affect the choice of law agreement. For example, if a contract of sale is invalid, the choice of law clause contained within that contract or as separately agreed remains unaffected. Moreover, the effectiveness or invalidity (regardless of whether substantive or formal) of the contract must be evaluated according to the law chosen in the agreement in which it was selected. It should be noted that severability is not the same as *dépeçage*, which is addressed below in Part 14.

295. Severability can be interpreted as flowing from Article 12, paragraph 1, of the Mexico Convention, which provides that: “The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention.” That provision clearly indicates that the validity of the choice of law should be assessed according to the rules contained in Chapter 2. Because party autonomy is enshrined therein, if a choice of law was made, that law will govern all matters related to the validity of the consent of the parties concerning that choice. However, according to paragraph 2 of Article 12, “...to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business.”

296. The Hague Principles refer explicitly to severability. Article 7 states that, “A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.” Thus, if the choice of law agreement is not affected, the allegation of the invalidity of the main contract must be examined in accordance with the law chosen by the parties.

297. The HP Commentary (7.2) provides the example of a contract invalidated on the grounds of mistake, which does not necessarily invalidate the choice of

law agreement unless that agreement is also affected by the same defect. Another example is that of a corporation that enters into a contract which, according to the corporate law of its home state, should have been subject to shareholder approval. Nevertheless, this would not automatically invalidate the choice of law agreement, which must be considered separately. For the application of this provision, it does not matter whether the clause has been provided for in the main contract or in a separate agreement. If it is alleged that the parties did not enter into a contract, the principle of severability only takes effect if it is demonstrated that there was a valid choice of law agreement.

298. The HP Commentary (7.8) also indicates that the substantive or formal invalidity of the main contract does not automatically mean that the choice of law agreement is null and void; it can only be declared null and void for reasons affecting it specifically. The nullity of the main contract may or may not affect the parties' choice of law, but it depends on the specific circumstances. For instance, arguments focused on invalidating the consent of the parties in the main contract do not presume to challenge their consent to the choice of law agreement, unless there are circumstances that demonstrate the absence of consent in both agreements.

299. An example is given (7.9) of a contract that contains an agreement that it is governed by a law under which the contract is considered invalid due to lack of consent. The lack of consent cannot be said to extend to the choice of law agreement. "As a result, that law applies to determine the consequences of invalidity, notably the entitlement to restitution when the contract has been performed, in whole or in part."

300. It is a different case when the defect affects both the main contract and the choice of law agreement. The examples given in the HP Commentary (7.10) are the invalidity of the contract due to bribery or because one of the parties lacked capacity. This would invalidate both agreements.

301. An example from the Americas of a provision explicit to severability is Article 9 of the Paraguayan law on international contracts, drawn upon Article 7 of the Hague Principles.

302. Severability had its origins in arbitration, where it is a widely accepted principle that contributed to the development of this dispute settlement mechanism; it is enshrined in the UNCITRAL Model Law (Article 16(1)). By the application of this principle, invalidity of the main contract does not necessarily invalidate the arbitration clause. Even though this solution inspired the severability rule in the Hague Principles, it should be noted that severability of the arbitration clause has effects different from those of the severability of a choice of applicable law clause. The principle of severability has been enshrined in the domestic laws that govern international commercial arbitration in many States in the Americas.<sup>172</sup>

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<sup>172</sup> Among them: *Peru* (Article 41.2 of Legislative Decree 1071), *Bolivia* (Article 44.I of Law 708), *Brazil* (Article 8 of Law 9307), *Chile* (Article 16.1 of the Law 19.971), *Colombia* (Article 79.2 of Law 1563), *Costa Rica* (Article 16.1 of Law 8937), *Cuba* (Article 13 of Decree Law 250), *Ecuador* (Article 5 of Law 000.RO/145), *El Salvador* (Article 30 of Decree 914), *Guatemala* (Article 21.1 of Decree 67 of 1995), *Honduras* (Article 39 of Decree 161 of 2000), *Mexico* (Article 1432 of the Commercial Code), *Nicaragua* (Article 42 of Law 540), *Panama* (Article 30 of Decree Law 5), *Paraguay* (Article 19 of Law 1879), *Dominican Republic* (Article 11 of Law 489 of 2008), *Venezuela* (Article 7 of the Commercial Arbitration Law).

11.1 The domestic legal regime should confirm that a choice of law applicable to international commercial contracts cannot be contested solely on the ground that the contract to which it applies is not valid, consistent with Article 7 of the Hague Principles.

11.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solution.

**PART TWELVE**  
**OTHER CHOICE OF LAW PROBLEMS**  
**IN INTERNATIONAL COMMERCIAL CONTRACTS**

**I. Modification of the Choice of Law**

303. Article 8 of the Mexico Convention provides that: “The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.”

304. An express provision such as that is important. An earlier decision by a European court held that the parties’ choice of law is not admissible if it was made after the conclusion of the contract.<sup>173</sup> The result of that highly questionable ruling was changed by the Rome Convention and similar provisions were incorporated into Rome I, Article 3.2, in terms similar to those of Article 8 of the inter-American instrument, mentioned above.

305. Consistent with the Mexico Convention, Article 2.3 of the Hague Principles indicates that: “The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.”

306. As stated in the HP Commentary (2.10), the provision is a consequence of the principle of party autonomy and HP Commentary 2.12 clarifies that third party rights cannot be affected. In the example provided, if a third party provides a guarantee and the choice of law is later amended so as to impose greater liability on one of the contracting parties, although the modification is effective as between the contracting parties, such a change will not affect the responsibility of the guarantor. For greater certainty, it would be preferable for this to be clearly expressed in the instrument, rather than left by way of deference to domestic laws.

307. The HP Commentary (2.13) also makes it clear that as the Hague Principles “do not generally seek to resolve what are commonly considered to be procedural issues... if the choice or modification of the choice of law occurs during the dispute resolution proceedings, the effect... may depend on the *lex fori* or the rules governing the arbitration proceedings.”

308. Solutions similar to those provided in the Mexico Convention, Rome I, and the Hague Principles with respect to modification of the choice of law may

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<sup>173</sup> *Assael Nissim v. Crespi*. Supreme Court (Italy). Judgment of June 28, 1966, No. 1680. This judgment was called into question at the time by Italian scholars, as discussed in the commentary on Article 3 in Giuliano and Lagarde’s Official Report on the Rome Convention, *supra* note 169.

be found in recent domestic legislation of various states.<sup>174</sup> In *Argentina*, Article 2651 of the Civil and Commercial Code provides that "... (a) The parties may at any time agree that the contract shall be subject to a law other than that to which it was previously subject, whether by a prior choice or the application of other provisions of this Code. Nevertheless, that modification shall not affect the validity of the original contract or the rights of third parties." This provision is consistent with the criterion of Article 8 of the Mexico Convention, although the Argentine Code provides that the modification cannot affect the "validity of the original contract," while the Mexico Convention and the Hague Principles refer to the "formal validity of the original contract." Both instruments safeguard "the rights of third parties." For its part, Article 4.3 of the *Paraguayan* law on international contracts mirrors the solution set forth in the Hague Principles.

## II. Connection of the Chosen Law to the Contract

309. Historically, it was considered that the law chosen by the parties should have some connection either to the parties or to the transaction. This might have originated under the influence of doctrines such as *localization* in the 19th century. Even today, in some domestic legal systems as will be discussed below, the law chosen must be substantially related to the parties or the transaction, or there must be another reasonable ground for the parties' choice of law.

310. The Mexico Convention does not expressly address this point, although interpretations have been put forth that, by virtue of the principle of party autonomy enshrined therein, the application of a "neutral" law can be chosen freely.

311. By comparison, the issue has been addressed expressly in the Hague Principles. Article 2.4 of the Principles states that, "No connection is required between the law chosen and the parties or their transaction." The HP Commentary (2.14) states that "this provision is in line with the increasing delocalization of commercial transactions." It states further that "The parties may choose a particular law because it is neutral as between the parties or because it is particularly well-developed for the type of transaction contemplated (e.g., a State law renowned for maritime transport or international banking transactions)."

312. Rome I is silent with respect to the connection requirement (Article 3), except for two types of contracts: contracts for the carriage of passengers (Article 5.2) and insurance contracts covering small risks (Article 7.3). This silence is interpreted to mean that a connection is generally not necessary, except for the two types of contracts mentioned.

313. The laws of *Argentina* (Article 2651, Civil and Commercial Code), *Cuba* (Article 17, Civil Code), *Mexico* (Article 13, Section V, Federal Civil Code) and *Venezuela* (Article 29, Venezuelan Law on Private International Law) are also silent on this point. The interpretation in these jurisdictions tends to be that no connection would be required.

314. *Chilean* legislation is also silent on the need for a connection with the chosen law. Despite extensive discussions, the prevailing doctrine appears inclined towards acceptance of full conflictual and material autonomy, based on the literal wording of Article 1545 of the Civil Code, which does not establish requirements of any kind for such autonomy, at least for contracts concluded in Chile. The only recognized requirements are that said election was made in good

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<sup>174</sup> Examples include the following: Article 9 of Japan's 2006 Code of Private International Law and Article 1210(3) of the Civil Code of Russia.

faith, without fraud, and without violating either the rules of public policy and public order in Chile, or the rules of exclusive application of domestic law.

315. In *Canada*, under the broad application of the principle of party autonomy, it is understood that no connection to the choice of law is required. This is the current state of the law in Canada on the basis of a key court decision<sup>175</sup> and, in Quebec, on Article 3111 of the Civil Code.

316. In *Paraguay*, Article 4.4 of its Law Applicable to International Contracts, which reflects the Hague Principles, is explicit in stating that, “no connection of any kind between the chosen law and the parties or their transaction is required.”

317. In *Panama*, an earlier version of the Code of Private International Law did expressly require a connection between the law chosen and the economy of the transaction (Article 75 *in fine*); but after enactment of the new Code in 2015, this provision is no longer found (Article 69) (see para. 364, below).

318. In the *United States*, the requirement of a connection between the law chosen and either the parties or the contract is determined at the domestic state level and varies from state to state. In those states that follow the Second Restatement, there is still a requirement that the law chosen must be substantially related to the parties or the transaction, or that there must be another reasonable ground for the parties’ choice of law.<sup>176</sup> However, some states have relaxed this requirement by statute.<sup>177</sup> And in the context of international commercial contracts, some courts have recognized that a different approach that does not require a connection may be appropriate.<sup>178</sup>

319. With respect to arbitration, this issue has not been clarified in the UNCITRAL Arbitration Rules or Model Law. Arbitral decisions have been made that, under a broad interpretation of the principle of party autonomy, would allow the parties to choose any law to govern their contract, even if it is not obviously related to the dispute.<sup>179</sup> Nevertheless, arbitrators must act with considerable caution in this area, given that failure to acknowledge public policy issues connected to the case can be the basis for setting aside an award or preventing its enforcement, pursuant to Article V(2)(b) of the New York Convention. This requirement flows from the general duty of arbitrators to issue awards that can be enforced.

### III. *Renvoi*

320. The doctrine of *renvoi* concerns the following questions: Does the application of a specific domestic law also include its private international law provisions? If so, those provisions may refer the matter back to another law, and so on.

321. Article 17 of the Mexico Convention provides that: “For the purposes of this Convention, ‘law’ shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.” This is consistent with Article 20 of Rome I and could be considered as the absolutely prevailing position in the doctrine of private international law on the issue of *renvoi*.

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<sup>175</sup> *Vita Food Products v. Unus Shipping*, *supra* note 153.

<sup>176</sup> Restatement (Second) of Conflict of Laws, Article 187(2)(a). Note that a Third Restatement is currently underway, as mentioned above. See *supra* note 157.

<sup>177</sup> See for example, NY Gen. Oblig. Law § 5-1401(1).

<sup>178</sup> See for example, *Bremen v. Zapata*, *supra* note 155 (giving deference to a choice-of-forum clause choosing a jurisdiction where no connection existed (England) and assuming the English court would apply English law).

<sup>179</sup> See for example, ICC Case No. 4145 of 1984.

322. Along the same lines but with a slight variation, Article 8 of the Hague Principles states that, “A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.” The HP Commentary (8.2) explains that this “avoids the possibility of an unintentional *renvoi* and therefore conforms to the parties’ likely intentions.” It goes on to note that, nevertheless, in accordance with the principle of party autonomy, parties are allowed—by way of exception—“to include in their choice of law the private international law rules of the chosen law, provided they do so *expressly*.”

323. In *Argentina*, Article 2651 of the Civil and Commercial Code states that “When the application of a national law is chosen, it shall mean that the domestic law of that country has been chosen excluding its conflict of laws rules, unless otherwise agreed.” Accordingly, the parties may agree that their reference to a specific law includes its conflict of laws rules. If the parties do not make such an agreement, it is understood that the law chosen is the domestic law of that State.<sup>180</sup>

324. In *Brazil*, the solution is similar to that of the Mexico Convention. Article 16 of the LINDB provides that, in the determination of the applicable law, “no reference by it to another law” shall be taken into account. Likewise, *renvoi* is generally not accepted in Brazil in other matters of private international law.

325. In *Canada*, specifically in Quebec, the Civil Code prohibits *renvoi* stating that “Where, under the provisions of this Book, the law of a foreign State is applied, the law in question is the internal law of that State, but not its rules governing conflict of laws” (Article 3080).

326. In *Chile*, the argument until 1989 was that the legislation supported *renvoi* and the doctrine had been accepted in a decision by the Supreme Court.<sup>181</sup> Although the legislation has been modified, it has not resulted entirely in the elimination of *renvoi*.

327. In *Paraguay*, Article 10 of the Law Applicable to International Contracts mirrors Article 8 of the Hague Principles.

328. In *Peru*, the legislation includes a rule that avoids *renvoi* (Article 2048, Civil Code of 1984).

329. In *Venezuela*, with respect to *renvoi*, Article 4 of the Venezuelan Law on Private International Law provides that: “When the relevant foreign law declares the law of a third State applicable that, in turn, is declared relevant, the domestic law of that third State shall be applied. When the relevant foreign law declares Venezuelan law applicable, that law shall be applied. In cases not provided for in the two paragraphs above, the domestic law of the State that the Venezuelan conflict of laws rules declares relevant shall be applied.” This rule is considered useful, according to the perambulatory comment to the law (“*exposición de motivos*”), “...in furtherance of the principle of legal certainty.” The perambulatory comment states that Article 4 allows *renvoi* “...when it tends to

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<sup>180</sup> Moreover, Article 2596 establishes, with respect to *renvoi*, that “When a foreign law is applicable to a legal relationship, the private international law of that country is also applicable. If the applicable foreign law refers back to Argentine law, the rules of domestic Argentine law are applicable. When the parties to a legal relationship choose the law of a particular country, the domestic law of that State is understood to have been chosen, unless expressly stated otherwise.”

<sup>181</sup> *Tschumi Case*. Supreme Court, Law and Jurisprudence Magazine, XLII, part 2, section 1, page 331.

unify the national solution and the foreign law solution, or when, as frequently occurs in simple *renvoi*, both are inevitably divergent.”

330. Although Article 4 of the Venezuelan Law is the general rule and, apparently, has no exceptions, scholars have interpreted it such that, in the matter of international commercial contracts, the solution of the Mexico Convention to exclude *renvoi* is the prevailing one in Venezuela. The rules regulating contracts, in accordance with the perambulatory comment to the law, seek to incorporate the most relevant guidelines of the inter-American convention. Therefore, it is considered that the provisions of the law are subject to an interpretation that is in keeping with the Mexico Convention and, accordingly, *renvoi* should be understood to be excluded in relation to contractual obligations. In order to justify this exclusion, Article 2 of the Venezuelan law is also used, which is a rule to apply foreign law in accordance with the principles of said law and, in turn, to realize the purpose of the Venezuelan conflict rules. In contractual matters, these principles represent respect for party autonomy and in the absence of choice, application of the law most closely connected to the contract.

331. In the area of arbitration, in the UNCITRAL Model Law there is also a presumption against *renvoi* (Article 28.1).

#### **IV. Assignment of Receivables**

332. The Mexico Convention does not address issues that could arise in relation to choice of law in the context of assignment of receivables.

333. This is addressed in the Hague Principles which state in Article 10 that “In the case of contractual assignment of a creditor’s rights against a debtor arising from a contract between the debtor and creditor: (a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract; (b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor; (ii) the rights of the assignee against the debtor; and (iii) whether the obligations of the debtor have been discharged.” This is consistent with the *UN Convention on the Assignment of Receivables in International Trade (New York, 2001)* (Articles 28 and 29) and the *UNCITRAL Model Law on Secured Transactions (2016)* (Articles 84 and 96).<sup>182</sup>

334. As explained in the HP Commentary, the objective of the provision is to give the greatest possible effect to the parties’ intent with respect to choice of law when expressed in a contract of assignment of receivables. Nevertheless, given the complexity of the situations that arise in such transactions, the provision reflects the need to clarify which law is applied when there are two or more coexisting contracts (for instance, one contract between the creditor and the debtor and another contract between the creditor and the assignee), in which the parties to each one have chosen different applicable laws.

335. Although voluntary assignment and contractual subrogation have the same effect, that is, the replacement of the old with a new creditor by agreement,

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<sup>182</sup>*UN Convention on the Assignment of Receivables in International Trade*. Adopted December 12, 2001, not yet entered into force. Text accessible at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2001Convention\\_receivables.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html);

*UNCITRAL Model Law on Secured Transactions*. Text accessible at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html).

the Hague Principles do not cover other situations such as legal and conventional subrogation or set-off. While these topics are addressed in Rome I (Articles 14 and 15, and Article 17, respectively), the Hague Principles focus instead on assignment, which is very common in international commercial practice.

336. Although the issue is generally not addressed in domestic law, one exception is that of Paraguay; Article 14 of the *Paraguayan* law mirrors Article 10 of the Hague Principles.

12.1. The domestic legal regime on the law applicable to international commercial contracts should:

- provide that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties, consistent with Article 8 of the Mexico Convention and Article 2.3 of the Hague Principles;
- provide that no connection is required between the law chosen and the parties or their transaction, consistent with Article 2.4 of the Hague Principles;
- exclude the principle of *renvoi* to provide greater certainty as to the applicable law, consistent with Article 17 of the Mexico Convention and Article 8 of the Hague Principles;
- in relation to assignment of receivables, favor party autonomy to the maximum extent, consistent with Article 10 of the Hague Principles.

12.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solutions.

## PART THIRTEEN

### ABSENCE OF CHOICE OF LAW BY THE PARTIES

#### I. The Problem

337. By the exercise of party autonomy, parties can choose the law applicable to their contract. Nevertheless, they often fail to do so. The reasons for this may be due to simple oversight, or the contracting parties may not have considered it necessary, or they may have discussed it but not come to an agreement. It may also be that the parties intentionally avoided discussing the matter because they knew it would be difficult to reach an agreement or out of fear that such discussions might prevent conclusion of the contract. A similar issue arises when the parties have exercised their autonomy and made a choice of law but that choice is subsequently ineffective.

338. In the absence of an effective choice of law by the parties, the question arises as to which law should be applied: a question that can arise during enforcement of the contract or in the course of litigation. Clarity in this respect can help to prevent disputes and, in the event of legal action, clarity can also help to orient the parties in the assertion of their positions and provide the adjudicator with guidance in issuing a decision.

339. If the contract does not contain a choice of law clause, in the Americas as in Europe, in court proceedings the applicable law will be determined on the basis of objective criteria laid down by the conflict of laws rules. The following paragraphs provide an overview of the different connecting factors under various international instruments adopted by states.

## II. Solutions of the Montevideo Treaties and the Bustamante Code

340. Review of the solutions presented by these earlier instruments provides some context for the current approach in the absence of a choice of law. Article 37 of the 1940 Montevideo Treaty uses as a connecting factor the *place of performance* of the contract to govern issues related to formation, characterization, validity, effects, consequences, and performance. Article 33 of the 1889 Montevideo Treaty was the original source of this provision.

341. This approach raises problems when the place of performance is in more than one State. Moreover, the place of performance may not be known at the time the contract is concluded or could change later on. These and other problems were to be resolved through the *presumptions* established in Article 38 of the 1940 Montevideo Treaty, in relation to contracts “on specific and individually identified things,” contracts “on specific types of things” and “referring to fungible things,” and contracts “for the provision of services.” At the same time, Article 40 of the 1940 Montevideo Treaty provides that the law of the *place of conclusion* of the contract will be applicable to those contracts for which the place of performance cannot be determined at the time of conclusion.

342. These solutions, nevertheless, have led to additional challenges. As an international contract and the obligations arising therefrom often have more than one place of performance, it becomes impossible to determine which law to apply, unless a *specific service or “characteristic”* and its respective place of performance is chosen. However, this solution also creates discrepancies in its practical application. For instance, does it refer to the physical place of performance, or to the domicile, habitual residence, or establishment of the obligor of the characteristic performance? Furthermore, determining the characteristic performance can become uncertain in cases of swap agreements, distribution agreements, and in complex contractual relationships generally, given that international contracts tend to be complex. Worse yet, the solution tends to favor application of the law of parties that are dominant in the provision of goods and services in international transactions.

343. Consequently, the approach set forth in the Montevideo Treaties in the absence of choice have created controversies, even though this approach is still defended by respected scholars from within the region. Critics say that the adjudicator is not granted the flexibility to determine whether there are closer connections than those provided in advance by the legislator nor are the solutions offered by these treaties clearly presented. This criticism is considered controversial by some who maintain that flexibility can be derived from the Additional Protocols to the Treaties of 1889 and 1940, and subsequently, by the *Inter-American Convention on General Rules of Private International Law*, (“General PIL Rules Convention”) particularly Article 9.<sup>183</sup>

344. The solutions provided in the Bustamante Code in the absence of choice are also unsatisfactory. It provides that contracts shall be governed by the law that, where appropriate, is common to the parties to determine capacity and, in the absence thereof, that of the place of conclusion (Article 186). However, it is unlikely for there to be a law common to the parties to determine capacity, given that in international commercial contracts, a party’s “domicile” - a criterion that in Latin America at times prevails over “nationality” - is almost always different for each party. Therefore, as the criterion of a *law common to the parties to determine capacity* will rarely be met, the criterion of *place of conclusion* is

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<sup>183</sup> *Inter-American Convention on General Rules of Private International Law*, adopted at Montevideo at CIDIP-II, signed May 8, 1979 and entered into force June 10, 1981.

widely used instead, with its attendant challenges as noted above. Concerning requirements as to formalities, the law of the place of conclusion and performance of the contract (Article 180) apply cumulatively, which is also a questionable solution.

### III. Approach in Europe and the United States

345. The Rome Convention adopted the *closest connection* formula in the absence of a choice of law; later, a set of guidelines was derived for arriving at an understanding of *characteristic performance* that coincides with that formula, which generated considerable criticism and disparities.

346. The reforms that generated Rome I resulted in rather rigid rules as to which law applies in different scenarios in order to determine characteristic performance (Article 4). Nevertheless, the solutions are complicated, and one must refer to the perambulatory clauses of Rome I in an attempt to resolve issues of interpretation. Such detailed rules diminish the value of broad or flexible formulas. Given the rich variety of commercial life, it becomes unlikely that a mechanical rule appropriate for one type of contract will be appropriate for another. For this reason, the adjudication of contracts should be characterized by flexibility.

347. This flexibility existed in English law until 1991 (when the Rome Convention came into effect in England) with use of the *proper law of the contract* formula, which is similar in concept to that of the closest connection test before the search for characteristic performance. Along these same lines, in the United States, while it is necessary to take a state-by-state approach to conflict of laws analysis, those domestic states that follow the Second Restatement have adopted for non-sale of goods contracts the flexible formula of the closest connection or *most significant relationship*.<sup>184</sup>

348. With that as an overview, specific examples of this approach from various domestic laws will be provided below.

### IV. Absence of Choice in the Mexico Convention

#### A. Principle of Proximity

349. The Mexico Convention aims above all to recognize and promote the principle of party autonomy. Nevertheless, in the absence or ineffectiveness of a choice, there must be a way to determine the applicable law. In this regard, Article 9, paragraph 1 provides that: “If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties [connections].” This is known as “the proximity principle.”

#### B. Objective and Subjective Elements

350. In making that determination, “The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties [connections]. . . .” (Article 9, paragraph 2, first sentence). This provision is consistent with Article 11 when it refers to “... State with which the contract has close [connections].”

351. Another interpretation has been advanced that a determination of the “closest connection” must also evaluate all the possible circumstances, as well as the territorial circumstances related to the conclusion, performance, domicile or

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<sup>184</sup> Restatement (Second) of Conflict of Laws of 1971 (Sections 145, 188). For sales of goods not governed by the CISG, Section 1-301(b) of the UCC provides that when the parties have not made an effective choice, the UCC (as codified in that state) “applies to transactions bearing an appropriate relation to this state.”

establishment, dispute resolution clause, currency, prior negotiations, and others. These are the *objective* connections that are to be considered together with the *subjective* ones that arise from different clauses and circumstances before, during, and after the conclusion of the contract and which indicate the legitimate expectations of the parties.

### C. Principles of International Bodies

352. In making its determination, a court shall also take into account “the general principles of international commercial law recognized by international organizations” (Article 9, paragraph 2, second sentence).

353. During the process of drafting the inter-American instrument, the United States delegation proposed the formula of *the closest connection*, the intention being that it would lead to a transnational, non-State law, rather than to a domestic law.<sup>185</sup> Around the same time, the UNIDROIT Principles, some two decades after their inception and drafting, were coming into the limelight. It was the opinion of Friedrich Juenger, member of the United States delegation, that the reference to “general principles” should clearly lead to the UNIDROIT Principles.<sup>186</sup>

354. After considerable discussions during CIDIP-V, a compromise was reached.<sup>187</sup> Regarding the rule that was ultimately adopted, one interpretation is that the role of *lex mercatoria* or non-State law has been reduced to that of an auxiliary element that, together with the objective and subjective elements of the contract, help the adjudicator to identify the law of the State with the closest connection to the contract. Another interpretation, in line with Juenger’s advocacy, favors the application of non-State law in absence of choice.<sup>188</sup> Juenger even stated afterward literally the following: “...even in countries that fail to ratify the Convention, its provisions can be considered an expression of inter-American policy that judges ought to consult in rendering their decisions. Once courts as well as arbitrators begin to rely on them, the Principles can

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<sup>185</sup> “If the parties have not selected the applicable law, or if this election proves ineffective, the contracts shall be governed by the general principles of international commercial law accepted by international organizations.” Juenger, Friedrich K., *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*. *The American Journal of Comparative Law*, Volume 42, Number 2, Spring 1994, 381 at page 391.

<sup>186</sup> *Id.* See also: Juenger, Friedrich K., *Conflict of Laws, Comparative Law and Civil Law: The Lex Mercatoria and Private International Law*, 60 *La. L. Rev.* 1133 (2000), at p. 1148. The relevance of this opinion is highlighted by José Siqueiros, the original drafter of the Mexico Convention, since the former was the one who had proposed the compromise solution. Siqueros, J.L., *Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales*, in *Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT*, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 223.

<sup>187</sup> Juenger, *supra* note 185.

<sup>188</sup> There had also been discussion as evidenced in the preparatory works that the term *international organizations* incorporates all of the elements of *lex mercatoria*. Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev.1. This was prior to the development of this idea in more recent times.

furnish the necessary legal infrastructure for this Continent's ever-increasing economic and legal integration".<sup>189</sup>

#### V. Absence of Choice in the Hague Principles

355. The Hague Principles apply only when parties have made a choice of law; application of law in the absence of or an ineffective choice fall outside their scope. Noteworthy, however, is that the Hague Principles use the term *closest relationship* when determining the relevant establishment, in Article 12.

#### VI. Absence of Choice in Domestic Laws

356. As explained above, the Mexico Convention establishes that if the parties to a contract fail to choose the applicable law (or make an ineffective choice), the law that has the closest connection to the contract will apply. In the aforementioned survey that was conducted in 2015, OAS Member States were asked whether their domestic legislation was consistent with this provision. Out of the eleven States that responded, seven States replied in the affirmative.<sup>190</sup> Although many States still adhere to the traditional approach as evidenced in the overview that follows, change is underway and new reforms, together with recent jurisprudence, is indicative of a new direction for conflict of laws in the Americas. This is also consistent with a similar trend in recent court decisions emerging from Europe.<sup>191</sup>

357. One exception is *Argentina*, where the new Civil and Commercial Code, unlike the Mexico Convention, adheres to the formula of place of performance (Article 2652). If that cannot be determined, the applicable law will be that of the domicile of the obligor of the characteristic performance, and in its absence, that of the place of conclusion. This is the same criterion that the Argentine courts had been using previously. Nevertheless, because the formula leaned toward "current" domicile, the provision left open the possibility that the applicable law could be changed unilaterally. An analogous solution in the Rome Convention created so many problems that Rome I relegates it to a secondary level, after establishing a number of strict rules on applicable law.

358. In *Brazil*, Article 9 of the LINDB provides that in order to qualify and govern obligations, the law of the State in which they are entered into—in other words, of the place where the contract is signed—is applied. Paragraph 2 of the same Article provides that the obligation arising from the contract is considered to be established in the place where the offeror resides. However, in a recent court decision, the traditional connecting factors were apparently rejected in favor of the more flexible principle of proximity.<sup>192</sup> As Brazilian labor jurisprudence uses different criteria, the value of this decision as influential is questionable; however, two more recent decisions likewise invoke the principle of proximity and reject the traditional connecting factor of the place of conclusion of the contract. In both instances, the court applied the CISG together with the UNIDROIT Principles as an expression of the "new *lex mercatoria*." The decisions considered the inadequacy of the results of the traditional conflict

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<sup>189</sup> Juenger, *supra* note 185, p. 236.

<sup>190</sup> Argentina, Bolivia—with provisos—, Canada, Jamaica, Mexico, Panama, and Paraguay. Article 804 of the Bolivian Commercial Code states that contracts executed in another State and performed in Bolivia are governed by Bolivian Law. See: 2016 Contracts Report, Appendix A, *supra* note 1.

<sup>191</sup> See the decisions rendered by the Belgian Cour de Cassation in 2009 and the two French decisions rendered by the Court d'Appel of Reims in 2012 and the Cour de Cassation in 2015, all reported in the UNILEX database.

<sup>192</sup> Superior Court of Labor (Tribunal Superior do Trabalho), DEJT, October 15, 2010, Ruling No. 186000-18.2004.5.01.0034.

of law rule of the place of conclusion of the contract and the appropriateness of uniform law rules to govern a multi-jurisdictional relationship.<sup>193</sup>

359. In *Canada*, in the civil law province of Quebec, the CCQ provides that “if no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the State with which the act is most closely connected in view of its nature and the attendant circumstances.”<sup>194</sup> According to the case law applicable in Canada’s common law jurisdictions, in the absence of an express or implied choice of law by parties to a contract, courts will apply the law which has the closest and most substantial connection to the contract.<sup>195</sup>

360. In *Chile*, the Civil and Commercial Codes do not contain specific provisions on the issue. Based on the prevailing territorial approach, in the absence of a choice by the parties (and even against their express agreement), judges will apply the local law if the goods subject to the contract are located in Chile. Otherwise (if the goods subject to the contract are not in Chile), in accordance with Article 16 of the Civil Code, the contract will be governed by the law of the place of conclusion (prevailing doctrine) or by that of the place of performance. In commercial matters, however, Article 113 of the Commercial Code contains a rule similar to that of the aforementioned Article 16 of the Civil Code, but establishes an exception for the case in which “the parties have agreed otherwise”, a clear allusion to party autonomy, since no additional requirements are established.

361. In the *United States*, in the absence of an effective choice of law, the court in a domestic state that follows the Second Restatement will examine the most significant relationship to determine the applicable law. Specific points of contact will be considered, which must be evaluated according to their relative importance with respect to a particular issue.<sup>196</sup> For sales of goods not governed by the CISG, the court will apply the UCC as codified in that state if the transaction bears an appropriate relation to that state.

362. *Guatemala* follows the principle of *lex loci executionis* (Article 31 of the Judicial Branch Law). Accordingly, if the legal transaction or act must be performed in a place other than the one where the agreement was concluded, all matters concerning its performance are governed by the law of the place of performance.

363. In *Mexico*, as it is party to the Mexico Convention, if the parties to a contract fail to choose the applicable law, or the choice is ineffective, the law with the closest connection to the contract will apply. However, in principle, the treaty applies only to cases between Mexico and Venezuela. For other cases, the Federal Civil Code provides in Article 13, Section V that “except as provided in the preceding sections, the legal effects of the acts and contracts shall be

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<sup>193</sup> *Noridane Foods S.A. v. Anexo Comercial Importacao e Distribuicao Ltda.* Court of Appeal of Rio Grande do Sul, February 14, 2017, Ruling No. 70072362940, and March 30, 2017. <http://www.unilex.info>. See also above, for more recent cases from Brazil.

<sup>194</sup> CCQ, Article 3112. Consider also Article 3113 which provides that “a juridical act is presumed to be most closely connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is concluded in the ordinary course of business of an enterprise, has his establishment” [unofficial translation].

<sup>195</sup> *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443.

<sup>196</sup> Restatement (Second) of Conflict of Laws, sections 6, 187 and 188. See *supra* note 156.

governed by the law of the place where executed, unless the parties have designated another applicable law.”

364. In *Panama*, the Code of Private International Law establishes that in the absence of a choice of law “the judge shall apply the law of the place of performance of the obligation and, when this cannot be determined, the judge shall apply the law of the State with the closest connection to the international contract and, failing that, the law of the forum” (Article 69 of Law 61 of 2015, subrogating Law 7 of 2014). The proximity principle enters here as one of the components of the conflict of laws rules that contains cascading connection points; e.g., in the first instance, it would be the place of compliance and only if this cannot be determined then, as a second instance, one would apply the law of the State with the closest connections.

365. In the *Dominican Republic*, in the absence of a choice, the new Private International Law provides that the applicable law is that with which the contract has the closest connection, in line with the identical language of Article 9 of the Mexico Convention (Law 544 of 2014, Article 60). In making that determination, the new law stipulates that “... [the court] shall consider all the objective and subjective elements that arise from the contract to determine the law of the State with which it has the closest ties; and the general principles of international commercial law recognized by international organizations” (Article 61).

366. In *Paraguay*, Article 11.1 of the Law Applicable to International Contracts replicates Article 9 of the Mexico Convention, which adopts the flexible formula of the “closest or most significant connection” and rules out other controversial and restrictive methods, such as the place of performance of the obligation. Notably, the Paraguayan law does not replicate the provisions of the Mexico Convention whereby a court shall also take into account “the general principles of international commercial law recognized by international organizations” (Article 9, second paragraph). This language is excluded because it is already clear (Article 3) that the reference to law therein can be understood also to include non-State law, which means that if adjudicators find the case to be more closely connected to transnational law than to a domestic law, they will apply it directly, whether or not it comes from an international body (such as UNIDROIT).

367. The *Peruvian* Civil Code provides that, in the absence of a choice, the law applicable to the contractual obligations will be the law of the place of its performance, and if the obligations must be performed in different States, it will be the law of the principal obligation; in the event that this cannot be determined, the law of the place of conclusion of the contract will apply (Article 2095).

368. In *Venezuela*, the Law of Private International Law adopts in its Article 30 the provisions of Article 9 of the Mexico Convention verbatim; thus, in the absence of choice, or when it is ineffective, the law with which the contract is most closely connected shall be applied, for which the objective and subjective elements of the contract will be taken into account, as well as the general principles of international commercial law accepted by international organizations. The Supreme Court stated that the closest connection formula conduces to take into account the *lex mercatoria*, which is comprised of commercial customs and practices.<sup>197</sup>

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<sup>197</sup> *Banque Artesia Nederland, N.V. v. Corp Banca, Banco Universal C.A.*, Civil Chamber of the Supreme Court of Justice, December 2, 2014, Ruling No. 0738. The Supreme Court held that, in accordance with the Venezuelan Private International Law (Articles 29, 30, and 31), if the parties to an international

## VII. Absence of Choice in Arbitration

369. Arbitrators are in a different position than judges as arbitration laws usually confer upon arbitrators broader discretion.

### A. Texts of Arbitration Conventions

370. The New York Convention does not address the issue of the applicable law in the absence of the parties' choice of law.

371. In the Americas, the Panama Convention does offer a solution. It refers to the IACAC Rules, specifically Article 30, which states: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." The rule is identical to that of the UNCITRAL Model Law, discussed below, and it is similar to the approach taken by the European Convention.

372. The MERCOSUR Arbitral Agreement of 1998 grants arbitrators the same authority as that of the parties. Article 10 states that: "The parties may choose the law to be applied to resolve the dispute based on private international law and its principles, as well as on international commercial law. If the parties failed to specify their choice of law, the arbitrators will rule in keeping with those same sources."<sup>198</sup> The instrument is open to the selection of uniform law when it refers to "international commercial law" and secondly, that the reference is to private international law "and its principles", which is thereby not limited to conflict of laws rules but also includes uniform law.

### B. UNCITRAL Model Law

373. By comparison, the UNCITRAL Model Law does contain provisions to address the issue. When the parties have not chosen the substantive law, "...Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable" (Article 28(2)).

374. The unofficial UNCITRAL commentary states that here the powers of the arbitral tribunal adhere to traditional guidelines. This is because (at least in principle) the arbitrators are bound to apply the rules of private international law.<sup>199</sup> This situation brings about uncertainties due to the lack of a national forum of the arbitrators. The provisions of Article 28(1) of the UNCITRAL Model Law have not been included by all States in their domestic legislation and instead, provisions are included whereby arbitrators have been given the freedom to choose the law that they deem appropriate (e.g., see Article 57(2) of the Peruvian arbitration legislation).

375. The UNCITRAL Model Law (and the domestic legislation that follows it) adheres to more traditional criteria on this issue. Nevertheless, these instruments may be interpreted broadly, both in theory and in the practice of arbitration, in a way that does not result in "domestic" perspectives. The provision of Article 28(2) appears to constrain the arbitrator, who is not allowed the freedom to choose the applicable law, and supposedly prevents him or her from applying

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contract have not expressly chosen the law applicable, judges may apply the "closest connection" criterion. To this end, the judges need to take into account all objective and subjective elements of the contract to determine the law with which it has the closest ties, as well as the general principles of international commercial law recognized by international organizations. This includes, the Supreme Court held, the *lex mercatoria*, which is composed of commercial customs and practices (see in [www.unilex.info](http://www.unilex.info)).

<sup>198</sup> *Supra* note 134.

<sup>199</sup> See also discussion on *voie directe*.

non-state law. Nevertheless, it has been argued that an arbitrator who disregards this provision does not jeopardize his or her award, due to the absence in the UNCITRAL Model Law of provisions for oversight by State courts of the reasoning that led to the determination of the applicable law. However, while it is true that there is no judicial control in this matter in the annulment remedy or the New York Convention, it is necessary to consider this aspect within the provisions regarding public policy. This is discussed at length in Part 17, below.

### C. Approaches for Applying Conflict of Laws Rules

376. There are major differences regarding the approach that should be used in an arbitral matter to determine the applicable law in the absence of an effective choice by the parties. The provisions of the Mexico Convention can serve as an effective guide also for international arbitrations seated in jurisdictions within the Americas. Some States have opted for the direct route and have omitted reference to the rules of conflict of laws. The arbitration rules of many institutions have done the same, which serves as a basis for the arbitrators applying the Mexico Convention in the effective use of these powers. In the absence of such provisions, the following approaches have been used in comparative law.

#### 1. Conflict of Laws Rules of the Place of Arbitration

377. Originally, the trend as reflected in awards granted was to give priority to the conflict of laws rules of the place of arbitration. In fact, an old resolution of the IIL adopted in 1959 stated that “The rules of choice of law in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the dispute.”<sup>200</sup> This approach received tacit support for a long time, especially in the common law world. Indeed, the Restatement (Second) of Conflict of Laws of the United States notes that the selection of the seat of the arbitration presumes a “demonstration of the intent for the local law of the country to govern the contract in its entirety” (§ 218, comment b).

378. However, the determination of the seat is often fortuitous, especially when the decision is made by the arbitral tribunal or an arbitral institution rather than by the parties. At other times, the parties choose the seat for additional reasons other than its conflict of laws rules, such as the political neutrality of the country, its proximity, or the logistical services it offers. Thus, as reflected in recent awards, there appears to be an emerging trend that upon determining the law applicable to the substance of the case, the arbitrator will set aside the conflict of laws rules of the forum.<sup>201</sup>

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<sup>200</sup> Article 11.

<sup>201</sup> Ad Hoc Arbitral Tribunal, Award of October 10 1973, V Yearbook Comm. Arb. (1980), 143 (148); ICC Award 2637 of 1975, in: Collection of ICC Arbitral Awards 1974-1985, 13 (15); ICC Award 1422 of 1966, in: Collection of ICC Arbitral Awards 1974-1985, 185 (186). Award in *Sapphire International Petroleum Ltd. v. The National Iranian Oil Company* (1964), 13 ICLQ 1011. ICC Award 3540 of 1980, VII Yearbook Comm. Arb. (1982), 124 (127). Cairo Regional Center for International Commercial Arbitration, Partial Award, June 23, 2000, number 120/1998, in: Eldin (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* (2000), 25 (28). ICC Award 3540 of 1980, VII Yearbook Comm. Arb. (1982), 124 (128). ICC Award 4434 de 1983, in: Collection of ICC Arbitral Awards 1974-1985, 458, 459; ICC Award 2730 of 1982, in: Collection of ICC Arbitral Awards 1974-1985, 490 (491).

## **2. Conflict of Laws Rules of Another Jurisdiction**

379. One position is to advocate for the application of the law of the State of the arbitrator on the basis that the arbitrator has better knowledge of his or her own law. Nevertheless, the position is unconvincing. It suggests that arbitrators are unable to apply conflict of laws rules other than their own - a position that has long been rejected. In addition, the State of the arbitrator may have no connection to the dispute, apart from it being his or her country of origin, which would create a connection to the dispute even more tenuous than that of the seat of the arbitration. This approach also raises the practical problem of the determination of the arbitrator's country of origin - that is, whether the determining factor should be the arbitrator's nationality, citizenship, domicile, or residence. Moreover, in practice, an arbitration tribunal tends to be composed of arbitrators from different States.

380. A different position would be to give effect to the law of the State whose courts would have had jurisdiction in the absence of an arbitration agreement. This approach has not prevailed either because arbitration is not comparable to the dispute resolution mechanism of a State. Moreover, in some cases, conflicts of jurisdiction may arise due to differences in State rules in this regard.

381. Another suggested approach is the application of the law of the State where the award will be executed. This is impractical because it is unpredictable, in addition to the fact that the award may be enforced in more than one State. In any case, awards often reflect the solutions that arbitrators find based on the arguments put forward by the parties, in order not to surprise the parties too much with their solutions.

## **3. Cumulative Application of the Rules of All States with a Connection**

382. Under this approach, arbitrators should perform a comparative exercise to determine whether there is any conflict between the legal systems connected to the case. This approach has the advantage of being consistent with the transnational nature of international commercial arbitration, in addition to being more in line with the expectations of the parties. It also reduces the possibility of challenges alleging that the wrong law was applied, in those rare instances in which a challenge is possible.

383. Nevertheless, this mechanism—which is quite costly—is only useful when the rules are similar or convergent, or at least aim toward the same outcome, unless, of course, one finds it sufficient to “adopt the law that appears most frequently as the applicable law.” This means that the persuasive value of this approach is inversely proportional to the number of applicable laws that arise from the application of the various sets of conflict of laws rules. Additionally, the approach leaves broad discretion for arbitrators to decide which conflict of laws rules are connected with the dispute and, therefore, must be taken into account.

## **D. Application of General Principles or Non-State Law**

384. An alternative to the conflict of laws approach is the application of “general principles” of private international law, which also takes a comparative approach, but with less attention on the connection between these rules and the contractual relationship in dispute. Towards that end, there is a tendency to turn to international conventions for guidance as to these general principles, especially the Rome Convention and now Rome I, regardless of whether the parties are subject to that regulation.

385. Use of this approach has been limited because it increases the uncertainty of the conflict of laws analysis by requiring a two-part analysis, but without producing noticeable benefits. This approach requires first, identification of

which State has the “closest connections” to a dispute. Secondly, it is necessary to identify the conflict of laws rules of that State. Ultimately, those conflict of laws rules have to be applied in order to choose the substantive law, which in turn entails carrying out another potentially complex analysis.

386. Nevertheless, in applying the provisions of the Mexico Convention using a liberal interpretation, the closest connection may not necessarily lead to a domestic law but rather, to *lex mercatoria* or other forms of non-State law. Application of uniform law instruments such as the UNIDROIT Principles might be preferable to the conflict of laws approach, the complexities of which have been outlined above.

387. Applying non-State law before domestic law may be helpful under different scenarios. For instance, it is possible that the potentially applicable local law does not offer a viable solution to resolve the matter. An example would be the interest payable on a loan, often not addressed in Islamic law. Another example might be the lack of a legal framework for contracts concluded online. Or, sometimes the laws of the parties provide opposing solutions and the use of the conflict of laws rules alone would not determine the outcome. In such cases, the application of non-State law offers a neutral method of resolving the dispute, without treading on the sensitivities of the eventual “loser.” Likewise, if the law of the two parties or of the States with which the contract is connected and the non-State law contains the identical solution, the adjudicator may resort directly to non-State law without having to declare a “winner.” On occasion, an approach that leads to the choice of a domestic law can be considered unsatisfactory by an arbitral tribunal because it would require application of a domestic law, designed for domestic commerce, to an international transaction. However, in any procedure of this nature, before making a decision it is necessary to hear the position of the parties.

388. The issue has been addressed in the domestic legislation of some states. For example, in *France*, the new Code of Civil Procedure provides that the arbitral tribunal may resolve disputes according to the rules of law that the parties have chosen or, failing that, according to those it deems appropriate, taking into account in all cases commercial practices.<sup>202</sup> A review of that new Code reveals that the relevant articles establish the existence of an autonomous legal system for international arbitration.<sup>203</sup> Other States have taken similar initiatives.<sup>204</sup> In *Mexico*, Article 1445 of the Commercial Code provides that if the parties have not indicated the law, the arbitral tribunal, taking into account the characteristics and connections of the case, will determine the applicable law. In *Peru*, not only does the legislation provide for *voie directe*, it also expressly authorizes the arbitrators to apply “rules of law” that they deem appropriate (see discussion on *voie directe*, below).

389. Contrary to widely-held but erroneous concerns that the transnational rules method, which involves the application or taking into account of non-State law, will lead to greater uncertainty, predictability of the outcome is better ensured using this method rather than the classic conflict of laws approach. Parties that have not taken the precaution of choosing the law applicable to their contract may be more surprised by the application of an unknown domestic law than by the application of a non-State set of rules that reflects broad consensus.

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<sup>202</sup> As amended by Decree 2011-48 of 2011, Article 1511.

<sup>203</sup> *Id.*

<sup>204</sup> The arbitrators’ autonomy is also enshrined in the *Belgian* Code of Civil Procedure (Article 1700); the *Dutch* Code of Civil Procedure (Article 1054); and the *Italian* Code of Civil Procedure (Article 834).

390. As has been described above, while traditionally arbitrators have resorted to the conflict of laws rules of the place of arbitration or the arbitrator's State, more recently there is a tendency to apply the conflict of laws rules of all States with a connection to the case at hand or, alternatively, the conflict of laws rules which the arbitrators themselves in each given case consider relevant, or even to allow the arbitrators to disregard conflict rules altogether and determine the applicable substantive law they consider to be appropriate "directly" or "*en voie directe*", discussed below.

#### **E. Use of *Voie Directe***

391. The term "*voie directe*" or "direct method" is well known in the language of arbitration. It enables the arbitrators to choose the law without the need to refer to any conflict of laws rule. In the application of this mechanism, the arbitrator will probably also consider principles of private international law, at least in his or her internal reasoning, but without the obligation to provide an explanation or legal basis. This is despite the fact that, under most arbitration rules the award should, in the absence of a different agreement by the parties, "contain the reasons on which it is based."

392. The direct method should not be seen as arbitrary and, in any case, concepts that form part of the conflict of laws approach, such as "closest connection" or "place of performance", can be used as a point of reference. In particular, when the outcome of the case differs depending on which law is applied, arbitrators would not choose the law applicable to the dispute according to the expected outcome. Accordingly, the expected outcome will not always lead the arbitrators to choose the same method. Depending on the circumstances of each case, the method that appears to be the most solidly supported will vary.

393. The direct method that now has been incorporated into the UNCITRAL Arbitration Rules of 2010 (Article 35) is considered one of the major advances over the prior rules of 1976. It is also an advancement with respect to the UNCITRAL Model Law, which did not provide for this approach in Article 28(2).

394. When amendments to the UNCITRAL Arbitration Rules were discussed, different points of view were expressed on whether or not an arbitral tribunal had the discretion to designate "rules of law" in the absence of an effective choice of law by the parties. It was decided that the rules should be consistent with Article 28(2) of the UNCITRAL Model Law, which refers to the arbitral tribunal applying the "law" rather than the "rules of law" determined to be applicable.<sup>205</sup>

395. It is necessary to expressly address the question as to the relationship between this latter "direct" method and the application of non-State law as the law applicable to the substance of the dispute. Even when using the "direct" method the arbitral tribunals will usually apply a particular domestic material law. Yet exceptionally they also may – and actually more often do – resort to non-State law. This occurs especially in cases of a so-called "implied negative choice", i.e. when it can be inferred from the circumstances that the parties intended to exclude the application of any domestic law (e.g. where one of the parties is a State or a government agency and both parties during lengthy negotiations made it clear that neither of them would accept the application of the other's domestic law or that of a third State; or where the parties expressly chose as the applicable law no further defined "general principles of international commercial law"; "principles of natural justice"; "the *lex mercatoria*", or the

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<sup>205</sup> See page 33 of Explanatory Note by the UNCITRAL Secretariat at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

like; or where the parties referred to non-existing “laws” such as “European law”, “Latin American law” or “Principles and Rules of the ICC”; or, finally, where the parties chose as the law governing their contract the INCOTERMS or the UCPs, etc.). Yet the same result is often achieved also in so-called multi-connected cases, i.e. when the contract is silent as to the applicable law but presents connecting factors with a multitude of States, none of which is predominant enough to justify the application of the respective domestic law to the exclusion of all the others. As demonstrated by the numerous arbitral awards reported in the database UNILEX, in cases like those, arbitral tribunals worldwide are more often no longer insistent on the application of a particular domestic law as the law applicable to the substance of the dispute, but rather prefer to resort to a balanced, comprehensive, and internationally recognized set of rules of law such as the UNIDROIT Principles.

396. It is noteworthy to contrast the solution of the UNCITRAL Model Law (*voie indirecte*) with the most innovative solution adopted in the UNCITRAL Arbitration Rules in Article 35(1) (*voie directe*). While the former authorizes the arbitrators to choose the rules of private international law that they deem most convenient in order to determine the law applicable to the contract, the second authorizes them to choose, directly, the law applicable to the contract. This latter solution has been adopted in the rules of most arbitration institutes (such as those of the ICC and the American Arbitration Association (“AAA”), among others). Consequently, when the parties decide that the arbitration will be conducted according to certain arbitration rules, they adopt the second solution (*voie directe*) rather than the first (*voie indirecte*). Depending on whether or not the State in which the arbitration is being carried out has either adopted the UNCITRAL Model Law or amended its domestic law accordingly, it is foreseeable that the second solution (*voie directe*) may have greater practical application.

397. The *voie directe* method has been incorporated into the modern arbitration laws of several States,<sup>206</sup> including many in the Americas.<sup>207</sup>

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<sup>206</sup> It is recognized, for instance, in the laws of *France* (Article 1511 of the Code of Civil Procedure, amended in 2011); the *Netherlands* (Article 1054(2) of the Code of Civil Procedure); *Spain* (Spanish Arbitration Act, Article 34(2)); *Austria* (Article 603(2) of the Code of Civil Procedure, RGBI. Nr. 113/1895 as amended by the 2013 Amendment to the Arbitration Act, BGBl. Nr. 118/2013; and *Slovenia* (Article 32(2) of the Arbitration Act of April 28, 2008).

<sup>207</sup> In Latin America, *voie directe* is enshrined in the laws of *Colombia* (Article 10 of the National and International Arbitration Statute of 2012); *Mexico* (Article 1445 of the Commercial Code and 628 of the Code of Civil Procedure of Mexico City, Federal District, *ad contrario*) and *Peru* (Article 57 of Legislative Decree 1071 of 2008). In Peru, not only does the legislation provide for *voie directe*, it also expressly authorizes the arbitrators to apply “legal rules” that they deem appropriate, without providing reasons or applying conflict of laws rules. The major arbitration centers of Peru also follow this approach. See Article 21 of the Arbitration Rules of the Chamber of Commerce of Lima and Article 7 of the Arbitration Rules of Amcham Peru.

13.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the “closest connection”, consistent with the provisions of Article 9 of the Mexico Convention.

13.2 Adjudicators should apply the flexible criteria of the “closest connection” in a liberal interpretative approach.

## PART FOURTEEN

### *Dépeçage* OR “SPLITTING” OF THE LAW

#### I. Meaning of *Dépeçage*

398. In private international law, the French term *dépeçage*, or “splitting” of the law, refers to the division of the contract so that different parts can be governed by different laws. There are numerous reasons why contracting parties may wish to do so. For example, in an international sales contract the majority of contractual obligations might be governed by the law of a single State, yet it would be preferable that the conditions under which the seller must obtain inspection certificates be governed by the law of the State(s) of the final destination of the goods, or that the deadline for the purchaser to report any defect in the goods conveyed be governed by the law of the place of delivery. Another example is that of a clause that provides for the payment of capital and interest, at the creditor’s option, in one State or more, in the currency of a particular State. In that case, the parties will often agree that the law of the State in which payment is to be made will govern matters related to the sum to be paid and the form of payment.

399. *Dépeçage* is a manifestation of the principle of party autonomy; it does not fall within the 19<sup>th</sup> century doctrines of localization. In fact, Ronald Herbert, one of the Uruguayan negotiators of the Mexico Convention, has said that the provision for it within that instrument could be profoundly at odds with the Montevideo Treaties.<sup>208</sup>

400. Scholarly opinions that oppose *dépeçage* rely on arguments such as its minimal advantage in view of the risks that *dépeçage* entails because of technical problems that could arise from discrepancies in the knowledge and application of the different laws chosen. It is also considered to be a weapon in the hands of the stronger party to the detriment of the weaker party, because aspects of the applicable law that may favor the stronger party can be manipulated.

401. Nevertheless, even those who oppose *dépeçage* must admit that certain issues, such as those related to the form of the contract and capacity, may be governed more appropriately by different laws and the mandatory rules of the forum. They may concede that this matter relates to the approach of correctly classifying each issue (form of contract and capacity) into the only category that corresponds to it.

402. Those who argue in favor of *dépeçage* point out that party autonomy is available to parties for the improved regulation of their interests, if deemed appropriate. Thus, the principle serves the intent of the parties, and mandatory rules or public policy are available to prevent it from being used by the stronger

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<sup>208</sup> Herbert, Ronald, La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales, RUDIP, Año 1 - N° 1, p. 91. According to Herbert, *dépeçage* would seem like heresy for the system of the Montevideo Treaties.

party against the weaker one. Overriding mandatory rules and the *ordre public international* limit the risk of abuse through *dépeçage* by the stronger party but, of course, the stronger party can still use *dépeçage* to its advantage so as to avoid the application of simple mandatory rules and public policy that would normally apply as part of the chosen law.

403. There are two possible situations for the use of *dépeçage*. One is where legislation specifically provides that the parties may choose more than one law to govern the contract, as is provided in certain domestic codifications (see below, Section III). Another is where there has been a partial choice of applicable law and the rest of the contractual obligations are left to be determined objectively. Rome I expressly permits this partial choice, specifying that the parties may choose the law applicable to part of the contract only (Article 3.1). The Mexico Convention follows along the same lines. A third situation may occur if the law that the parties have chosen does not cover all issues that may arise. For example, if a contract is governed by the CISG, there are matters that the CISG itself excludes under Article 4, such as validity of the contract and effects on property to the goods sold. In accordance with Article 7(2) of the CISG, “questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with general principles...” but issues not addressed by the CISG will have to be governed by the supplementary law that the parties have chosen and, in the absence of such a choice, it will be necessary to determine the applicable law, in which case, two different laws may govern the contract.<sup>209</sup>

## II. *Dépeçage* in the Mexico Convention and the Hague Principles

404. The Mexico Convention states in Article 7 that the choice of law selection “...may relate to the entire contract or to a part of same.” Hence, it enshrines voluntary *dépeçage*. Involuntary *dépeçage* is provided for in Article 9 of the Mexico Convention, paragraph 3 of which states: “Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.” This can occur, for instance, should an adjudicator decide to apply either the rules of a third State connected to the contract or mandatory rules or policies.

405. The Hague Principles provide in Article 2.2 that: “The parties may choose (a) the law applicable to the whole contract or to only part of it; and (b) different laws for different parts of the contract.” Because the Hague Principles include non-State law within the meaning of “law,” as provided in Article 3, non-State sources also can be chosen.

406. Reasons for the multiplicity of choices (for instance, that a clause about the exchange rate be subject to another legal system) and the corresponding risks (contradiction and inconsistency in determining the rights and obligations of the parties) are discussed in the HP Commentary (2.6). If there is a partial choice, and no indication that the law will govern the rest of the contractual relationship, “the law that will apply to that remainder will be determined by the court or the arbitral tribunal according to the rules applicable in the absence of a choice” (2.7). The HP Commentary (2.9) also says that, “in practice, such partial or multiple choices [of law] may concern the contract's currency denomination, special clauses relating to performance of certain obligations, such as obtaining governmental authorizations, and indemnity/liability clauses.”

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<sup>209</sup> The Bustamante Code uses *dépeçage* to regulate separately the different issues of the contractual relationship (for instance, Articles 169-172, 176, 181 and 183).

### III. *Dépeçage* and Domestic Laws

407. *Argentina* allows for total or partial voluntary *dépeçage*, whether express or tacit, by stating that choice of law “may refer to the entire contract or parts thereof.” (Civil and Commercial Code, Article 2651, first paragraph *in fine*).

408. In *Brazil* there is provision for *dépeçage* in Article 9, paragraph 1 of the LINDB.

409. In *Canada*, in the province of Quebec, the Civil Code specifically provides that the parties may choose more than one law to govern the contract (Article 3111(3)).

410. In *Chile*, the doctrine discusses the acceptance of *dépeçage* in its Civil Code based on the tenor of Article 16, third paragraph, which establishes that “the effects of contracts granted in a foreign country, to be fulfilled in Chile, will be in accordance with Chilean laws.” While the traditional position supports the doctrine of *dépeçage*, another interpretation is that the correct meaning of the cited provisions of Article 16 is that if the contract is to be fulfilled in Chile, it will be regulated in everything else by Chilean law. Accordingly, if the legal consequences (the “effects”) are determined under Chilean law, it matters that it and not another law determines the requirements or substantive conditions that the actions must meet.

411. In *Colombia*, without expressly authorizing it, the legislation does not prohibit *dépeçage*. It is accepted by interpretation within a particular context, as evidenced in Article 13 of Law 80 of 1993 on Public Procurement and in Article 20 of the Civil Code.

412. In *Panama*, Article 70 of Law 61 of 2015 specifically allows *dépeçage* by establishing that a contractual relationship may be governed by “two or more laws provided that the nature of the international legal transaction allows so and the divisibility of the applicable law regulates a certain obligation or situation of the legal business.” However, this same article states that *dépeçage* cannot be allowed if “it prevents the execution of the contract’s business object or leads to fraud or damage to one of the parties.”

413. In *Paraguay*, the new Law Applicable to International Contracts transcribes in Article 4.2 the provisions of Article 2.2 of the Hague Principles.

414. In the *Dominican Republic*, reference can be made to Law 544 of 2014, Article 58, paragraph 2. It provides that “the choice of the applicable law may refer to the entire contract or to a part of thereof.”

415. In *Venezuela*, the parties can choose a legal system for each part of the contract or for only one part, as voluntary *dépeçage* is permitted. Although Article 29 of the Law on Private International Law does not refer expressly to the possibility of *dépeçage*, it can be inferred from the reference to the law applicable to “conventional obligations” rather than simply to “international contracts,” thereby following the Mexico Convention, which has been ratified by Venezuela. Therefore, given that the contract is the source of “obligations,” each one of the obligations arising from a contract may be subject, by the intent of the parties, to a different law. This interpretation is reinforced by the application of the principles contained in the Mexico Convention to interpret the norms of the Law and to integrate its gaps.

### IV. *Dépeçage* and Arbitration

416. The arbitration forum has its peculiarities and the issue of *dépeçage* is not addressed expressly in either the UNCITRAL Model Law or the UNCITRAL Arbitration Rules. According to scholarly doctrine, *dépeçage* is widely accepted

pursuant to the principle of party autonomy, which openly prevails in this context.

417. The use of *dépeçage* could enable parties to avoid public policy rules, as long as they are not affected by the respective laws of the State of the potential forum with the authority to set aside or enforce the award. See the discussion on public policy below in Part 17.

418. A different issue is the law applicable to the arbitration clause. This clause is considered a contract itself, and different positions have been advanced as to the law that should be applicable to it, such as the law of the seat of the arbitration, the law of the main contract, or the law favoring the validity of the arbitration clause.

14.1 The domestic legal regime on the law applicable to international commercial contracts should admit the “splitting” of the law (*dépeçage*), consistent with the provisions of Articles 7 and 9 of the Mexico Convention and Article 2.2 of the Hague Principles.

14.2 Adjudicators, when granted interpretive discretion, are encouraged to admit *dépeçage*.

## PART FIFTEEN

### FLEXIBLE INTERPRETATION IN INTERNATIONAL COMMERCIAL CONTRACTS

#### I. Rationale

419. Provisions for “flexible” solutions grant authority to the adjudicator to mitigate the harshness of strict application of law. In matters involving international contracts, such provisions can be of particular help to find an appropriate resolution of the case. This is, in part, because many domestic legal systems are ill-equipped to regulate international transactions. For instance, a buyer’s refusal to accept goods is normally much more onerous in an international sales transaction. In such circumstances, even while recognizing that the buyer is entitled to this right, it would be desirable to impose certain obligations on the buyer, such as the safekeeping or resale of the goods.

420. International transactions commonly involve additional complicating factors. Among others, these can include the long distance between buyer and seller; extra requirements, such as import and export licenses, the issuance of which is dependent on various authorities; or prohibitions against the transfer of foreign currency. In these cases, the adjudicator cannot act subserviently or mechanically to blindly apply provisions designed primarily for domestic situations in the resolution of an international dispute.

421. Moreover, judges are generally not well prepared to apply foreign domestic laws. It is unrealistic to expect the local judiciary to be equally trained in the application of both domestic and foreign law.

422. As a consequence, it is often impossible for legal advisors to issue an opinion as to the interpretation and application of domestic law on a complex question in a transboundary matter or to predict how a local court will rule. Some domestic codes or laws may be so old, or may have undergone so many amendments, that it is impossible to know whether one is working with an accurate text. The problem is exacerbated in States plagued by judicial corruption, which thereby makes it difficult to predict outcomes based on case law or judicial precedents of dubious origins.

423. Adjudicators frequently resort to escape clauses in seeking justice in an individual case and to concepts of private international law such as classification, *renvoi*, *ordre public*, among others; they may even invoke constitutional or human rights and do so directly (rather than via the public policy exception). Some decisions from European courts are illustrative in that regard.<sup>210</sup>

424. When contracting parties do choose the law of a third State, they do so mainly with the intent to find a neutral solution, despite rarely having in-depth knowledge of that law. The subtleties of rules as distilled by case law can come as a surprise to a foreign party. This issue arose in a well-known interim arbitral award where the tribunal decided not to apply a peculiar jurisprudential interpretation of the text of a domestic law as the parties were experienced international business people and to find otherwise “would be inconsistent with commercial reality.”<sup>211</sup>

425. This entire issue, of course, warrants careful examination. A case-by-case analysis is essential with a focus on the legitimate interest of the parties. If a party does desire strict application of a law to a specific case, it should express this and thereby preclude the possibility that the adjudicator would consider other laws or a non-State law. Otherwise, the adjudicator should have sufficient discretion to reach an appropriate decision in light of the circumstances of the contract and the international environment in which the relationship has developed.

## II. Authority for Flexible Interpretations in International Transactions

426. For reasons given above, domestic laws should preferably be interpreted from a broad or flexible perspective to arrive at the appropriate resolution of cases involving transboundary transactions. The authority to do so derives from various sources.

427. First, the fact that domestic laws already contain what might be considered “flexible” provisions should be taken into account. These may be derived from principles contained, for instance, in national constitutions or international human rights treaties. National courts have both a duty and the authority to uphold these principles.

428. Secondly, many legal systems have the same general principles in common that can be broadly – but consistently – interpreted by adjudicators. Examples include the principles of *good faith*, *force majeure*, and *hardship*. In this regard, comparative law has proven to be very effective as an auxiliary interpretive tool. Domestic laws that include principles like *good faith* can be interpreted, firstly, in light of international solutions like those provided by the UNIDROIT Principles.<sup>212</sup>

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<sup>210</sup> For example, the German Constitutional Chamber handed down a historic judgment in this regard in 1971, in which constitutional rights were invoked in the reinterpretation of its private international law *Spanier Entscheidung*, Entscheidungen des Bundesverfassungsgerichts, May 1971. On several occasions the European Court of Justice has based its decision on the European Convention on Human Rights; it has ruled that the scope of the public policy exception to the duty to recognize the civil judgments of other member States should be interpreted in keeping with the Convention (*Krombach v. Bamberski*, 2000, Case C-7/98, ECR I-1935).

<sup>211</sup> ICC Arbitration No. 10279, January 2001.

<sup>212</sup> Comparison of their interpretation by other courts can be seen, for example, in the UNILEX database that compiles relevant cases in this regard ([www.unilex.info](http://www.unilex.info)).

429. Comparative construction becomes even more valuable in an international context. One reason is because it is impossible to dissociate law from the language of its expression. Terms such as *cure*, *reliance*, *consideration*, *misrepresentation* or *frustration*, call for a broad interpretation, particularly when one of the parties does not come from the common law tradition. The same can be said of the terms *cause*, *conversion*, or *obligations of means and result*, which have not been developed in the common law system.

430. The flexibility described in this section relates to flexibility in applying principles of domestic law that are ill-suited for international transactions; it does not contemplate the right of the judge or arbitrator to disregard the terms of the parties' actual bargain. Whereas a flexible approach is often a foundation of the laws of States that are code-based and where flexibility and good faith take a central role given the reality of a code-based system, in common law jurisdictions although the outcome may be no different, the underlying principles are different.<sup>213</sup>

### III. Flexibility when Applying “Customs” or “Usages”

431. In transactions governed by domestic laws, parties can include “customs” or “usages” (see discussion above at Part Six, II.A). They can do so expressly, through the use of incorporation by reference, for example, to the ICC INCOTERMS. In many systems, they can also do so tacitly. This would be the case of a custom that is not specific to the parties, but is widely known and accepted, which should be understood as included within what the parties intended. In this regard, commercial practices can be considered internalized within the contract as an expression of the will of the parties. In this way, “customs” prevail over supplementary provisions of domestic laws.

432. This is also desirable in international commercial contracts. Customs that have been included implicitly should prevail over a contrary supplementary provision in the law chosen or applied by adjudicators to the extent of the inconsistency with usual practice. The CISG (Article 9(2)) and the UNIDROIT Principles (Article 1.9) provide that customs are applicable even when the parties were unaware of their existence, as long as they are widely known and regularly observed in the commerce in question and the parties should have known of them.

### IV. Flexibility when Applying “Principles”

433. Frequently, parties to an international commercial contract include a reference to general principles, whether as supplementary to the domestic law chosen or as directly applicable to any possible dispute. In addition, principles provide flexible interpretative tools in both the domestic and the international order. Many domestic systems accept principles such as good faith or equity in the interpretation of specific legal provisions in order to reach fair outcomes. The same occurs in international commercial contracts when adjudicators avail themselves of such principles in order to achieve appropriate results.

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<sup>213</sup> The United States, for example, has the principle of *stare decisis*, and “flexibility” principles, such as the theory of estoppel, are often applied through case law. Courts in the United States have also implied a duty of good faith in the performance of contracts outside the UCC, but good faith is limited to specific duties in the contract. Careful consideration should be given to the difference between code-based and common law realities, particularly when dealing with the United States where “flexibility” principles take a secondary role the applicable rules of interpretation.

### V. Pioneering Role of the OAS in Favor of Flexibility

434. Advanced decades ago, Article 9 of the General PIL Rules Convention provides that: “The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.”<sup>214</sup>

435. The provision introduces flexibility concerning problems that arise from the simultaneous application of several laws to a specific case. Article 9 provides two criteria: to carry out the legislative policies underlying each of the norms and to achieve equity in the specific case. It should be interpreted broadly; if considered only within its narrow literal terms, the rule would only operate in cases of *dépeçage*. But if interpreted broadly, the rule becomes relevant in virtually any case where different laws are applied to different aspects, legal relationships and categories.

436. The General PIL Rules Convention has been ratified by several States within the region (Argentina, Brazil, Colombia, Guatemala, Paraguay, Ecuador, Mexico, Peru, Uruguay, and Venezuela). It has not been ratified by any State from the common law tradition, despite the fact that the solution offered by this Convention was derived from formulas that had been proposed by common law jurists.

### VI. Flexible Formula of the Mexico Convention

437. The Mexico Convention also contains a flexible formula that can be applied in the determination of the applicable law. It provides in Article 10 that, “In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.” Although the analogous wording of the aforementioned Article 9 had been suggested by common law jurists, Article 10 of the Mexico Convention was proposed by Gonzalo Parra Aranguren, President of the Venezuelan delegation, who hailed from the civil law tradition.<sup>215</sup>

438. Discussions have been raised as to whether Article 10 has a merely supplementary role; however, the text clearly indicates its applicability when justice so requires. Moreover, the Mexico Convention provides that, for purposes of its application and interpretation, “its international nature and the need to promote uniformity in its application shall be taken into account.” This provides solid authority that interpretation should also be done according to this broad approach.

439. The understanding in the deliberations prior to the adoption of the Mexico Convention was that Article 10 points to *lex mercatoria*.<sup>216</sup> Although to this day, doubts remain over the interpretation of that expression, (see discussion above Part Six, II. C), that issue is separate from that herein over the value of the flexible formula.

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<sup>214</sup> *Supra* note 183.

<sup>215</sup> Inter-American Convention on the Law Applicable to International Contracts, OAS Doc. OEA/Ser.K/XXI.5 (Mar. 17, 1994). See also: La Quinta Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP-V), México, 1994) in, *Revista de la Fundación Procuraduría General de la República*, Caracas, pp. 219-220.

<sup>216</sup> Report on Experts’ Meeting, *supra* note 19.

## VII. Flexible Formula in Domestic Laws

440. Only a few States have legislation in place with provisions similar to those of Article 10 of the Mexico Convention. There is no equivalent to those provisions in *Canada, Chile, Colombia, or Guatemala*, although those States do have laws that include flexible norms applicable to arbitral matters.

441. In Argentina, provisions have been included into the new Civil and Commercial Code in this regard. Article 2653 provides that, exceptionally, at the request of a party and taking into account all the objective and subjective elements that arise from the contract, the judge is empowered to apply the law of the State with which the relationship presents the closest connections. This provision is not applicable when the parties have made a choice of law. This rule reiterates, with particular reference to contracts, the general provision contained in Article 2597.

442. In *Paraguay*, Article 12 of the Law Applicable to International Contracts is a verbatim copy of Article 10 of the Mexico Convention.

443. The Civil Code of *Peru* refers to the application of the principles and criteria established in private international law doctrine (Article 2047).

444. In the *Dominican Republic*, the new Private International Law provides that: “In addition to the provisions of this article, the guidelines, customs, and principles of international commercial law, and the generally accepted commercial usages and practices will be applied where appropriate” (Law 544 of 2014, Article 61, paragraph 2).

445. In *Venezuela*, Article 31 of the Law on Private International Law mirrors Article 10 of the Mexico Convention.

## VIII. Flexible Formula in Arbitration

446. Article 28(4) of the UNCITRAL Model Law states that “in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.” This formula had originally been included in the European Convention (Article VII), in the UNCITRAL Arbitration Rules of 1976 (Article 33)), and remains in the current 2010 Rules (Article 35(3)).

447. In the deliberations of the Working Group that drafted Article 28 of the UNCITRAL Model Law, it was made clear that the tribunal was to take these into account *in all cases* [emphasis added]. Thus, the arbitral tribunal is granted a wide margin of discretion in the resolution of particular cases, “divorcing” it from a specific national system.<sup>217</sup>

448. These provisions reclaim the spirit of the historic origins of arbitration and aim to place it in the international context in which it is developing. The application of a rule like this one leads to a cosmopolitan approach. This was acknowledged, for instance, by an arbitral tribunal seated in Costa Rica.<sup>218</sup> In an

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<sup>217</sup> UNCITRAL (1975). Report of the Secretary General on the UNCITRAL Arbitration Rules. Volume VII. [online] Yearbook of the United Nations Commission on International Trade Law. Accessible at: <http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/vol7-p157-166-e.pdf>.

<sup>218</sup> Ad hoc arbitral award in Costa Rica, April 30, 2001 / UNILEX, citing other ICC awards in this regard. “Not only national statutes and jurisprudence are applicable to this case, but also regulations of international trade that are essentially conformed by the principles and usages generally admitted in commerce which the parties agreed upon in the tenth clause of the letter of intent stating that they would act, amongst themselves, on the basis of good faith and

arbitration seated in Argentina—despite the fact that both parties had designated Argentine law as applicable—the arbitral tribunal turned to the UNIDROIT Principles as international commercial usages and practices that reflect the solutions of different legal systems and international contract practices. It stated that, as such, and in accordance with Article 28(4) of the UNCITRAL Model Law, those Principles should prevail over any domestic law.<sup>219</sup>

449. Are the arbitrators operating *contra legem* in these cases? The answer is clearly no. When a party chooses an applicable substantive law and a jurisdiction that adopted the UNCITRAL Model Law, it is also selecting Article 28(4) with its flexible formula. In addition, Article 2 of the 2006 amendment emphasizes its international origin and the need to promote the uniformity of its application. It can be argued that a provision like this one imposes a legal mandate on arbitrators that favors a broad interpretation.

450. Moreover, even in arbitration, parties frequently choose domestic laws over a non-State law in order to minimize the risk of challenges in the forum of the legal action or the eventual place of performance. It has been argued that arbitrators can mitigate the unfair consequences of this by referring or resorting to the flexible formula.

451. Nevertheless, the arbitrator must also be extremely careful when the parties have based their arguments solely on a law that they themselves have chosen, in order not to jeopardize due process. A good arbitrator should ensure that the parties have had, where appropriate, the opportunity to discuss the

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proper customs and with regard to the most sound commercial practices and friendly terms.” This statement enables the Tribunal to use such rules as has been done by the ICC International Court of Arbitration in similar cases (Cf. Awards 8908 of 1996 and 8873 of 1997; International Court of Arbitration Bulletin, vol. 10/2-Fall-1999, p. 78 ss.).

<sup>219</sup> Ad hoc arbitral award of Dec. 10, 1997 / UNILEX. Notwithstanding the fact that both parties had based their claims on specific provisions of Argentinean law, the Arbitral Tribunal decided to apply the UNIDROIT Principles. It held that the UNIDROIT Principles constituted usages of international trade reflecting the solutions of different legal systems and of international contract practice, and as such, according to Art. 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law. On the merits of the case, the Arbitral Tribunal rejected the Buyer's argument that the contract was avoided on account of fault or mistake and held that the communication the Buyer had sent to the Sellers, informing them of the discovery of the hidden debts, could not be considered a proper notice of avoidance according to Art. 3.14 of the UNIDROIT Principles, as not only was there no indication of the intention to avoid the contract but its content even led the Sellers to believe that the Buyer wanted to stick to the contract, though in a modified version. Moreover, the Arbitral Tribunal held that the Buyer's subsequent conduct (in particular its proposal to terminate the contract by agreement; the payment of another installment of the price; the entering into negotiations with a view to modifying the contract) amounted to a confirmation of the contract according to Art. 3.12 of the UNIDROIT Principles (in this connection the Arbitral Tribunal expressly referred also to the Comment to Art. 3.12). As to the request for a price reduction, the Arbitral Tribunal granted a reduction of only 65% of the hidden debts. One reason for this decision was that the contract had been drafted by the Buyer so that its provisions, including the one containing the Sellers' warranty as to hidden debts, according to Art. 4.6 of the UNIDROIT Principles, had to be interpreted in a sense more favorable to the Sellers.

potential scope and relevance of the international usages or principles that would be applicable to the case in view of what may expressly or implicitly emerge from the contract.

452. Also, consideration should be given as to any legal requirement for the arbitrators to base their decisions in law, in order to avoid possible allegations of arbitrariness. Disregard by arbitrators of the choice of law made by parties could be seen as an excess of powers.

453. The arbitration laws of several Latin American States contain analogous language to that of the UNCITRAL Model Law.<sup>220</sup> In addition to the UNCITRAL Arbitration Rules, there are other arbitration rules that also provide a flexible formula. The 2012 ICC Rules of Arbitration provide that “The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages,” a provision which remains in the new 2017 edition.<sup>221</sup> A similar provision is contained in the 2009 AAA International Arbitration Rules.<sup>222</sup> In Latin America, the same formula is enshrined in the rules of several arbitration centers.<sup>223</sup>

15.1 The domestic legal regime on the law applicable to international commercial contracts should recognize the need for flexible interpretation, consistent with the provisions of Article 10 of the Mexico Convention.

15.2 Adjudicators, when the circumstances so require in the resolution of a particular case, if so authorized, should apply rules, customs and principles of international commercial law as well as generally accepted commercial usage and practices in order to discharge the requirements of justice and equity, consistent with the provisions of Article 10 of the Mexico Convention.

<sup>220</sup> A mandate to address in all cases the contractual stipulations and relevant commercial usages can be found in *Bolivia* (Articles 54 and 73 of Law 1770); *Costa Rica* (Article 22 of Decree Law 7727 of 1997); *Chile* (Article 28.4 of Law 19.971 of 2004); *Guatemala* (Article 36.3 of Decree Law 67 of 1995); *Mexico* (Article 1445 of the Commercial Code); *Nicaragua* (Article 54 of Law 540 of 2005); *Panama* (Decree Law 5 of July 8, 1999, now partly replaced by National and International Law of Arbitration in Panama, Law 131 of 2013); *Peru* (Article 57.4 of Decree 1071 of 2008); *Paraguay* (Article 32 of Law 1879 of 2002); *Dominican Republic* (Article 33.4 of Law 489 of 2008); and *Venezuela* (Article 8 of the 1998 Commercial Arbitration Law.) In *Brazil* the Arbitration Law stipulates that the parties may authorize arbitrators to take account of general principles of law, usages and customs, and international commercial rules (Law 9307 of 1996, Article 2). In *Ecuador*, the Arbitration and Mediation Act of 1997 does not refer to “commercial usages,” but it does establish that in arbitrations based on law the arbitrators must pay attention to *universal legal principles*, which could, where appropriate, encompass the principles of international commercial law.

<sup>221</sup> 2012 ICC Rules of Arbitration, Article 21; 2017 edition.

<sup>222</sup> American Arbitration Association, 2009 International Arbitration Rules, Article 28.2

<sup>223</sup> For instance, the Rules of the Arbitration Center of Mexico (2009); the Chamber of Commerce of Santiago (2012); the Chamber of Commerce of Caracas (2012); Article 35 of the Arbitration Rules of the Arbitration and Mediation Center of Paraguay (2010), and Article 21.2 of the Arbitration Rules of the Chamber of Commerce of Lima (2017).

## PART SIXTEEN

### SCOPE OF THE APPLICABLE LAW

#### I. Overview

454. The scope of the applicable law is to be distinguished from the scope of the instrument. The latter was discussed above, in Part Five, in regards to the Mexico Convention and the Hague Principles, and concerns those matters that fall within the scope of these instruments, either by inclusion or exclusion. By contrast, in this Part Sixteen consideration is given to the scope of the applicable law, whether the decision as to the applicable law has been made by way of an effective choice of law by the parties or otherwise, and the aspects that will be governed by that applicable law.

455. These international instruments all make express reference to the scope of the applicable law: the Mexico Convention, the Hague Principles, and Rome I all include in slightly different language that the law applicable to the contract shall govern its interpretation and they outline the rights and obligations of the parties (not included in Rome I), contract performance and consequences of breach, and consequences of nullity or invalidity. The Hague Principles add two additional topics: burden of proof and pre-contractual obligations.

456. The list is not exhaustive, as the texts state that the applicable law “shall govern *principally*...” (Mexico Convention, Article 14, first sentence) or “*in particular*” (Rome I, Article 12.1) or “shall govern *all aspects* of the contract between the parties, including but not limited to...” (Hague Principles, Article 9.1) [emphasis added].

457. As noted in the HP Commentary (9.4), these issues are among the most important for any contract. The concept shared by these three instruments is that the chosen law shall govern the main aspects of the contract. As pointed out in the HP Commentary (9.2) “this approach ensures legal certainty and uniformity of results and reduces the incentive for forum-shopping.” The law applicable to any aspect of the contractual relationship will be that chosen by the parties, regardless of the court or arbitral tribunal that adjudicates the dispute.

458. By virtue of inclusion on the lists, these aspects should be considered as “contractual,” which is not the case for all of these aspects in all legal systems. Specification of these aspects as ones to be governed by the law applicable to the contract reduces the likelihood of their being otherwise classified as non-contractual and the uniformity of outcomes is thereby encouraged.

459. This, of course, does not prevent the parties from choosing different legal systems to govern different parts of the contract (*dépeçage*), or even to make a choice of law applicable solely to one or more of the matters mentioned in Article 9.1, for example, interpretation of the contract (for discussion on *dépeçage*, see above Part Fourteen).

#### II. Specific Aspects

##### A. Interpretation

460. Interpretation of the contract is included in the list of all three instruments (Mexico Convention, Article 14(a); Hague Principles, Article 9(1)(a); and Rome I, Article 12.1(a)). The appropriate or chosen law, as explained in the HP Commentary (9.5), “determines what meaning is to be attributed to the words and terms used in the contract...using the canons of interpretation and construction of [that] law.”

### **B. Rights and Obligations of the Parties**

461. Whereas under the Mexico Convention the scope of the applicable law extends to “the rights and obligations *of the parties*” (Article 14(b), under the language of the Hague Principles, it extends to “the rights and obligations *arising from the contract*” (Article 9(1)(b)). As explained in the HP Commentary (9.5), the scope should extend only to contractual rights and obligations. It is conceivable that additional non-contractual rights and obligations may also arise between contracting parties and that would not be governed by the law chosen to govern the contract. This aspect is not included among those listed in Rome I.

### **C. Performance and Consequences of Breach**

462. Under the Mexico Convention, scope of the applicable law extends to “the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury [i.e., loss] to the extent that this may determine payment of compensation” (Article 14 (c)). Rome I includes among its list in Article 12.1 “performance,” clause (b) while the following clause (c) extends the scope of application, “within the limits of the powers conferred on the court by its procedural law,” to “the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law.” However, Article 12.2 provides that “in relation to the manner of performance and the steps to be taken in the event of defective performance, regards shall be had to the law of the country in which performance takes place.”

463. Similarly, the Hague Principles stipulate “performance and the consequences of non-performance, including the assessment of damages” (Article 9(1)(c)).

464. In the Mexico Convention, translation from the Spanish term “*daño*” into English would be better read as “loss” or “damage” rather than “injury” in the given context.

465. The HP Commentary (9.6) explains that this means the law chosen extends to govern matters such as the standard of diligence, the place and time of performance or the extent to which the obligation can be performed by a person other than the party liable. The law chosen by the parties also governs matters related to non-performance, such as compensation and the determination of its amount, specific performance, restitution, reduction for failure to mitigate a loss, or the validity of penalty clauses.

### **D. Satisfaction of Contractual Obligations**

466. Under the Mexico Convention, the scope of the applicable law extends to “the various ways in which the obligations can be performed, and prescription and lapsing of actions” (Article 14(d). Similar language in Rome I provides “the various ways of extinguishing obligations, and prescription and limitation of actions” (Article 12.1(d) and in the Hague Principles, “the various ways of extinguishing obligations, and prescription and limitation periods” (Article 9(1)(d). As has been noted already several times, the language in both the Mexico Convention and Rome I is based on the Rome Convention.

467. In the Mexico Convention, translation from the Spanish term “*extinción*” was incorrectly translated into English as “performed” (which in Spanish would be “*cumplido*”), when the correct word would be “satisfied.” The preparatory reports on the inter-American instrument contain the observation that the

Commission approved clause (d) “providing that obligations, in the English version, should be “satisfied” rather than “performed”.”<sup>224</sup>

468. As explained in the HP Commentary (9.8), “The chosen law determines the commencement, computation, extension of prescription and limitation, and their effects, i.e., whether they provide a defense for the debtor or they extinguish the creditor’s rights and actions. The law chosen by the parties governs these issues irrespective of their legal classification under the [law of the forum], [thus ensuring] harmony of results and legal certainty.”

#### **E. Consequences of Nullity or Invalidity**

469. Under the Mexico Convention, scope of application of the chosen law extends to “the consequences of nullity or invalidity of the contract” (Article 14(e)). Whereas the language of Rome I refers to “the consequences of nullity of the contract” (Article 12.1(e)), the Hague Principles refer to the “validity and the consequences of invalidity of the contract” (Article 9(e)).

470. Validity of the contract is addressed under the Mexico Convention in the provisions contained in Articles 12 and 13 of Chapter III. These have been discussed above in Parts 9 and 11. By contrast, in the Hague Principles the matter is included in this provision, which extends the scope of application of the law chosen by the parties also to the validity of the contract. The HP Commentary (9.9) makes no distinction between the terms “null” “void” or “invalid”. On that interpretation, but only insofar as the consequences are concerned, the scope of application of the chosen law under all three instruments would be the same.

471. The HP Commentary also points out that “it may be the case that the choice of law clause is valid, whereas the main contract to which it applies is not valid” and notes that “in such a case, the consequences of the nullity of the contract are still governed by the law chosen by the parties.”

#### **F. Registration of Contracts**

472. The Mexico Convention provides that “The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity in respect of same” (Article 16). It should be noted that translation of the Spanish term “la publicidad” into English would be better read as “filing” or “notice” rather than “publicity”, which in English has a very different meaning.

#### **G. Other Aspects**

473. The Hague Principles also extend the scope of the chosen law expressly to the “burden of proof and legal presumptions” Article 9.1 (clause f); and to “pre-contractual obligations” (clause g). These matters are delicate due to the divergences in different laws and in the consideration of them as either procedural or substantive. Given the difficulty in advocating for legal regime change, at times it may be more effective to identify the divergences between procedural and substantive laws and to recommend strategies for addressing or mitigating those divergences. For example, when so authorized, contracting parties may agree that certain presumptions should govern their contracts and

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<sup>224</sup> Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev. 1. A fulsome discussion on the importance of the distinction between these two terms in English legal systems is beyond the scope of the Guide; in brief, “satisfied” is broader than “performed” and can include payment obligations under the contract while the latter term can be limited to refer to obligations other than payment.

agree to define procedural rules to govern their contractual rights and any dispute arising from those rights.

474. The HP Commentary (9.11) explains that “legal presumptions and rules determining the burden of proof contribute to clarifying the parties’ obligations and thus are inextricably linked to the law governing the contract. Furthermore, a uniform characterization of these issues ensures harmony of results and legal certainty.” They are therefore different from other procedural issues<sup>225</sup> that are usually excluded from the scope of the chosen law. The solution is consistent with Article 12(g) of the 1986 Hague Sales Convention and Article 18.1 of Rome I.

475. With respect to prior negotiations, the HP Commentary (9.12) states that “once a contract is concluded between the parties, the obligations that arose out of dealings prior to its conclusion are also subject to the law applicable to the contract. However, even before the contract is concluded, the parties may choose the law applicable to the contractual negotiations and therefore to the pre-contractual liability based, for example, on an unexpected breakdown of such negotiations.” It has been noted that this is a rather theoretical case.

16.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to the scope of the applicable law, should address interpretation of the contract, rights and obligations arising therefrom, performance and non-performance including the assessment of damages, prescription and its effects, consequences of invalidity, burden of proof and pre-contractual obligations, consistent with the provisions of Article 14 of the Mexico Convention and Article 9 of the Hague Principles. For greater certainty, it would be preferable to do so by way of explicit provisions.

16.2 The domestic legal regime on the law applicable to international commercial contracts should provide both that the law of the State where an international commercial contract is to be registered shall govern all matters concerning filing or notice, consistent with the provisions of Article 16 of the Mexico Convention; and, that the rules of other international agreements which may be specifically applicable to an international commercial contract should prevail, consistent with the provisions of Article 6 of the Mexico Convention.

## PART SEVENTEEN PUBLIC POLICY

### I. The Concept of Public Policy (*Ordre Public*)

476. The concept of public policy, also referred to as “*ordre public*”, is one of the most controversial in comparative law. The confusion arises in part from the terminological discrepancies between different civil law systems and the common law system, each with their own nomenclatures. Disagreements also arise in defining the principle and the criteria for determining its application in a given case.

477. Public policy serves as a mechanism to preclude the possibility of contracts that conflict with the basic values of a community. Public policy may seek to safeguard fundamental interests of the State, such as those related to political institutions or monetary regulation. It also may seek to protect the well-being of the inhabitants and proper functioning of the economy, for example,

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<sup>225</sup> Some scholars do not consider issues such as burden of proof as strictly “procedural.” For example, in *Venezuela*, the burden of proof is subject to the *lex causae* (Article 38 of the Private International Law).

through laws that ensure freedom of competition. It may also aim to protect parties who at times may find themselves in a weak position in contractual relationships, such as employees and consumers. The fundamental values public policy seeks to protect may not only derive from domestic law but also from international law applicable in the forum, such as certain human rights provisions of global or regional treaties. At the same time, if taken to an extreme, public policy could potentially undermine party autonomy and choice of law rules with the associated risks of uncertainty and instability in relation to international transactions. Thus, a balance is required.

478. In private international law, public policy has two facets. One comprises the *overriding mandatory rules* of the forum that must be applied irrespective of the law indicated by the conflict of laws rule. The other precludes application of the law indicated by the conflict of laws rule if the result would be *manifestly incompatible* with the public policy of the forum. In its *first* facet, public policy is manifested through *mandatory rules* applied directly to the international case, without any consideration of the conflict of laws rules that may point to a different solution. Many States have these types of provisions that, functioning as a *sword*, are applied directly to cross-border issues, without regard for the intent of the parties or any other conflict of laws rule. In its *second* facet, public policy serves as a *barrier* or *shield* that bars the application of law that would otherwise be applicable under the conflict of laws rule.

479. Both facets of public policy are applicable, whether or not there has been an effective choice of law made by the parties. Although the conflict of laws rule may authorize party autonomy, the choice of law made by the parties cannot run counter to the public policy of the forum. Similarly, in the absence of a choice, if the conflict of laws rule leads the adjudicator to the application of a law that contradicts public policy, public policy will prevail. The use of both facets of public policy and as provided for in private international law instruments is discussed in the paragraphs below.

## **II. Overriding Mandatory Rules (*Lois de police*)**

### **A. Interpretation**

480. Domestic or international mandatory rules apply directly in an international case irrespective of the law that would be applicable according to choice of law by the parties or conflict of laws rules. These are rules that limit party autonomy. In other words, parties cannot circumvent them by contractual agreement.

481. Mandatory rules do not necessarily take any particular form and can be found in any number of instruments. These rules may be set forth in economic or public law policy, or in instruments designed to protect weaker parties in contractual relationships.

482. It may be useful, for purposes of facilitating international commerce and enhancing certainty with respect to international commercial contracts, for mandatory rules to be codified or legislated. This would help avoid surprising parties to international contracts with a mandatory rule that is unwritten and not well known. Mandatory rules are applied directly, whereas the use of public policy exceptions to deny the application of the law chosen by the parties or determined by conflict of laws rules is generally defensive; public policy usually has a corrective function.

483. Various modern private international law instruments, including all of the HCCH conventions on choice of law matters over the past decades, contain this distinction between public policy and mandatory rules (for instance, Articles 16-17 of the 1978 Hague Agency Convention; Articles 17-18 of the 1986 Hague

Sales Convention, and Article 11 of the Hague *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*<sup>226</sup>).

484. There is also a difference in terminology with respect to mandatory rules. For instance, French law refers to *lois de police* or *règles de droit impératives*. The concept of “laws of immediate application” is close to that of mandatory rules, in the sense that it concerns material or substantive rules that are primarily intended to be applied directly to international transactions. The distinction between them would be that “laws of immediate application” do not originate as local rules that require extraterritorial application in specific cases, but rather, they are rules designed to govern directly in international cases. There are also other terms related to mandatory rules in comparative law such as “self-limiting clauses” in laws (*norme autolimitate*), “spatially conditioned internal rules,” “localized rules,” and “*norme di applicazione necessaria*,” all of which pertain to the positive aspect of public policy, equivalent to mandatory rules.

485. In the common law tradition, the phrase *mandatory rules* was introduced relatively recently in England with the promulgation of the *Unfair Contract Terms Act* of 1977 and the *Sale of Goods Act* of 1979, after centuries of referring to illegality or *public policy*. The term *mandatory rules* includes both mandatory laws in the domestic sphere and public security laws that are absolutely binding internationally.

486. The Rome Convention uses the expression “mandatory rules” (Article 7), while Rome I refers to “provisions that cannot be derogated from by agreement” (Article 8.1). However, that latter phrase from Rome I is in relation to individual employment contracts while the expression from the Rome Convention is in relation to *lois de police*. Preamble clause 37 of Rome I distinguishes between “overriding mandatory provisions” and “provisions that cannot be derogated from by agreement” and suggests that the former should be construed more restrictively.

#### **B. Mandatory Rules in the Mexico Convention, Hague Principles and Rome I**

487. The Mexico Convention refers expressly to this issue in Article 11, paragraph 1, by indicating that “the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements.”

488. The Hague Principles similarly include the terminology of mandatory rules. Article 11.1 states: “These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.”

489. This issue was the subject of intense debate in the meetings of the HCCH Working Group; its members expressed some concerns regarding the detailed definition of *mandatory rules* or equivalent terms adopted by preexisting international instruments. Consequently, the proposal to include a definition was rejected.

490. As explained in the HP Commentary (11.17) a mandatory rule is not required to take a specific form, it need not be a provision of a constitutional instrument or law and it need not expressly state that it is mandatory and overriding. However, the HP Commentary (11.16) describes two requisite

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<sup>226</sup> *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, adopted July 5, 2006, entered into force April 1, 2017. Text accessible at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>.

characteristics that serve “to emphasize the importance of the provision within the relevant legal system and to narrow the category.” The first is their *mandatory nature* in the sense that it is not open to derogate from them. The second is that they are *overriding* in the sense that a court must apply them.

491. The HP Commentary (11.18) makes clear that the impact of overriding mandatory rules is limited; application of the law that would otherwise apply is constrained only to the extent of the incompatibility. The rule does not invalidate the rest of the applicable law, which “must be applied to the greatest possible extent consistently with the overriding mandatory provisions.”

### C. Application of Mandatory Rules of a Foreign State

492. Some modern bodies of law authorize the adjudicator to consider the mandatory rules of another legal system not referred to by the conflict of laws rules. This authority is conferred in the 1978 Hague Agency Convention (Article 16), which inspired the Rome Convention and Rome I, Article 9.3 of which provides: “Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

493. This provision may have its roots in adjudication. In a 1966 decision from the Netherlands, it was stated that, “although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.”<sup>227</sup> Nevertheless, European case law on the issue is quite limited. More recently, in 2016, the European Court of Justice (“ECJ”) held that Article 9(3) of Rome I does not prevent a Member State court from taking the overriding mandatory provisions of the law of another Member State (other than the place of performance) into account as matters of fact (that is, indirectly).<sup>228</sup> In the field of arbitration, in a well-known case it was decided that the public policy of a third State and the location of the headquarters or seat of incorporation of a business entity must be considered with regard to the determination of incapacity or the authority to enter into an agreement. This is because lack of capacity is grounds to deny enforcement of an award.<sup>229</sup>

494. The Mexico Convention also leaves it to the discretion of the forum “to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties [connections]” (Article 11).

495. Similarly, the Hague Principles (Article 11.2) provide that: “The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.” This flexible and open approach leaves it to the forum to determine whether it is possible to apply the overriding mandatory rules of a third State. Current practice and opinions of States with regard to the usefulness of provisions of this type vary widely. As

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<sup>227</sup> *Alnati*, Netherlands Supreme Court, May 13, 1966. (1967) 56 Rev. cri. dr. internat. priv. 522 (Annot. A.V.M. Struycken).

<sup>228</sup> *Hellenic Republic v. Nikiforidis*, ECJ, October 19, 2016. Case C-135/15; ECLI: EU: C: 2016:774.

<sup>229</sup> *Videocon Power Limited, Rep. v. Tamil Nadu Electricity Board*. Madras High Court, December 2004. 2005 (3) ARBLR 399 Madras, 2004 (5) CTC 668.

stated in the HP Commentary (11.19), the Hague Principles seek to accommodate this diversity by deferring the matter to the private international law of the forum.

### III. Manifest Incompatibility

#### A. Interpretation

496. While public policy rules are applied directly within a State to domestic transactions, the “public policy” doctrine in private international law prevents application of foreign law in an international transaction if the result would be manifestly incompatible with the public policy of the forum.

497. In this way, public policy in the context of international contractual relationships is a defense mechanism such that the adjudicator is not required to apply the foreign law that would otherwise have been applicable according to conflict of laws rules. Similarly, the adjudicator is not required to enforce a foreign judgment when that would offend public policy. Thus, the public policy mechanism has a corrective function. However, not all mandatory provisions of the forum’s law which the parties must respect in a purely domestic context, necessarily apply in an international context.

498. That is the reason why some legal systems call this public policy in private international law *international public policy*.<sup>230</sup>

499. For their part, all of the HCCH conventions after World War II include public policy as a hurdle to the application of the law as indicated by the conflict of laws rules of the respective convention. While the 1955 Hague Sales Convention referred only to “public policy” (Article 6), later Hague conventions incorporated the word “manifest” (in reference to the infringement of public policy), thereby implicitly adopting the terminology of “international public policy.” The term “manifest” has also been incorporated into inter-American conventions, including those on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Article 2.h), on Letters Rogatory (Article 17), on General PIL Rules Convention (Article 5), and the Mexico Convention (Article 18). At MERCOSUR, the term has been incorporated into the Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters (Article 20(f)) and the Protocol on Precautionary Measures (Article 17).<sup>231</sup>

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<sup>230</sup> For example, *Peru* (Article 2049 of the Civil Code and Articles 63(1)(f) and 75(3)(b) of the Arbitration Law); *Panama*, Article 7 of Law 61 of 2015; *Dominican Republic*, Article 7 of Law 544 of 2014; *France* (Articles 1514 and 1520 (5) of the French Code of Civil Procedure (amended by Article 2 of Decree 2011-48 of 2011); *Portugal* (Article 1096 (f) of the Portuguese Code of Civil Procedure of 1986); as well as the arbitration laws of *Paraguay* (Articles 40(b) and 46(b)) and those of *Algeria* and *Lebanon*. *Romania* and *Tunisian* laws refer to “public policy as understood in private international law,” while in *Canada*, the Civil Code of Quebec provides for “public order as understood in international relations” (Article 3081).

<sup>231</sup> *Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR*, May 27, 1992, Las Leñas, Spanish text accessible at:

[https://iberred.org/sites/default/files/mercosurprotocololasleas3\\_0.pdf](https://iberred.org/sites/default/files/mercosurprotocololasleas3_0.pdf); and *Protocol on Precautionary Measures of MERCOSUR*, Dec. 1, 1994, Ouro Preto, Spanish accessible at:

[https://iberred.org/sites/default/files/mercosurprotolomedcaut\\_0.pdf](https://iberred.org/sites/default/files/mercosurprotolomedcaut_0.pdf).

500. It is preferable to use this established terminology of “manifest” incompatibility above others that are overly broad and insufficiently descriptive, such as “international public policy” or “truly international public policy” as proposed in some scholarly works; this approach would also be consistent with the Hague Convention and inter-American instruments.

501. International public policy may also reflect corporate responsibility to respect core internationally recognized human rights, as emerging, for instance, from the UN *Guiding Principles on Business and Human Rights*.<sup>232</sup> Domestic norms may also reflect human rights principles; however, courts and arbitral tribunals should be mindful of internationally recognized human rights norms that may inform public policy or mandatory rules.

### **B. Manifest Incompatibility in the Mexico Convention and the Hague Principles**

502. The Mexico Convention states that, “Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum” (Article 18). This provision was based on the Rome Convention, according to which the Member States of the EU can refuse to apply foreign law “manifestly incompatible” with the public policy of the forum. Rome I maintains this earlier provision of the Rome Convention in Article 21.

503. Similarly, the Hague Principles provide that, “A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum” (Article 11.3).

504. The HP Commentary (11.23) outlines three requirements for this provision to apply. First, the policy of the forum “must be of sufficient importance to justify its application *to the case in question*” [emphasis added]. Secondly, “the chosen law must be obviously inconsistent with that policy.” Thirdly, “the manifest incompatibility must arise in the application of the chosen law to the dispute before the court.” The HP Commentary explains further (11.25) that “any doubt as to whether application of the chosen law would be incompatible with the forum’s fundamental policies must be resolved in favor of the application of the [chosen law].”

505. As stated in the HP Commentary (11.26 and see emphasized phrase above), “it is the result of applying the chosen law in a particular case rather than the chosen law in the abstract that must be assessed for compliance with public policy.” Evaluation must be carried out in each particular situation as to whether there is manifest infringement. However, the HP Commentary (11.26) also clarifies that the court is not restricted to consideration of the outcome of the dispute between the parties, “but may have regard to wider considerations of public interest.” In that regard, it provides the following example: “a court may refuse on public policy grounds to enforce a contract, valid under the law chosen by the parties, based on a finding that the choice was designed to evade sanctions imposed by a United Nations Security Council resolution, even if non-enforcement would benefit financially a person targeted by those sanctions and even if the other party was not party to the evasion.”

### **IV. Public Policy at a Regional Level**

506. Public policy at a regional level reflects the fundamental shared values of States within an area of integration. If the rule-making authority is not

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<sup>232</sup> UNHRC. *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*. A/HRC/17/31, endorsed by the UNHRC, resolution 17/4 of June 16, 2011.

exclusively held by nation States but is instead distributed across different levels—such as at both the national and regional levels— the question arises as to whether the conflict of laws rules should refer at all times to the private law of a State and whether the fundamental notions of public policy should be extracted solely from laws of nation States.

507. In the EU, judges are bound to take account of the European Convention on Human Rights<sup>233</sup> which serves as one of the basis for public policy within the EU. The CJEU has affirmed this in the oft-cited case of *Krombach* of 2000.<sup>234</sup>

508. Moreover, the EU is a supranational organization whose law is directly binding on its Member States. In each one of those States, EU law applies directly within the domestic legal system. In the event of conflict, EU law prevails over domestic law. Basic principles of EU law, such as the free movement of goods and people, or freedom of competition, have become part of the public policy of EU Member States. Accordingly, in a landmark judgment the CJEU held that the “defense of competition” enshrined in the Treaty of Rome is a fundamental provision for the workings of the free market within the EU. The CJEU found that, “Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in [Article 85] of the Treaty.”<sup>235</sup>

509. In another case the CJEU held that specific provisions of EU law can also be mandatory. Consequently, the provisions of minimum protection established in a Council Directive must be considered European public policy and, therefore, will prevail over a contrary result derived from the conflict of laws rules. The EU thus continues to broaden the scope of mandatory rules with a view to harmonizing the legal system and especially the internal market.<sup>236</sup>

510. Rome I addresses this issue expressly in Article 3.4 which states: “Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.”

511. There is no analogous provision that addresses public policy in the Mexico Convention, the Hague Principles, or any regulatory text in the Americas. Perhaps this is because there is no similar supranational law as there exists for the EU. Intergovernmental law emanating from the organs of MERCOSUR must be incorporated into the domestic legal systems of its Member States, like that of any other treaty. This raises the question of whether the issue is essentially a matter of “national” public policy. In 1998, the Austrian Supreme Court held in two cases that EU law directly applicable to the Member

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<sup>233</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*. (Council of Europe) 213 UNTS 222, ETS No. 5, UN Reg. No. I-2889.

<sup>234</sup> *Krombach v. Bamberski*, *supra* note 210.

<sup>235</sup> *Eco Swiss China Time Limited v. Benetton International NV*, CJEU, June 1, 1999 (judgment, reference for a preliminary ruling). Case C-126/97, [1999] ECR I-3055; [1999] 2 All ER (Comm) 44; [2000] 5 CMLR 816; (1999) XXIV YB Com Arb 629; EuZW 1999, 565.

<sup>236</sup> *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, CJEU, 2000. Case C-381/98; 2000 ECR I-9305.

States is, given its supremacy, automatically part of Austrian national public policy, (although some might consider this to be a minority view).<sup>237</sup>

512. This is consistent with the view expressed by the majority of the Permanent Review Tribunal of MERCOSUR. It held that mandatory rules correspond fundamentally to two types of interests subject to protection: first, the so-called public policy of direction—that is, the authority of the State to intervene in matters affecting its sovereignty or economic activity, as with regulations on currency or the defense of competition, for example; second, there is the so-called public policy of protection, which each State normally establishes and regulates in order to safeguard the rights of weaker parties in contractual relationships, such as consumers. This protection is established on the understanding that there are scenarios in which the contractual relationship is not the product of free will, but rather of other factors. Thus, the scope of its public policy of direction or protection as exceptional limits to party autonomy depends upon each State. The tribunal ultimately held that, where appropriate, specific abuses or violations of mandatory rules or principles will be adjudicated by the intervening national judge.<sup>238</sup>

#### V. Mandatory Rules and Public Policy in Domestic Laws

513. In *Argentina*, the new Civil and Commercial Code reflects the distinction between public policy as a barrier and as internationally mandatory rules. Article 2651 provides that: “The public policy principles and internationally mandatory rules of Argentine law are applied to the legal relationship, regardless of the law governing the contract; the contract is also governed, in principle, by the internationally mandatory rules of those States that have significant economic ties to the case.” The first limit is set by the public policy principles that inform the Argentine legal system, to which the parties are bound when the contractual case is decided before a national court. The second limit consists of the *lois de police* or internationally mandatory rules of Argentine law, because they exclude any other rule of restrictive interpretation (since they do not apply in the event of doubt). Therefore, “the internationally mandatory rules of Argentine law” are applied to the legal relationship, irrespective of the law governing the contract. In addition, the internationally mandatory rules of the chosen law also act as a limit to the autonomy.

514. In *Brazil*, the legislation provides that laws, acts and judgements of another State, or any autonomous declarations, will not be effective in Brazil if offensive to national sovereignty, public order and morality (LINDB, Article 17).

515. In *Canada*, the supremacy of overriding mandatory rules of the forum (*lex fori*) is generally accepted. In the civil law province of Quebec, Article 3081 of the CCQ states that “The provisions of the law of a foreign State do not apply if their application would be manifestly inconsistent with public order as understood in international relations.” In common law provinces, public policy can also be invoked to limit the effect of the law chosen by the parties or that is applicable pursuant to the application of conflict of law rules. Canadian courts have construed the public policy exception narrowly and it has rarely been invoked with success.<sup>239</sup>

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<sup>237</sup> International Law Association, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2000), cases cited at p. 20.

<sup>238</sup> Permanent Tribunal of Review of MERCOSUR, Advisory Opinion No. 1 of 2007.

<sup>239</sup> *Block Bros. Realty Ltd. v. Mollard*. [1981] B.C.J. No. 4; 122 D.L.R. (3d) 323 (C.A.); *Canadian Acceptance Corporation Ltd. v. Matte and Matte*. [1957] S.J. No. 41 (Sask. C.A.).

516. *Chile* has no express provision on the matter, although the natural inclination of the courts tends to be to apply Chilean rules, even when many of them are not mandatory, *sensu stricto*. Due to the territorialist interpretation in Chile, the contradiction need not be “manifest” in order to exclude the foreign law, given the weight the courts have given Article 16 of the Civil Code, which favors this approach. In principle, any contradiction (even if apparent) leads Chilean adjudicators to give priority to the domestic law; however, recent decisions emanating from the judiciary indicate some evolution in this regard.

517. In *Costa Rica*, the new Code of Civil Procedure, Law 9342, states in Article 3.1 that procedural rules are *ordre public* and of mandatory application and in Article 3.5 that these rules cannot be waived.<sup>240</sup>

518. In *Colombia*, there are important judicial decisions that provide guidance for the determination of public policy and that make a clear difference between its application in the domestic and international contexts.<sup>241</sup>

519. In *Guatemala*, in addition to rejecting the application of a law incompatible with the public policy of the forum, Article 31 of the Judiciary Branch Law contains an additional provision that is applicable when the agreement is counter to express prohibitory laws. Article 4 of this Law, although not a rule of private international law, contains a general provision applicable to all contracts. This Article establishes that “Acts contrary to mandatory rules and express prohibitory laws are fully null and void, unless they provide for a different effect in the case of contravention.”

520. In *Paraguay*, Article 17 of the Law Applicable to International Contracts adapts Article 11 of the Hague Principles. The provision reads: “Overriding mandatory rules and public policy. 1. The parties’ choice of law shall not prevent the judge from applying overriding mandatory provisions of Paraguayan law that, according to this law, must prevail even when a foreign law has been chosen by the parties. 2. The judge may consider the overriding mandatory rules of other States closely tied to the case, taking account of the consequences of their application or non-application. 3. The judge may exclude the application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy.”

521. In *Panama*, reference may be made to Law 61 of 2015, Article 7.

522. In the *Dominican Republic*, reference may be made to Law 544 of 2014, Article 7.

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<sup>240</sup> Code of Civil Procedure, Law 9342. Article 3.1: “Orden público y aplicación en el tiempo. Las normas procesales son de orden público y de aplicación inmediata.” Article 3.5 *ibidem*: “las normas procesales son indisponibles e irrenunciables.”

<sup>241</sup> See, for instance, (i) *García Fernandes Internacional Importação e Exportação AS v. Prodeco -Productos de Colombia*, Colombian Supreme Court of Justice (Corte Suprema de Justicia de Colombia), Civil Chamber, August 6, 2004, Ruling No. 77 (Motion to execute a Portuguese Ruling); (ii) Colombian Constitutional Court (Corte Constitucional de Colombia), May 26, 2005, Ruling No. T-557; (iii) *Industria y Distribuidora Industri SA v. SAP Andina y Del Caribe CA*, Superior Court of Bogota District (Tribunal Superior del Distrito de Bogotá, D.C.), Civil Chamber, March 10, 2010, Ruling No. 20100015000. More recent cases are the following: Colombian Supreme Court of Justice, June 24, 2016, Ruling No. SC8453-2016, and February 8, 2017, Ruling No. SC5207-2017.

523. In *Peru*, the Civil Code provides that the law applicable to international contracts will determine the mandatory rules and the limits of party autonomy. Article 2049 of the Peruvian Civil Code establishes that the provisions of the pertinent foreign law according to the rules of private international law will be excluded if their application is incompatible with international public policy or with ethics and morals.

524. In *Uruguay*, Article 2404 of Law 16.603 of 1994 is consistent with the declaration of Uruguay of 1979 made with respect to Article 5 of the Convention on General Rules and which states: "...the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and principles essential to the international public order on which each individual state bases its legal individuality."<sup>242</sup>

525. In *Venezuela*, despite the fact that the Draft Law on Private International Law (1963-1965) established the consideration of the mandatory rules of third States by ordering the judge in contractual matters to apply, "...in all cases, the provisions of the law of the place of the performance regulated therein for economic and social reasons of general interest" (Article 32), the enacted law is silent with respect to the matter. That silence necessarily raises the question of whether the mandatory rules of third States can be considered when the matter falls outside the scope of the Mexico Convention. On this point, the judge may resort, by application of Article 1 of the Law on Private International Law, to the generally accepted private international law principle contained in the Convention, as it is undeniably important to apply these rules in order to decide the specific case (see Article 10 of the Venezuelan law.) As in Peru, the Venezuelan law contemplates *ordre public* without considering the possibility of protecting, within this institution, the essential principles of the legal system of third States.

526. In the *United States*, there are certain points of intersection with the approach taken under the Hague Principles and Mexico Convention. Under the First Restatement, there was a traditional public policy exception based on the concept that if the foreign law is offensive to the basic morality of the forum, its application would be considered unjust. This is still the approach taken in some domestic state jurisdictions within the United States. Under the Second Restatement, a version of this approach survives, but with overriding exceptions as outlined in sections 6, 187 and 188.<sup>243</sup>

## VI. Public Policy and Arbitration

527. The controversy of mandatory rules and the applicable law is one of the most difficult in arbitration. Because of the deambulatory character of arbitration, and because arbitrators are not judges or State officials, one cannot speak of a national law of the forum (or *lex fori*). *Lex fori* contains provisions of private international law relative to classification, connecting factors and public policy.

528. In the absence of *lex fori*, there are two fundamental consequences. On one hand, there is no competent national law or law that the arbitrator should apply as a principle—unless the parties have chosen the law of the place of arbitration, but that results from the application of a law pertaining to international arbitration rather than from a particular *lex fori*. On the other hand, there is no foreign law in international arbitration. All domestic laws have the same value and none has a privileged status. Consequently, the arbitrator does

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<sup>242</sup> Uruguay declaration made at the time of signature. Text accessible at: <http://www.oas.org/juridico/english/sigs/b-45.html>.

<sup>243</sup> See *supra* note 156.

not have to be certain that purely national concepts are respected. The key question is not whether an arbitrator should take account of the mandatory rules, but rather how the arbitrator determines what constitutes a mandatory rule for purposes of the specific dispute. By way of illustration, the *Peruvian* arbitral law expressly recognizes “international public order” as grounds for annulment of an arbitral award (Article 63(1)(f)) as well as a cause of non-recognition of a foreign award (Article 75(3)(b)), which provides interesting criteria to interpret the source of public order of the New York Convention when it is to be applied in Peru.

529. When arbitrators consider that they are not bound by specific rules of the forum, or national laws, they sometimes opt to directly apply non-State law (or internationally recognized principles, or *lex mercatoria*), which in one of its facets consists of a public policy independent of national laws. This public policy allows arbitrators to penalize bribery, arms trafficking, drug trafficking, or human trafficking irrespective of the provisions of the local laws. The ICC Case 1110/1963, in which a single arbitrator, Judge Lagergren, refused to hear the case because the object of the contract involved the bribery of public servants, is emblematic in this regard.

530. Public policy as a ground for refusing to recognize or enforce foreign judgments and awards is provided for in Article V(2) of the New York Convention and in Article 36 of the UNCITRAL Model Law. On this point, interpretation tends to be quite restrictive, or as *international public policy*. In several States, the policy of the courts is to give effect to arbitral awards to the greatest extent possible rather than provide incentives for litigation in the courts. In a recent decision from *Peru* concerning recognition of a foreign arbitral award, the court defined restrictively the international public order as “the set of principles and institutions that are considered fundamental in the social organization of a State and that inspire its legal system.”<sup>244</sup>

531. There are relatively few cases in which this public policy provision of the New York Convention has been used to deny the enforcement of an award. In many of these cases this was the result of anachronistic arbitration laws, such as the outdated English law of 1950, and certain serious violations that truly warranted the denial of enforcement. In short, this tendency not to set aside arbitral awards on the basis of merely localist arguments on the pretext of alleged “public policy” arising from national rules, obviously contributes to the valid circulation of arbitral decisions.

532. Given the difficulty of this issue, it is hardly surprising that the question of public policy in arbitration was one of the “most sensitive” issues addressed in the drafting of the Hague Principles. Article 11.5 of the Principles states that, “These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.” The Principles thus take a “neutral” position, reflecting the peculiar situation of arbitral tribunals, which, unlike national courts, have the obligation to issue a final judgment capable of enforcement; and to that end, they can be led to consider the laws of the jurisdictions in which enforcement is sought.

533. The HP Commentary (11.31) states that Article 11(5) “does not confer any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law” that is

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<sup>244</sup> *Stemcor UK Limited v. Guiceve S.A.C.*, Superior Court of Justice of Lima, First Civil Chamber with Commercial Specialization, April 28, 2011.

applicable in principle. On the contrary, tribunals might be required to take account of public policy and mandatory rules, and where appropriate ascertain the need for them to prevail in the specific case. Some provisions, like Article 34(2) of the UNCITRAL Arbitration Rules, or Article 41 of the ICC Rules, are interpreted to obligate the arbitrator to endeavor to render an “enforceable award.” The HP Commentary (11.32) states that determining “whether a duty of this kind requires the tribunal to have regard to the overriding mandatory provisions and policies of the seat, however identified, or of the places where enforcement of any award would be likely to take place,” is a controversy on which Article 11.5 of the Hague Principles does not express any view. It is emphasized that the tribunal should be careful in its analysis of this issue.

534. In fact, the “obligation” of arbitral tribunals is to ensure to the maximum extent -albeit not as a general imperative- the effectiveness of their awards. An issue also arises regarding the consideration of the public policies that may come into play. Should they be raised mainly as a responsibility of the parties? This is a sensitive issue because it may be arguable if *ex officio* arbitrators can introduce controversial issues that have not been raised by the parties during the development of the case, such as the application of public policy rules of a law different from the *lex contractus*. Obviously, in such a case an award cannot be made without first having been submitted to the parties for discussion.

17.1 The domestic legal regime on the law applicable to international commercial contracts should provide that neither a choice of law nor a determination of applicable law in the absence of an effective choice,

- shall prevent the application of overriding mandatory provisions of the forum or those of other fora, but that such mandatory provisions will prevail only to the extent of the inconsistency;
- shall lead to the application of law that would be manifestly incompatible with the public policy of the forum, consistent with Article 18 of the Mexico Convention and Article 11 of the Hague Principles;

17.2 Adjudicators and counsel should take into account any overriding mandatory provisions and public policy as required or entitled to do so, consistent with Article 11 of the Hague Principles.

## PART EIGHTEEN OTHER PROVISIONS

### I. Prevalence of Other International Agreements

535. The Mexico Convention states in Article 6 as follows: “The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.” During the course of translation from Spanish into English, the intended meaning has been lost. It may be better read as follows: “The rules of this Convention shall not be applicable to contracts specifically governed by other international conventions in force among the States Parties to this Convention.” Rome I contains a somewhat similar provision in Article 23. It stipulates that, with certain exceptions, “[Rome I] shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of laws rules relating to contractual obligations.”

536. The Mexico Convention also addresses the relationship between it and other international agreements on the same subject. It states that: “This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are

pertinent, or those concluded within the context of integration movements” (Article 20). Once again, during the course of translation from the Spanish text into the English, some words were omitted and the intended meaning was lost. The provisions may be better read as follows: “This Convention shall not affect the application of other international conventions containing rules on this same subject to which a State Party to this Convention is or becomes a party, if they are concluded within the framework of integration processes.” Rome I contains a similar provision in Article 25(1).

## **II. States with More than One Legal System or Different Territorial Units**

### **A. International Conventions**

537. The Mexico Convention does expressly state that “In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: (a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; (b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State” (Article 22).

538. As noted in the preparatory works of the instrument, Article 22 establishes that each territorial unit should be considered a State for purposes of determining the applicable law according to the Mexico Convention. In other words, the reference to the law of the State will be considered a reference to the law in force in the respective territorial unit.<sup>245</sup> Rome I uses language similar to that of the above-cited report, providing that, “Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation” (Article 22.1). A similar provision is contained in the Rome Convention (Article 19), as well as in the 1986 Hague Sales Convention (Article 19).

539. The Mexico Convention also provides that “A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.” (Article 23). The same solution is found in Rome I (Article 22.2), the Rome Convention (Article 19), and the 1986 Hague Sales Convention (Article 20).

540. Lastly, the Mexico Convention expressly allows for the possibility for States that have two or more territorial units with different legal systems to declare, at the time of signature, ratification, or accession, whether this Convention will extend to all its territorial units or to only one or more of them (Article 24). The instrument has been ratified only by Mexico and Venezuela, neither of which made any declaration to that effect at the time of signature or ratification.

541. The HP Commentary (1.22) points out that the Hague Principles “do not address conflicts of law among different territorial units within one State” but that this does not prevent “extending the scope of application of their application to intra-State conflicts of laws.” Moreover, “the fact that one of the relevant elements of the contractual relationship is located in a different territorial unit within one State does not constitute internationality of the contract.”

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<sup>245</sup> Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev.1.

### B. Domestic Laws

542. In *Canada*, in the province of Quebec the CCQ provides that “Where a State comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a State. Where a State comprises several legal systems applicable to different categories of persons, any reference to the law of that State is a reference to the legal system prescribed by the rules in force in that State; in the absence of such rules, any such reference is a reference to the legal system most closely connected with the situation” (Article 3077).

18.0 States with more than one legal system or different territorial units may wish to consider the provisions of Article 22 of the Mexico Convention and Article 1.2 of the Hague Principles and provide in the domestic legal regime on the law applicable to international commercial contracts that any reference to the law of the State may be construed as a reference to the law in the territorial unit, as applicable.

## APPENDIX A

### THE MEXICO CONVENTION AND THE HAGUE PRINCIPLES

#### COMPARATIVE TABLE

Mexico Convention	Hague Principles
<u>Purpose and Objective</u>	
<ul style="list-style-type: none"> <li>● <u>Preamble:</u> REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States;</li> <p>REASSERTING the advisability of harmonizing solutions to international trade issues;</p> <p>BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them,</p> <li>● <u>Article 1, para. 1:</u> This Convention shall determine the law applicable to international contracts.</li> <li>● <u>Article 4:</u> For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.</li> </ul>	<ul style="list-style-type: none"> <li>● <u>Preamble:</u> 1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.</li> <p>2. They may be used as a model for national, regional, supranational or international instruments.</p> <p>3. They may be used to interpret, supplement and develop rules of private international law.</p> <p>4. They may be applied by courts and by arbitral tribunals.</p> </ul>

<b><u>Scope of Application of the Instrument</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 1, para. 3</u>: This Convention shall apply to contracts entered into or contracts to which States or State agencies or entities are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party.</li> <li>• <u>Article 3</u>: The provisions of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of contracts used as a consequence of the development of international trade.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 1.1</u>: These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.</li> </ul>
<b><u>Definitions I: “International Contract”</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 1, para. 2</u>: It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 1.2</u>: For the purposes of these Principles, a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.</li> </ul>
<b><u>Definitions II: “Establishment”</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 1, para. 2</u>: It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 1.2</u>: For the purposes of these Principles, a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.</li> <li>• <u>Article 12</u>: If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion.</li> </ul>
<b><u>Definitions III: “Principles of International Law”</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 9, para. 2</u>: The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.</li> <li>• <u>Article 10</u>: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 3</u>: The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.</li> </ul>

<p>accepted shall apply in order to discharge the requirements of justice and equity in the particular case.</p>	
<p><b><u>Issues Not Covered by the Instrument</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 1, para. 2 and 4</u>: It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party.</li> </ul> <p>Any State Party may, at the time it ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.</p> <ul style="list-style-type: none"> <li>• <u>Article 5</u>: This Convention does not determine the law applicable to: <ul style="list-style-type: none"> <li>a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties;</li> <li>b) contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships;</li> <li>c) obligations deriving from securities;</li> <li>d) obligations deriving from securities transactions;</li> <li>e) the agreements of the parties concerning arbitration or selection of forum;</li> <li>f) questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 1.1</u>: These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.</li> <li>• <u>Article 1.3</u>: These Principles do not address the law governing: <ul style="list-style-type: none"> <li>(a) the capacity of natural persons;</li> <li>(b) arbitration agreements and agreements on choice of court;</li> <li>(c) companies or other collective bodies and trusts;</li> <li>(d) insolvency;</li> <li>(e) the proprietary effects of contracts;</li> <li>(f) the issue of whether an agent is able to bind a principal to a third party.</li> </ul> </li> </ul>
<p><b><u>Rules for Determining the Applicable Law: Choice of Law by the Parties</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 7, para. 1</u>: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Preamble para. 1</u>: This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions</li> <li>• <u>Article 2.1</u>: A contract is governed by the law chosen by the parties.</li> </ul>
<p><b><u>Rules for Determining the Applicable Law: Express or Implied Choice of Law</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 7</u>: The contract shall be governed by the law chosen by the parties. The parties' agreement on</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 4</u>: A choice of law, or any modification of a choice of law, must be made expressly or appear</li> </ul>

<p>this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</p> <p>Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.</p>	<p>clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.</p>
<p><b><u>Rules for Determining the Applicable Law: Law that May be Chosen by the Parties</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 2:</u> The law designated by the Convention shall be applied even if said law is that of a State that is not a party.</li> <li>• <u>Article 4:</u> For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.</li> <li>• <u>Article 7, para 1:</u> The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</li> <li>• <u>Article 9, para. 2:</u> The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.</li> <li>• <u>Article 10:</u> In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.</li> <li>• <u>Article 17:</u> For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 2.1:</u> A contract is governed by the law chosen by the parties.</li> <li>• <u>Article 2.4:</u> No connection is required between the law chosen and the parties or their transaction.</li> <li>• <u>Article 3:</u> The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.</li> </ul>
<p><b><u>Rules for Determining the Applicable Law: Formal (and Substantive) Validity of Choice of Law Clause</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 12:</u> The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention. Nevertheless, to establish that one of the parties has</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 5:</u> A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.</li> </ul>

<p>not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business.</p>	
<p><b><u>Rules for Determining the Applicable Law: Severability of Choice of Law Clause</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 12:</u> The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention.</li> </ul> <p>Nevertheless, to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business.</p>	<ul style="list-style-type: none"> <li>• <u>Article 7:</u> A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.</li> </ul>
<p><b><u>Rules for Determining the Applicable Law: Applicability to All or Part of the Contract</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 7, para 1:</u> The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 2.2:</u> The parties may choose: <ul style="list-style-type: none"> <li>(a) the law applicable to the whole contract or to only part of it; and</li> <li>(b) different laws for different parts of the contract.</li> </ul> </li> </ul>
<p><b><u>Rules for Determining the Applicable Law: Amendments</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 8:</u> The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties.</li> </ul> <p>Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.</p>	<ul style="list-style-type: none"> <li>• <u>Article 2.3:</u> The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.</li> </ul>
<p><b><u>Rules for Determining the Applicable Law (Absence or Ineffective Choice of Law): Closest Ties and General Principles of International Commercial Law</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 9:</u> If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.</li> </ul> <p>The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.</p> <p>Nevertheless, if a part of the contract were</p>	

<p>separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.</p> <ul style="list-style-type: none"> <li>• <u>Article 10</u>: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the resolution of a particular case.</li> </ul>	
<p><b><u>Rules for Determining the Applicable Law : Mandatory Rules, Public Policy &amp; “Ordre Public”</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 11</u>: Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements.</li> </ul> <p>It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.</p> <p><u>Article 18</u>: Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.</p>	<ul style="list-style-type: none"> <li>• <u>Article 11</u>: <ol style="list-style-type: none"> <li>1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.</li> <li>2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.</li> <li>3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (<i>ordre public</i>) of the forum.</li> <li>4. The law of the forum determines when a court may or must apply or take into account the public policy (<i>ordre public</i>) of a State the law of which would be applicable in the absence of a choice of law.</li> <li>5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (<i>ordre public</i>), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.</li> </ol> </li> </ul>
<p><b><u>Existence and Validity of Contract Itself: Validity as to Substance</u></b></p>	
<ul style="list-style-type: none"> <li>• <u>Article 12, para. 1</u>: The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Article 9.1</u>: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: <ol style="list-style-type: none"> <li>(e) validity and the consequences of invalidity of the contract;</li> </ol> </li> </ul>

<b><u>Existence and Validity of Contract Itself: Validity as to Form</u></b>	
<ul style="list-style-type: none"> <li>● <u>Article 13</u>: A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or with those of the law of the State in which the contract is valid or with the law of the place where the contract is performed.</li> </ul> <p>If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.</p>	<ul style="list-style-type: none"> <li>● <u>Article 9.1</u>: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: <ul style="list-style-type: none"> <li>(e) validity and the consequences of invalidity of the contract;</li> </ul> </li> <li>● <u>Article 9.2</u>: Paragraph 1e does not preclude the application of any other governing law supporting the formal validity of the contract.</li> </ul>
<b><u>Scope of the Applicable Law</u></b>	
<ul style="list-style-type: none"> <li>● <u>Article 14</u>: The law applicable to the contract in virtue of Chapter 2 of this Convention shall govern principally: <ul style="list-style-type: none"> <li>a) its interpretation;</li> <li>b) the rights and obligations of the parties;</li> <li>c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation;</li> <li>d) the various ways in which the obligations can be performed, and prescription and lapsing of actions;</li> <li>e) the consequences of nullity or invalidity of the contract.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>● <u>Article 9.1</u>: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: <ul style="list-style-type: none"> <li>(a) interpretation;</li> <li>(b) rights and obligations arising from the contract;</li> <li>(c) performance and the consequences of non-performance, including the assessment of damages;</li> <li>(d) the various ways of extinguishing obligations, and prescription and limitation periods;</li> <li>(e) validity and the consequences of invalidity of the contract;</li> <li>(f) burden of proof and legal presumptions;</li> <li>(g) pre-contractual obligations.</li> </ul> </li> </ul>
<b><u>Scope of the Applicable Law: Considerations Concerning Agency</u></b>	
<ul style="list-style-type: none"> <li>● <u>Article 15</u>: The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.</li> </ul>	<ul style="list-style-type: none"> <li>● <u>Article 1.3</u>: These Principles do not address the law governing: <ul style="list-style-type: none"> <li>(f) the issue of whether an agent is able to bind a principal to a third party.</li> </ul> </li> </ul>

<b><u>Scope of the Applicable Law: Considerations Concerning Public Notice</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 16</u>: The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity in respect of the same.</li> </ul>	
<b><u>General Provisions and Other Considerations: Rules of Private International Law</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 17</u>: For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Preamble, para. 3</u>: [The Principles] may be used to interpret, supplement and develop rules of private international law.</li> <li>• <u>Article 8</u>: A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.</li> </ul>
<b><u>General Provisions and Other Considerations: Other International Agreements</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 6</u>: The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.</li> <li>• <u>Article 20</u>: This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are pertinent, or those concluded within the context of integration movements.</li> </ul>	
<b><u>General Provisions and Other Considerations: States with Two or More Territorial Units or Systems of Law</u></b>	
<ul style="list-style-type: none"> <li>• <u>Article 22</u>: In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State.</li> <li>• <u>Article 23</u>: A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.</li> </ul>	

**APPENDIX B**

**INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS**

**Reconciliation between the Spanish, English and French Texts**

**(PART 1 – English)**

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**CONVENCIÓN INTERAMERICANA**

**SOBRE DERECHO APLICABLE A LOS CONTRATOS INTERNACIONALES**

**La reconciliación entre los Textos Español, Inglés y Francés**

**(PARTE 1 - Inglés)**

**COMMENTARY:**

Article 30 states that the English, French, Portuguese and Spanish texts are equally authentic.

**Legibility – Level 1:** Recommended reading in order to clarify meaning and/or for improved consistency between the texts.

**Legibility – Level 2:** Although not required, suggested reading for clarification.

**Differences in Meaning:** In three instances the meaning is clear but different as between the language versions, or unclear in more than one language.

**Note:** Minor differences in language that do not hamper understanding have not been highlighted. Annotations have not been provided. It was thought these suggested readings could be helpful to promote the use of the texts to further advance the development of the law applicable to international contracts in the Americas.

**COMENTARIO:**

El artículo 30 establece que los textos en español, francés, inglés y portugués son igualmente auténticos.

**Legibilidad - Nivel 1:** Se recomienda la lectura para aclarar el significado y/o mejorar la consistencia entre los textos.

**Legibilidad - Nivel 2:** Aunque no es necesario, lectura sugerida para aclaración.

**Diferencias en Significado:** En los tres casos el significado es claro, pero hay diferencias entre las versiones lingüísticas, o poco clara en más de un idioma.

**Nota:** Las pequeñas diferencias de lenguaje que no dificulten la comprensión no se han puesto de relieve. No se han proporcionado anotaciones. Se pensaba estas lecturas sugeridas podrían ser útiles para promover el uso de los textos para seguir avanzando en el desarrollo del derecho aplicable a los contratos internacionales en las Américas.

<b>ORIGINAL SPANISH</b>	<b>ORIGINAL ENGLISH</b>	<b>DIL RECOMMENDED READING</b>
<b>CONVENCIÓN INTERAMERICANA SOBRE DERECHO APLICABLE A LOS CONTRATOS INTERNACIONALES</b>	<b>INTER-AMERICAN CONVENTION  ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS</b>	<b>INTER-AMERICAN CONVENTION  ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS</b>
<i>Suscrita en México, D.F., México el 17 de marzo de 1994, en la Quinta Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP-V)</i>	<i>Signed at Mexico, D.F., Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V)</i>	<i>Signed at Mexico, D.F., Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V)</i>

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
<p>Estados Partes de esta Convención,</p> <p>REAFIRMANDO su voluntad de continuar el desarrollo progresivo y la codificación del derecho internacional privado entre Estados miembros de la Organización de los Estados Americanos;</p> <p>REITERANDO la conveniencia de armonizar las soluciones de las cuestiones relativas al comercio internacional;</p> <p>CONSIDERANDO que la interdependencia económica de los Estados ha propiciado la integración regional y continental, y que para estimular este proceso es necesario facilitar la contratación internacional removiendo las diferencias que presenta su marco jurídico,</p> <p>HAN CONVENIDO aprobar la siguiente Convención:</p>	<p>The States Parties to this Convention,</p> <p>REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States;</p> <p>REASSERTING the advisability of harmonizing solutions to international trade issues;</p> <p>BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them,</p> <p>HAVE AGREED to approve the following Convention:</p>	<p>The States Parties to this Convention,</p> <p>REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States;</p> <p>REASSERTING the advisability of harmonizing solutions to international trade issues;</p> <p>BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them,</p> <p>HAVE AGREED to approve the following Convention:</p>

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
<p><b>CAPITULO PRIMERO</b></p> <p><b>Ámbito de aplicación</b></p>	<p><b>CHAPTER I</b></p> <p><b>Scope of Application</b></p>	<p><b>CHAPTER I</b></p> <p><b>Scope of Application</b></p>
<p><b>Artículo 1</b></p> <p>Esta Convención determina el derecho aplicable a los contratos internacionales.</p> <p>Se entenderá que un contrato es internacional si las partes del mismo tienen su residencia habitual o su establecimiento en Estados Partes diferentes, o si el contrato tiene contactos objetivos con más de un Estado Parte.</p> <p>Esta Convención se aplicará a contratos celebrados o en que sean parte Estados, entidades u organismos estatales, a menos que las partes en el contrato la excluyan expresamente. Sin embargo, cualquier Estado Parte podrá declarar en el momento de firmar, ratificar o adherir a esta Convención que ella no se aplicará a todos o a alguna categoría de contratos en los cuales el Estado o las entidades u organismos estatales sean parte.</p> <p>Cualquier Estado Parte podrá, al momento</p>	<p><b>Article 1</b></p> <p>This Convention shall determine the law applicable to international contracts.</p> <p>It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party.</p> <p>This Convention shall apply to contracts entered into or contracts to which States or State agencies or entities are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party.</p>	<p><b>Article 1</b></p> <p>This Convention shall determine the law applicable to international contracts.</p> <p>It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments <b>principal place of business</b> in different States Parties or if the contract has objective <b>ties connections</b> with more than one State Party.</p> <p>This Convention shall apply to contracts entered into <b>by States or State agencies or entities</b> or contracts to which <del>States or State agencies or entities</del> <b>they</b> are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party.</p> <p>Any State Party may, at the time it <b>signs</b>,</p>

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
de firmar, ratificar o adherir a la presente Convención, declarar a qué clase de contratos no se aplicará la misma.	Any State Party may, at the time it ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.	ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.
<b>Artículo 2</b>  El derecho designado por esta Convención se aplicará aun cuando tal derecho sea el de un Estado no Parte.	<b>Article 2</b>  The law designated by the Convention shall be applied even if said law is that of a State that is not a party.	<b>Article 2</b>  The law designated by the Convention shall be applied even if said law is that of a State that is not a party.
<b>Artículo 3</b>  Las normas de esta Convención se aplicarán, con las adaptaciones necesarias y posibles, a las nuevas modalidades de contratación utilizadas como consecuencia del desarrollo comercial internacional.	<b>Article 3</b>  The provisions of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of contracts used as a consequence of the development of international trade.	<b>Article 3</b>  The <del>provisions</del> <b>rules</b> of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of <del>contracts contracting</del> used as a consequence of the development of international trade.
<b>Artículo 4</b>  Para los efectos de interpretación y aplicación de esta Convención, se tendrá en cuenta su carácter internacional y la necesidad de promover la uniformidad de su aplicación.	<b>Article 4</b>  For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.	<b>Article 4</b>  For purposes of interpretation and application of this Convention, <b>regard shall be had to</b> its international nature and the need to promote uniformity in its application. <del>shall be taken into account.</del>
<b>Artículo 5</b>  Esta Convención no determina el derecho aplicable a:	<b>Article 5</b>  This Convention does not determine the law applicable to:	<b>Article 5</b>  This Convention does not determine the law applicable to:

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
<p>a) las cuestiones derivadas del estado civil de las personas físicas, la capacidad de las partes o las consecuencias de la nulidad o invalidez del contrato que dimanen de la incapacidad de una de las partes;</p> <p>b) las obligaciones contractuales que tuviesen como objeto principal cuestiones sucesorias, cuestiones testamentarias, regímenes matrimoniales o aquellas derivadas de relaciones de familia;</p> <p>c) las obligaciones provenientes de títulos de crédito;</p> <p>d) las obligaciones provenientes de la venta, transferencia o comercialización de títulos en los mercados de valores;</p>	<p>a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties;</p> <p>b) contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships;</p> <p>c) obligations deriving from securities;</p> <p>d) obligations deriving from securities transactions;</p> <p>e) the agreements of the parties concerning arbitration or selection of forum;</p>	<p>a) <del>questions</del> <b>issues</b> arising from the <del>marital civil</del> status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties;</p> <p>b) contractual obligations <del>intended for</del> <b>essentially related to</b> successional and <del>questions</del> testamentary <b>matters</b>, marital arrangements or those deriving from family relationships;</p> <p>c) obligations deriving from <del>securities</del> <b>negotiable instruments</b>;</p> <p>d) obligations deriving from <del>securities transactions</del> <b>the sale, transfer or marketing of securities in securities markets</b>;</p> <p>e) the agreements <del>of the parties</del> concerning arbitration or selection of forum;</p> <p>f) <del>questions</del> <b>issues</b> of company law,</p>

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
<p>e) los acuerdos sobre arbitraje o elección de foro;</p> <p>f) las cuestiones de derecho societario, incluso la existencia, capacidad, funcionamiento y disolución de las sociedades comerciales y de las personas jurídicas en general.</p>	<p>f) questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.</p>	<p>including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.</p>
<p><b>Artículo 6</b></p> <p>Las normas de esta Convención no se aplicarán a aquellos contratos que tengan una regulación autónoma en el derecho convencional internacional vigente entre los Estados Partes de esta Convención.</p>	<p><b>Article 6</b></p> <p>The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.</p>	<p><b>Article 6</b></p> <p>The <b>provisions rules</b> of this Convention shall not be applicable to <b>contracts which have autonomous regulations specifically regulated</b> in international conventional law in force among the States Parties to this Convention.</p>
<p><b>CAPITULO SEGUNDO</b></p> <p><b>Determinación del derecho aplicable</b></p>	<p><b>CHAPTER II</b></p> <p><b>Determination of applicable law</b></p>	<p><b>CHAPTER II</b></p> <p><b>Determination of applicable law</b></p>
<p><b>Artículo 7</b></p> <p>El contrato se rige por el derecho elegido por las partes. El acuerdo de las partes sobre esta elección debe ser expreso o, en caso de ausencia de acuerdo expreso, debe desprenderse en forma evidente de la</p>	<p><b>Article 7</b></p> <p>The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from</p>	<p><b>Article 7</b></p> <p>The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from</p>

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
<p>conducta de las partes y de las cláusulas contractuales, consideradas en su conjunto. Dicha elección podrá referirse a la totalidad del contrato o a una parte del mismo.</p> <p>La selección de un determinado foro por las partes no entraña necesariamente la elección del derecho aplicable.</p>	<p>the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</p> <p>Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.</p>	<p>the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.</p> <p>Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.</p>
<p><b>Artículo 8</b></p> <p>En cualquier momento, las partes podrán acordar que el contrato quede sometido en todo o en parte a un derecho distinto de aquel por el que se regía anteriormente, haya sido o no éste elegido por las partes. Sin embargo, dicha modificación no afectará la validez formal del contrato original ni los derechos de terceros.</p>	<p><b>Article 8</b></p> <p>The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.</p>	<p><b>Article 8</b></p> <p>The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.</p>
<p><b>Artículo 9</b></p> <p>Si las partes no hubieran elegido el derecho aplicable, o si su elección resultara ineficaz, el contrato se regirá por el derecho del Estado con el cual tenga los vínculos más estrechos.</p>	<p><b>Article 9</b></p> <p>If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.</p>	<p><b>Article 9</b></p> <p>If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest <b>ties connections.</b></p>

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<p>El tribunal tomará en cuenta todos los elementos objetivos y subjetivos que se desprendan del contrato para determinar el derecho del Estado con el cual tiene vínculos más estrechos.</p> <p>También tomará en cuenta los principios generales del derecho comercial internacional aceptados por organismos internacionales.</p> <p>No obstante, si una parte del contrato fuera separable del resto del contrato y tuviese una conexión más estrecha con otro Estado, podrá aplicarse, a título excepcional, la ley de este otro Estado a esta parte del contrato.</p>	<p>The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.</p> <p>Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.</p>	<p>The Court <del>will shall take into account</del> <b>have regard to</b> all objective and subjective elements of the contract to determine the law of the State with which it has the closest <b>ties connections</b>. It shall also <del>take into account</del> <b>have regard to</b> the general principles of international commercial law recognized by <b>international organizations</b>.</p> <p>Nevertheless, if a part of the contract were separable from the rest and if it had a closer <b>tie connection</b> with another State, the law of that State could, exceptionally, apply to that part of the contract.</p>
<p><b>Artículo 10</b></p> <p>Además de lo dispuesto en los artículos anteriores, se aplicarán, cuando corresponda, las normas, las costumbres y los principios del derecho comercial internacional, así como los usos y prácticas comerciales de general aceptación con la finalidad de realizar las exigencias impuestas por la justicia y la equidad en la</p>	<p><b>Article 10</b></p> <p>In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.</p>	<p><b>Article 10</b></p> <p>In addition to the provisions in the foregoing articles, the <b>guidelines rules</b>, customs, and principles of international commercial law as well as generally accepted commercial usage and practices shall apply in order to discharge the requirements of justice and equity in the</p>

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solución del caso concreto.		<b>resolution of a</b> particular case.
<p><b>Artículo 11</b></p> <p>No obstante lo previsto en los artículos anteriores, se aplicarán necesariamente las disposiciones del derecho del foro cuando tengan carácter imperativo.</p> <p>Será discreción del foro, cuando lo considere pertinente, aplicar las disposiciones imperativas del derecho de otro Estado con el cual el contrato tenga vínculos estrechos.</p>	<p><b>Article 11</b></p> <p>Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements.</p> <p>It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.</p>	<p><b>Article 11</b></p> <p>Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements.</p> <p><del>It shall be up to</del> the forum <b>has the discretion when it considers it relevant to decide when it applies to apply</b> the mandatory provisions of the law of another State with which the contract has close <del>ties</del> <b>connections.</b></p>
<p><b>CAPITULO TERCERO</b></p> <p><b>Existencia y validez del contrato</b></p>	<p><b>CHAPTER III</b></p> <p><b>Existence and Validity of the Contract</b></p>	<p><b>CHAPTER III</b></p> <p><b>Existence and Validity of the Contract</b></p>
<p><b>Artículo 12</b></p> <p>La existencia y la validez del contrato o de cualquiera de sus disposiciones, así como la validez sustancial del consentimiento de las partes respecto a la elección del derecho aplicable, se regirán por la norma que corresponda conforme a esta Convención de acuerdo con los términos</p>	<p><b>Article 12</b></p> <p>The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention.</p>	<p><b>Article 12</b></p> <p>The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention.</p>

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<p>de su Capítulo Segundo.</p> <p>Sin embargo, para establecer que una parte no ha consentido debidamente, el juez deberá determinar el derecho aplicable tomando en consideración la residencia habitual o el establecimiento de dicha parte.</p>	<p>Nevertheless, to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business.</p>	<p>Nevertheless, to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business <b>of that party.</b></p>
<p><b>Artículo 13</b></p> <p>Un contrato celebrado entre partes que se encuentren en el mismo Estado será válido, en cuanto a la forma, si cumple con los requisitos establecidos en el derecho que rige dicho contrato según esta Convención o con los fijados en el derecho del Estado en que se celebre o con el derecho del lugar de su ejecución.</p> <p>Si las personas se encuentran en Estados distintos en el momento de la celebración del contrato, éste será válido en cuanto a la forma si cumple con los requisitos establecidos en el derecho que rige según esta Convención en cuanto al fondo o con los del derecho de uno de los Estados en que se celebra o con el derecho del lugar de su ejecución.</p>	<p><b>Article 13</b></p> <p>A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or with those of the law of the State in which the contract is valid or with the law of the place where the contract is performed.</p> <p>If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.</p>	<p><b>Article 13</b></p> <p>A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or <b>with</b> those of the law of the State in which the contract is <b>valid concluded</b> or <b>with</b> the law of the place where the contract is performed.</p> <p>If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law <b>governing it which, in accordance with this Convention, governs</b> as to substance, or those of the law of one of the States in which it is concluded or <b>with</b> the law of the place where the contract is performed.</p>

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<p><b>CAPITULO CUARTO</b></p> <p><b>Ámbito del derecho aplicable</b></p>	<p><b>CHAPTER IV</b></p> <p><b>Scope of the applicable law</b></p>	<p><b>CHAPTER IV</b></p> <p><b>Scope of the applicable law</b></p>
<p><b>Artículo 14</b></p> <p>El derecho aplicable al contrato en virtud de lo dispuesto en el Capítulo Segundo de esta Convención regulará principalmente:</p> <p>a) su interpretación;</p> <p>b) los derechos y las obligaciones de las partes;</p> <p>c) la ejecución de las obligaciones que establece y las consecuencias del incumplimiento del contrato, comprendiendo la evaluación del daño en la medida que pueda determinar el pago de una indemnización compensatoria;</p> <p>d) los diversos modos de extinción de las obligaciones, incluso la prescripción y caducidad de las acciones;</p> <p>e) las consecuencias de la nulidad o invalidez del contrato.</p>	<p><b>Article 14</b></p> <p>The law applicable to the contract in virtue of Chapter 2 of this Convention shall govern principally:</p> <p>a) its interpretation;</p> <p>b) the rights and obligations of the parties;</p> <p>c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation;</p> <p>d) the various ways in which the obligations can be performed, and prescription and lapsing of actions;</p> <p>e) the consequences of nullity or invalidity of the contract.</p>	<p><b>Article 14</b></p> <p>The law applicable to the contract <del>is</del> <b>by</b> virtue of Chapter 2 of this Convention shall govern principally:</p> <p>a) its interpretation;</p> <p>b) the rights and obligations of the parties;</p> <p>c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of <b>injury loss</b> to the extent that this may determine payment of compensation;</p> <p>d) the various ways in which the obligations <b>can be performed are extinguished, including and</b> prescription and lapsing of actions;</p> <p>e) the consequences of nullity or invalidity of the contract.</p>

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<p><b>Artículo 15</b></p> <p>Lo dispuesto en el artículo 10 se tomará en cuenta para decidir la cuestión acerca de si un mandatario puede obligar a su mandante o un órgano a una sociedad o a una persona jurídica.</p>	<p><b>Article 15</b></p> <p>The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.</p>	<p><b>Article 15</b></p> <p>The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.</p>
<p><b>Artículo 16</b></p> <p>El derecho del Estado donde deban inscribirse o publicarse los contratos internacionales regulará todas las materias concernientes a la publicidad de aquéllos.</p>	<p><b>Article 16</b></p> <p>The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity.</p>	<p><b>Article 16</b></p> <p>The law of the State where international contracts are to be registered or published shall govern all matters concerning <b>publicity filing or notice</b>.</p>
<p><b>Artículo 17</b></p> <p>Para los efectos de esta Convención se entenderá por "derecho" el vigente en un Estado, con exclusión de sus normas relativas al conflicto de leyes.</p>	<p><b>Article 17</b></p> <p>For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.</p>	<p><b>Article 17</b></p> <p>For the purposes of this Convention, "law" shall be understood to mean the law <b>current in force</b> in a State, excluding rules concerning conflict of laws.</p>
<p><b>Artículo 18</b></p> <p>El derecho designado por esta Convención sólo podrá ser excluido cuando sea manifiestamente contrario al orden público del foro.</p>	<p><b>Article 18</b></p> <p>Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.</p>	<p><b>Article 18</b></p> <p><b>Application of</b> The law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.</p>

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<p><b>CAPITULO QUINTO</b></p> <p><b>Disposiciones generales</b></p>	<p><b>CHAPTER V</b></p> <p><b>General Provisions</b></p>	<p><b>CHAPTER V</b></p> <p><b>General Provisions</b></p>
<p><b>Artículo 19</b></p> <p>Las disposiciones de esta Convención se aplicarán en un Estado Parte a los contratos concluidos después de su entrada en vigor en ese Estado Parte.</p>	<p><b>Article 19</b></p> <p>In a State Party, the provisions of this Convention shall apply to contracts concluded subsequent to its entry into force in that State.</p>	<p><b>Article 19</b></p> <p>In a State Party, the provisions of this Convention shall apply to contracts concluded subsequent to its entry into force in that State.</p>
<p><b>Artículo 20</b></p> <p>Esta Convención no afectará la aplicación de otros convenios internacionales que contengan normas sobre el mismo objeto en los que un Estado Parte de esta Convención es o llegue a ser parte, cuando se celebren dentro del marco de los procesos de integración.</p>	<p><b>Article 20</b></p> <p>This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are pertinent, or those within the context of integration movements.</p>	<p><b>Article 20</b></p> <p>This Convention shall not affect the application of other international conventions <b>containing rules on the same subject</b> to which a State Party to this Convention is or becomes a party, <b>insofar as they are pertinent, or those within the context of if they are concluded within the framework</b> of integration <b>movements processes</b>.</p>
<p><b>Artículo 21</b></p> <p>En el momento de firmar, ratificar o adherir a esta Convención, los Estados podrán formular reservas que versen sobre una o más disposiciones específicas y que no sean incompatibles con el objeto y fin de esta Convención.</p>	<p><b>Article 21</b></p> <p>When signing, ratifying or acceding to this Convention, States may formulate reservations that apply to one or more specific provisions and which are not incompatible with the effect and purpose of this Convention.</p>	<p><b>Article 21</b></p> <p>When signing, ratifying or acceding to this Convention, States may formulate reservations that apply to one or more specific provisions and which are not incompatible with the <b>effect object</b> and purpose of this Convention.</p>

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<p>Un Estado Parte podrá retirar en cualquier momento la reserva que haya formulado. El efecto de la reserva cesará el primer día del tercer mes calendario siguiente a la fecha de notificación del retiro.</p>	<p>A State Party may at any time withdraw a reservation it has formulated. The effect of such reservation shall cease on the first day of the third calendar month following the date of notification of withdrawal.</p>	<p>A State Party may at any time withdraw a reservation it has formulated. The effect of such reservation shall cease on the first day of the third calendar month following the date of notification of withdrawal.</p>
<p><b>Artículo 22</b></p> <p>Respecto a un Estado que tenga en cuestiones tratadas en la presente Convención dos o más sistemas jurídicos aplicables en unidades territoriales diferentes: a) cualquier referencia al derecho del Estado contempla el derecho en la correspondiente unidad territorial; b) cualquier referencia a la residencia habitual o al establecimiento en el Estado se entenderá referida a la residencia habitual o al establecimiento en una unidad territorial del Estado.</p>	<p><b>Article 22</b></p> <p>In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State.</p>	<p><b>Article 22</b></p> <p>In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State.</p>
<p><b>Artículo 23</b></p> <p>Un Estado compuesto de diferentes unidades territoriales que tengan sus propios sistemas jurídicos en cuestiones tratadas en la presente Convención no estará obligado a aplicar las normas de esta Convención a los conflictos que surjan entre los sistemas jurídicos vigentes en</p>	<p><b>Article 23</b></p> <p>A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.</p>	<p><b>Article 23</b></p> <p>A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.</p>

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dichas unidades territoriales.		
<p><b>Artículo 24</b></p> <p>Los Estados que tengan dos o más unidades territoriales en las que se apliquen sistemas jurídicos diferentes en cuestiones tratadas en la presente Convención podrán declarar, en el momento de la firma, ratificación o adhesión, que la Convención se aplicará a todas sus unidades territoriales o solamente a una o más de ellas.</p> <p>Tales declaraciones podrán ser modificadas mediante declaraciones ulteriores, que especificarán expresamente la o las unidades territoriales a las que se aplicará la presente Convención. Dichas declaraciones ulteriores se transmitirán a la Secretaría General de la Organización de los Estados Americanos y surtirán efecto noventa días después de recibidas.</p>	<p><b>Article 24</b></p> <p>If a State has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them.</p> <p>Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall take effect ninety days after the date of their receipt.</p>	<p><b>Article 24</b></p> <p>If a State has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them.</p> <p>Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall take effect ninety days after the date of their receipt.</p>

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<p><b>CAPITULO SEXTO</b></p> <p><b>Cláusulas finales</b></p>	<p><b>CHAPTER VI</b></p> <p><b>Final Clauses</b></p>	<p><b>CHAPTER VI</b></p> <p><b>Final Clauses</b></p>
<p><b>Artículo 25</b></p> <p>Esta Convención está abierta a la firma de los Estados miembros de la Organización de los Estados Americanos.</p>	<p><b>Article 25</b></p> <p>This Convention shall be open to signature by the member States of the Organization of American States.</p>	<p><b>Article 25</b></p> <p>This Convention shall be open to signature by the member States of the Organization of American States.</p>
<p><b>Artículo 26</b></p> <p>Esta Convención está sujeta a ratificación. Los instrumentos de ratificación se depositarán en la Secretaría General de la Organización de los Estados Americanos.</p>	<p><b>Article 26</b></p> <p>This Convention shall be subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.</p>	<p><b>Article 26</b></p> <p>This Convention shall be subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.</p>
<p><b>Artículo 27</b></p> <p>Esta Convención quedará abierta a la adhesión de cualquier otro Estado después que haya entrado en vigencia. Los instrumentos de adhesión se depositarán en la Secretaría General de la Organización de los Estados Americanos.</p>	<p><b>Article 27</b></p> <p>This Convention shall remain open for accession by any other State after it has entered into force. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.</p>	<p><b>Article 27</b></p> <p>This Convention shall remain open for accession by any other State after it has entered into force. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.</p>
<p><b>Artículo 28</b></p> <p>Esta Convención entrará en vigor para los Estados ratificantes el trigésimo día a partir de la fecha en que haya sido depositado el</p>	<p><b>Article 28</b></p> <p>This Convention shall enter into force for the ratifying States on the thirtieth day following the date of deposit of the second</p>	<p><b>Article 28</b></p> <p>This Convention shall enter into force for the ratifying States on the thirtieth day following the date of deposit of the second</p>

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<p>segundo instrumento de ratificación.</p> <p>Para cada Estado que ratifique esta Convención o se adhiera a ella después de haber sido depositado el segundo instrumento de ratificación, la Convención entrará en vigor el trigésimo día a partir de la fecha en que tal Estado haya depositado su instrumento de ratificación o adhesión.</p>	<p>instrument of ratification.</p> <p>For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.</p>	<p>instrument of ratification.</p> <p>For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.</p>
<p><b>Artículo 29</b></p> <p>Esta Convención regirá indefinidamente, pero cualquiera de los Estados Partes podrá denunciarla. El instrumento de denuncia será depositado en la Secretaría General de la Organización de los Estados Americanos. Transcurrido un año, contado a partir de la fecha de depósito del instrumento de denuncia, la Convención cesará en sus efectos para el Estado denunciante.</p>	<p><b>Article 29</b></p> <p>This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State.</p>	<p><b>Article 29</b></p> <p>This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State.</p>
<p><b>Artículo 30</b></p> <p>El instrumento original de esta Convención, cuyos textos en español, francés, inglés y portugués son igualmente auténticos, será depositado en la Secretaría General de la Organización de los Estados Americanos, la que enviará copia auténtica</p>	<p><b>Article 30</b></p> <p>The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward an</p>	<p><b>Article 30</b></p> <p>The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward an</p>

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<p>de su texto para su registro y publicación a la Secretaría de las Naciones Unidas, de conformidad con el artículo 102 de su Carta constitutiva. La Secretaría General de la Organización de los Estados Americanos notificará a los Estados miembros de dicha Organización y a los Estados que hayan adherido a la Convención, las firmas, los depósitos de instrumentos de ratificación, adhesión y denuncia, así como las reservas que hubiera y el retiro de las últimas.</p>	<p>authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of the Organization and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any, and of their withdrawal.</p>	<p>authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of the Organization and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any, and of their withdrawal.</p>
<p>EN FE DE LO CUAL los plenipotenciarios infrascritos, debidamente autorizados por sus respectivos Gobiernos, firman esta Convención.</p> <p>HECHO EN LA CIUDAD DE MÉXICO, D.F., MÉXICO, el día diecisiete de marzo de mil novecientos noventa y cuatro.</p>	<p>IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, do hereby sign the present Convention.</p> <p>DONE AT MEXICO, D.F., MEXICO, this seventeenth day of March, one thousand nine hundred and ninety-four.</p>	<p>IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, do hereby sign the present Convention.</p> <p>DONE AT MEXICO, D.F., MEXICO, this seventeenth day of March, one thousand nine hundred and ninety-four.</p>

## APPENDIX C

TABLE OF LEGISLATION<sup>1</sup>

- Inter-American Treaties and Conventions
  - Treaty on International Civil Law, February 12, 1889, Montevideo
    - Articles 33, 38, and 40
  - Treaty on International Civil Law, March 19, 1940, Montevideo
    - Article 37
  - Convention on Private International Law, February 20, 1928, Havana, Cuba (“Bustamante Code”)
    - Articles 169-172, 176, 180-181, 183-184 and 186
  - Inter-American Convention on the Law Applicable to International Contracts, March 15, 1994 (“Mexico Convention”)
    - Articles 1(2), 3(1), 4, 5, 5(b), 5(c), 5(d), 5(e), 5(f), 6, 7, 7(1)(2), 8(1), 9(1), 9(2), 10, 11, 11(1), 12, 12(1)(2), 13, 14, 14(a), 14 (b), 14(c), 15, 16, 17, 18, 20, 22, 22(1), 23, 24
  - Inter-American Convention on Commercial Arbitration, January 30, 1975, Panama
  - Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, Montevideo
  - Rules of Procedure of the Inter-American Commission on Commercial Arbitration (as amended and in effect April 1, 2002)
    - Article 30
  - Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, January 30, 1975, Panama
  - Inter-American Convention on Conflict of Laws concerning Checks, January 30, 1975, Panama and May 8, 1979, Montevideo
  - Inter-American Convention on Conflict of Laws concerning Commercial Companies, May 8, 1979, Montevideo
  - Inter-American Convention on General Rules of Private International Law, May 8, 1979, Montevideo
    - Articles 3, 5, 9, 33.3
  - Treaty establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Common Market of the South [MERCOSUR]), March 26, 1991 (“Treaty of Asuncion”)
    - Article 1
    - Agreement on International Commercial Arbitration of 1998, Article 10
    - Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR, May 27, 1992
    - Protocol on Precautionary Measures of MERCOSUR, Dec. 1, 1994
  - Charter of the OAS
    - Article 122
- Other Inter-American References
  - Principles of Latin American Contract Law
  - OHADAC Principles on International Commercial Contracts
  - ASADIP Principles on Transnational Access to Justice

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<sup>1</sup> Resource constraints did not permit more precise citations.

- International Treaties, Conventions, Model Laws and Principles
  - Convention on the Law Applicable to Contractual Obligations, June 19, 1980, Rome (“Rome Convention”)
    - Articles 3, 3(1), 7, 18, 19
  - Regulation of the European Parliament and of the Council on the law applicable to contractual obligations, June 17, 2008, Rome (“Rome I”)
    - Articles 1(2)(b), 3(1),3(2), 3(3), 3(4), 4, 5(2), 7(3), 8(1), 9(3), 10(1)(2), 11(1), 12(1),12(1)(a)(b)(c), 14, 15, 17, 18(1), 20, 21, 22 (2), 23, 25(1)
  - Principles on Choice of Law in International Commercial Contracts, March 19, 2015 (“Hague Principles”)
    - Articles 1, 1.2, 1.3(a)(b)(c)(d)(f), 2.1, 2.2, 2.3, 2.4, 3, 4, 4.2, 5, 6.1, 6.2, 7, 7.1, 8, 9.1, 9.1(a)(b)(f)(g), 10, 11.1, 11.2,11.3, 11.5, 12
    - HP Commentary
      - 1.6, 1.7, 1.25, 1.26, 1.27, 1.29,1.31, 1.32, 2.3, 2.6, 2.7, 2.9, 2.10, 2.12, 2.13, 2.14, 3.4, 3.10, 3.11,3.15, 4.11, 5.3, 5.4, 5.5, 6.1, 6.4, 6.7, 6.10, 6.28, 7.2, 7.8, 7.9, 7.10, 8.2, 9.2, 9.4, 9.5, 9.6, 9.8, 9.9, 9.11, 9.12, 11.16, 11.17, 11.18, 11.19, 11.22, 11.23, 11.25, 11.26, 11.31, 11.32, 12.3, 12.4
  - Convention on the Law Applicable to International Sales of Goods, June 15, 1955. (“1955 Hague Sales Convention”)
    - Articles 2.2, 6
  - Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964 (“1964 Sales Convention”)
  - Convention on the Law Applicable to Contracts for the International Sale of Goods, December 22, 1986 (“1986 Hague Sales Convention”)
    - Articles 10(1), 12 (g), 17, 18, 19, 20
  - Convention on the Law Applicable to Agency, March 14, 1978 (“Hague Agency Convention”)
    - Articles 16, 17
  - Convention on Choice of Court Agreements, June 30, 2005
  - Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006
  - UNIDROIT Principles of International Commercial Contracts (2016 revision and prior)
  - UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts
  - Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, Geneva
  - Convention Providing a Uniform Law for Cheques, January 1, 1934, Geneva
  - UN Convention on Contracts for the International Sale of Goods (“CISG”)
    - Articles 1(2), 4, 6, 7(1), 7(2), 8(3), 9, 9(1), 9(2), 10(a)
  - UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (“New York Convention”)
    - Article V(2)(b)
  - UN Convention on the Assignment of Receivables in International Trade, December 12, 2001
  - UNCITRAL Model Law on International Commercial Arbitration (1985)
    - Articles 1(3), 2(A)(1), 16.1, 28, 28.1, 28.2, 28.4, 36
  - UNCITRAL Arbitration Rules (1976) and as revised in 2010
    - 1976: Article 33
    - 2010: Articles 34(2), 35
  - UNCITRAL Model Law on Secured Transactions (2016)
  - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965 (“ICSID Convention”)
    - Article 42
  - UNHRC. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, June 16, 2011 (“Ruggie Principles”)
  - Universal Declaration of Human Rights, 1948

- Articles 17 and 29.1
  - Statute of the International Court of Justice, Article 38
  - European Convention on International Commercial Arbitration, April 21, 1964
  - Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950
  - Treaty on the Functioning of the EU, December 13, 2007 (“TFUE”)
    - Articles 85, 288
  - Principles of European Contract Law, (Parts I & 11, 1999), (Part III, 2003) (“PECL”)
    - Article 1:107
  - Draft Common Frame of Reference, 2008 (“DCFR”)
- Other International References
  - AAA, International Arbitration Rules (2009)
    - Article 28.2
  - FCI, Code of International Factoring Customs
  - FIDIC, Conditions of Contract for Works of Civil Engineering Construction (1987)
  - IBA, Rules on the Taking of Evidence in International Arbitration
  - ICC, International Commercial Terms or “INCOTERMS”
  - ICC, Rules of Arbitration (2012 and 2017)
    - Articles 21, 41
  - ICC, Uniform Customs and Practice for Documentary Credits or “UCP”.
  - ICC, Advertising and Marketing Communication Practice
  - ILI, The Proper Law of the Contract in Agreements between a State and a Foreign Private Person, September 11, 1979
  - ILI, The Autonomy of the Parties in International Contracts Between Private Persons or Entities, 1991
  - ITC, Model Contract for the International Commercial Sale of Perishable Goods
- Argentina
  - Civil and Commercial Code of Argentina of 2014
    - Articles 255, 2561, 2595, 2596, 2651 and 2652
  - Civil Code of Argentina of 1869
- Bolivia
  - Constitution of the Republic of Bolivia
    - Article 320.II
  - Commercial Code of Bolivia
    - Articles 852 et seq.
  - Civil Code of Bolivia
    - Article 454
  - Law 1770 of 1997
    - Articles 54 and 73
  - Law 708 of 2015
    - Article 44.I
- Brazil
  - Introductory Law to the Provisions of Brazilian Law (“LINDB”)
    - Articles 9, 9(2), 16 and 17
  - Civil Code of Brazil of 1916
    - Article 13
  - Bill 4905 (draft before Congress)
  - Law 9307 of 1996
    - Article 2
- Canada
  - Civil Code of Quebec (“CCQ”)
    - Articles 3076, 3077, 3080-3081, 3109, 3111-3112, 3117-3118
  - Saskatchewan: Consumer Protection and Business Practices Act, SS 2014, c. C-30.2, sections 15 and 101(2)
  - Ontario: Employment Standards Act, 2000, SO 2000, c. 41, s. 5
- Chile
  - Civil Code of Chile of 1857

- Article 135
  - Civil Code of Chile
    - Articles 16, 1462 and 1545
  - Commercial Code of Chile
    - Articles 113 and 141
  - Decree Law 2.349 of 1978
    - Article 1
  - Law 18.802 of 1989
  - Law 19.971 of 2004
    - Articles 16.1, 28 and 28.45
- Colombia
  - Civil Code of Colombia
    - Article 20
  - Commercial Code of Colombia
    - Articles 1328 and 1408
  - Law 1818 of 1998
    - Article 208.1
  - Law 80 of 1993
    - Article 13
  - Law 1563 of 2012
    - Articles 62, 79.2 and 101
  - Resolution 112 of 2007 issued by the Colombian Tax and Customs Authority
    - Article 3
- Costa Rica
  - Law 7727 of 1997 -Alternative Conflict Resolution and Promotion of Social Peace
  - Law 8937 of 2011 - Law of International Commercial Arbitration
  - Law 9342 of 2016 - Code of Civil Procedure
- Cuba
  - Civil Code of Cuba
    - Article 17
  - Decree Law 250 of 2007
    - Article 13
- Dominican Republic
  - Law 489 of 2008
    - Articles 11 and 33.4
  - Law 544 of 2014 on Private International Law
    - Articles 7, 58, 58(2), 59, 60 and 61(2)
- Ecuador
  - Law 000.RO/145 of 1997 on Arbitration and Mediation
    - Article 5
- El Salvador
  - Constitution of the Republic of El Salvador
    - Article 23
  - Civil Code of El Salvador
    - Article 1416
  - Decree 914 of 2002 - Law on Mediation, Conciliation, and Arbitration
    - Articles 30, 59 and 78
- Guatemala
  - Decree 2 of 1989 - Law on the Judiciary Branch
    - Article 4 and 31
  - Decree 67 of 1995 - Arbitration Law of Guatemala
    - Articles 21.1, 36.1 and 36.3
- Honduras
  - Decree 161 of 2000
    - Article 39
- Mexico

- General Regulation of International Contracts
- Federal Civil Code
  - Article 13, Section V
- Commercial Code
  - Article 1423,1432 and 1445
- Code of Civil Procedure of Mexico City, Federal District
  - Article 628
- Rules of the Arbitration Center of Mexico (2009)
- Nicaragua
  - Law 540 of 2005
    - Article 42 and 54
- Panama
  - Law 7 of 2014 - Code of Private International Law
  - Law 61 of 2015 - Code of Private International Law
    - Articles 7, 26, 27, 43, 69, 70, 72, 86 and 87
  - Law 5 of 1999 - Arbitration, conciliation, and mediation
    - Article 3 and 30
  - Law 131 of 2013 - National and International Arbitration in Panama
- Paraguay
  - Law 5393 of 2015 – Law Applicable to International Contracts
    - Articles 1, 2, 3, 4, 4.2, 4.3, 4.4, 5, 6, 7, 8, 9, 10, 11.1, 12, 13, 14, 15, 16, 17 and 18
  - Law 1879 of 2002
    - Articles 3, 19, 32, 40(b) and 46(b))
  - Arbitration Law of Paraguay
    - Articles 40(b) and 46(b)
  - Arbitration Rules of the Arbitration and Mediation Center of Paraguay (2010)
- Peru
  - Decree 1071 of 2008
    - Article 34(3), 41(2), 57(2), 57(4), 63(1)(f) and 75(3)(b)
  - Civil Code of Peru
    - Article 2047, 2048, 2049 and 2095
  - Arbitration Rules of the Chamber of Commerce of Lima (2017)
  - Arbitration Rules of Amcham Peru
- United States
  - ALI, First Restatement of Conflict of Laws of 1934
  - ALI, Second Restatement of Conflict of Laws of 1971
    - Sections 6, 145,187(2), 188, 288 (comment b)
  - ALI, Third Restatement of Conflict of Laws (preliminary draft 2017)
  - US Uniform Commercial Code (“UCC”)
    - Section I-301.
  - NY Gen. Oblig. Law § 5-1401(1)
- Uruguay
  - Draft Law of DIPr of Uruguay
    - Article 13 and 51
  - Civil Code of Uruguay
    - Article 2399 and 2403 of the Appendix
  - Law No. 16.603 of 1994
    - Article 2404
- Venezuela
  - Law on Private International Law (Official Gazette No. 36.511, 6 August 1998)
    - Articles 1, 2, 4, 8, 10, 29, 30 and 31
  - Commercial Arbitration Law (Official Gazette No. 36.430, 7 April 1998)
    - Articles 7 and 8
- Others
  - Austria - Civil Code of 1811

- Austria - Code of Civil Procedure, as amended by the Arbitration Act of January 13, 2006
  - Article 603(2)
- Belgium - Code of Civil Procedure
  - Article 1700
- France - Code of Civil Procedure (as amended by Decree 2011-48 of 2011)
  - Article 1496, 1504, 1514, 1520(5), 1511
- Germany - Code of Civil Procedure
  - Article 9
- Italy - Code of Civil Procedure
  - Article 834
- Japan - Code of Private International Law of 2006
  - Article 1096(f)
- Netherlands - Code of Civil Procedure
  - Article 1054, 1054(2)
- Portugal - Code of Civil Procedure of 1986
  - Article 1096(f)
- Russia - Civil Code
  - Article 1210(3) and 1210(4)
- Slovenia - Arbitration Act of April 28, 2008
  - Article 33(2)
- Spain - Arbitration Act
  - Article 34(2))
- Switzerland - Private International Law Act
  - Article 116(2), 187(1)
- United Kingdom
  - Unfair Contract Terms Act of 1977
  - Sale of Goods Act of 1979

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## APPENDIX D TABLE OF CASES<sup>2</sup>

- International
  - Audiolux SA e.a. v. Groupe Bruxelles Lambert SA, CJEU, October 15, 2009, Case C-101/08
  - Federal Republic of Germany v. Council of the European Union, CJEU, October 5, 1994, Case C-280/93
  - Société Thermale d'Eugénie-Les Bains, ECJ, July 18, 2007, Case C-277/95
  - Annelore Hamilton v. Volksbank Filder eG, ECJ, April 10, 2008, Case C-412/06
  - Pia Messner v. Firma Stefan Krüger, ECJ, September 3, 2009, Case C-489/07
  - Channel Tunnel Group Ltd. and France Manche SA v. Balfour Beatty
  - Hellenic Republic v. Nikiforidis. ECJ, October 19, 2016, Case C-135/15
  - Krombach v. Bamberski, 2000, Case C-7/98
  - Eco Swiss China Time Limited v. Benetton International NV, CJEU, June 1, 1999, Case C-126/97
  - Ingmar GB Ltd. v. Eaton Leonard Technologies Inc., CJEU, 2000, Case C-381/98
  - Frahuil SA v. Assitalia SpA, CJEU, February 5, 2004, Case C-265/02
  - Petra Engler v. Janus Versand GmbH, CJEU, January 20, 2005, Case C-27/02
  - Permanent Tribunal of Review of MERCOSUR, Advisory Opinion No. 1, 2007
  - Council of the Common Market, MERCOSUR, Decision No. 3, 1998
  - Sapphire International Petroleum Ltd. v. The National Iranian Oil Company (1964), 13 ICLQ 1011
  - Asia v. Republic of Indonesia, ICSID Case, 1983

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<sup>2</sup> Only a few key cases have been cited in this Guide to illustrate particular points. Resource constraints did not permit more precise case citations.

- Saudia Arabia v. Arabian American Oil Co. (ARAMCO), 1958
- Libya v. Texaco and Liamco, 1977
- Aminoil v. Kuwait, 1982
- Framatome v. Iran, 1982
- Hotel Materials Case, ICC Arbitration Case No. 7153, 1992
- Steel Bars Case, ICC Arbitration Case No. 6653, 26 March 1993
- Cowhides Case, ICC Arbitration Case No. 7331, 1994
- Printed Banknotes Case, ICC Arbitration Case No. 9474, February 1999
- Additional ICC Cases: 1110/1963; 1422/1966; 1641/1969; 2152/1972; 2291/1975; 2637/1975; 3267/1979; 3380/1980; 3540/1980; 3327/1981; 3344/1981; 2730/1982; 4145/1984; 4434/1983; 10279/2001
- Ad hoc arbitral award in Costa Rica, 30.04.2001 / UNILEX
- Ad hoc arbitral award, 10.12.1997 / UNILEX
- Argentina
  - Sagemüller, Francisco v. Sagemüller de Hinz, Liesse et al., Second Bench of the Second Civil and Commercial Chamber of Paraná (Entre Ríos), August 10, 1988
  - Third Bench of the National Commercial Chamber, October 27, 2006
- Bolivia
  - Constitutional judgment 1834/2010-R, Constitutional Court of Bolivia, October 25, 2010
- Brazil
  - Superior Court of Labor (Tribunal Superior do Trabalho) (“TST”), DEJT, October 15, 2010, Ruling No. 186000-18.2004.5.01.0034
  - Noridane Foods S.A. v. Anexo Comercial Importação e Distribuição Ltda, Court of Appeal of Rio Grande do Sul, February 14, 2017, Ruling No. 70072362940
  - Voges Metalurgia Ltda. v. Inversiones Metalmeccanicas I.C.A. – IMETAL I.C.A, Court of Appeal of Rio Grande do Sul, March 30, 2017, Ruling No. 4-25.2016.8.21.7004192500
  - Court of Justice of Sao Paulo (Tribunal de Justiça de São Paulo) (“TJSP”), DJE, November 30, 2011, Ruling No. 9066155-90.2004.8.26.0000
  - Court of Justice of Sao Paulo (Tribunal de Justiça de São Paulo), June 06, 2008, Ruling No. 9202485-89.2007.8.26.0000
  - Court of Justice of Sao Paulo (Tribunal de Justiça de São Paulo), February 19, 2016, Ruling No. 2111792-03.2015.8.26.0000
  - Court of Justice of Sao Paulo (Tribunal de Justiça de São Paulo), DJE, January 09, 2012, Ruling No. 0125708-85.2008.8.26.0000
  - Appellate Court of the State of Rio Grande do Sul. 12th Chamber, February 16, 2017, Ruling No. 70072362940
- Canada
  - Vita Foods Products Inc. v. Unus Shipping Co. Ltd., Judicial Committee of the Privy Council, [1939] 1 All E.R. 513
  - Imperial Life Assurance Co. of Canada v. Colmenares, Supreme Court of Canada, [1967] SCR 443
  - Block Bros. Realty Ltd. v. Mollard, [1981] B.C.J. No. 4, 122 D.L.R. (3d) 323 (C.A.)
  - Canadian Acceptance Corporation Ltd. v. Matte and Matte, [1957] S.J. No. 41. (Sask. C.A.)
- Chile
  - Tschumi Case, Supreme Court, Law and Jurisprudence Magazine, XLII, part 2, section 1, page 331
  - Exequatur State Street Bank and Trust Company, Supreme Court, May 14, 2007, Ruling No. 2349-05
  - Mauricio Hochschild S.A.C.I. v. Ferrostaal A.G., Supreme Court, January 22, 2008. Ruling No. 3247-2006
  - Raimundo Serrano Mac Auliffe Corredores S.A, Supreme Court, November 30, 2004, Ruling No. 868-2003
  - Exequatur Cubix v. Markvision, Supreme Court, August 20, 2014, Ruling No. 10890-2014
  - Marlex v. European Industrial Engineering, Supreme Court, July 28, 2008, Ruling No. 2026-

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  - Cruz Barriga v. Integral Logistics Society, Supreme Court, August 25, 2010, Ruling No. 1699-2009
- Colombia
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  - García Fernandes Internacional Importação e Exportação AS v. Prodeco -Productos de Colombia, Colombian Supreme Court of Justice Civil Chamber, August 6, 2004, Ruling No. 77
  - Colombian Constitutional Court, May 26, 2005, Ruling No. T-557
  - Industria y Distribuidora Indistri SA v. SAP Andina y Del Caribe CA, Tribunal Superior del Distrito de Bogotá, D.C., Civil Chamber, March 10, 2010, Ruling No. 20100015000
  - Colombian Supreme Court Justice, June 24, 2016, Ruling No. SC8453-2016
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  - Supreme Court, Constitutional Chamber, March 13, 2012
  - Second Civil and Commercial Court of San Salvador, February 28, 2013, Ruling No. PC-29-12
- Jamaica
  - Vita Foods Products Inc. v. Unus Shipping Co. Ltd., Judicial Committee of the Privy Council, [1939] 1 All E.R. 513
  - DYC Fishing Limited v. Perla Del Caribe Inc., Supreme Court Civil Appeal of Jamaica, [2014] JMCA Civ. 26, §§ 42-44, citing R. v. International Trustee for the Protection of Bondholders, [1937] 2 All E.R. 164
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  - Stemcor UK Limited v. Guiceve S.A.C., Superior Court of Justice of Lima, First Civil Chamber with Commercial Specialization, April 28, 2011
- United States
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  - Rafael Alfonso, Civil Chamber of the Supreme Court of Justice, Ruling No. 0176
  - Sotillo vs. Instituto de Clínicas y Urología Tamanaco, C.A. et al., May 20, 2010
  - Banque Artesia Nederland, N.V. v. Corp Banca, Banco Universal C.A., Civil Chamber of the Supreme Court of Justice, (SCJ/CC), Ruling No. 0738 December 2, 2014
- Others
  - France - Bisbal 1959
  - Germany - Spanier Entscheidung, Constitutional Chamber, May 1971
  - India - Videocon Power Limited, Rep. v. Tamil Nadu Electricity Board. Madras High Court, December 2004. 2005 (3) ARBLR 399 Madras, 2004 (5) CTC 668
  - Italy - Assael Nissim v. Crespi, Supreme Court, Judgment of June 28, 1966, No. 1680
  - Luxembourg - District Court of Luxembourg, Judgments of July 7, 1988 and March 17, 1990
  - Netherlands - Alnati, Netherlands Supreme Court, May 13, 1966
  - United Kingdom - Deutsche Schachtbau- und Tiefbohrgesellschaft mbH and Others v. Shell International Petroleum Company Limited. (H. L.) (July 1988), 27 ILM 1032

## APPENDIX E

### DATABASES AND ELECTRONIC SOURCES

To assist with the uniform interpretation of international texts, two of the three international organizations dedicated primarily to the development of private international law maintain online databases that contain judicial decisions and arbitral rulings. As already noted above, UNCITRAL has created a system to collect Case Law on UNCITRAL Texts (“CLOUT”), which can be accessed in print or over the internet ([www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)). A similar system exists at UNIDROIT - the “Intelligent” database of international case law and bibliography on the UNIDROIT Principles and on the CISG - and the related database is known as UNILEX ([www.unilex.info](http://www.unilex.info)). HCCH also maintains a bibliography that is available on the HCCH website.

There are also other databases that contain information relevant for comparative law and uniform interpretation. One is the Pace Law Albert H. Kritzer CISG Database, maintained by Pace University in the United States ([www.iicl.law.pace.edu/cisg/cisg](http://www.iicl.law.pace.edu/cisg/cisg)). Another database, maintained by the Center for Transnational Law (“CENTRAL”) at Cologne University in Germany, has a method for the progressive codification of new cross-border commercial law. For that purpose, an open list of principles dealing with commercial law was prepared, which is kept easily accessible over the internet and constantly updated with the addition of judicial and arbitral jurisprudence, doctrine, and other relevant information ([www.trans-lex.org](http://www.trans-lex.org)). There are also a handful of regional CISG databases. One example is as follows: [diprargentina.com](http://diprargentina.com), base de datos de la U. Carlos III - Pilar Perales.

The official texts and current status of the Inter-American private international law instruments are accessible at the OAS website:

[http://www.oas.org/en/sla/dil/private\\_international\\_law\\_conferences.asp](http://www.oas.org/en/sla/dil/private_international_law_conferences.asp)

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## 2. **Dissolution and liquidation of simplified corporations**

During the 93<sup>rd</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), the Inter-American Juridical Committee received the visit of Dr. Francisco Reyes who in 2011 had submitted a Simplified Stock Corporation Draft Model Law that was endorsed by the OAS General Assembly in June 2017. At the opportunity, Dr. Reyes presented a proposal "on dissolution and liquidation of a company by simplified actions" In light of the positive effects of adopting the Simplified Stock Corporation Model Law (SAS), he proposed that the Committee continue to study other initiatives regarding the dissolution of companies, in particular in Latin America and the Caribbean. He testified to the existence of processes to harmonize the area of simplified stock companies in Brazil, Paraguay and Ecuador. He explained that the proposal of model law establishes simple principles, which enables operations to continue when dissolving the company. It specifies differences between liabilities and assets, as well as between small and large companies. It proposes a well-defined liability regime. It is in favor of business actions being done online, without setting terms for their conclusion. It offers a summary process with clear and expeditious rules of dissolution or termination of their life cycle. Like any other initiative, it can be improved.

Dr. José Moreno thanked Dr. Reyes for his presence and proposal for a new priority topic. He explained that Paraguay is working on a model law in the sphere of the Simplified Stock Corporation. At the same time he supported the proposal presented, he asked if the solutions of the OAS and UNCITRAL are convergent.

Dr. Duncan Hollis expressed his gratitude for Dr. José Moreno’s presence and asked him how he considers this new proposal should be drawn up, if the Simplified Stock Corporation is seen as a necessary condition for applying the new proposal, or if both can live separately. He also asked him if the proposal takes into account the mechanisms applicable in Common Law.

Dr. Miguel Espeche-Gil was thankful for the proposal, which he considered relevant in the face of the crisis of small and medium enterprises in his country. In this regard, he followed-up Dr. Hollis question regarding the compatibility of both systems. He also asked for guideline in the case of a convention is proposed.

Dr. Francisco Reyes explained that there is no dichotomy between universal-harmonization bodies and the OAS; in way, they all converge. The guidelines proposed by the OAS are very similar to those of United Nations Commission on International Trade Law (UNCITRAL). However, the scope of the OAS is different from the rest because, among others, it joins together countries with civil law and Anglo-Saxon tradition, so there should be no conflict when harmonizing. The OAS can operate more quickly than globally, and the technical aspect of the Committee's work is an impartial scenario that enables efficient progress. In response to Dr. Duncan Hollis, he noted that both can subsist separately despite regulating matters in common. The model takes into account Common Law guidelines (contractual freedom, minimum transaction costs, the possibility of liability exoneration being agreed as shareholders deem appropriate, etc.). If there are approaches that have not been included, the Committee may include them. It is a hybrid between the best practices of both traditions to make implementation easier. Finally, in response to Dr. Espeche-Gil, Dr. Reyes explained that translating should be avoided and that it was preferable to develop an adequate process of transplantation. Regarding the steps to be taken, he recommended the appointment of a Rapporteur, as was done in the case of Simplified Stock Corporation. He concluded by expressing his availability to the Committee in case of assistance.

The Chair reminded the members about the existence of a mandate from the General Assembly requesting the Inter-American Juridical Committee (CJI) and its Technical Secretariat – the Department of International Law – “to disseminate the Model Law as widely as possible among the Member States,” AG/RES. 2906 (XLVII-O/17).

The plenary of the Committee designated Dr. Ruth Stella Correa Palacio as the Rapporteur of the topic.

During the 94<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019) the issue was not discussed.

During the 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July-August, 2019), the Committee decided to eliminate the treatment of this topic from the agenda.

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## **CHAPTER III**



## OTHER ACTIVITIES

### Activities carried out by the Inter-American Juridical Committee during 2019

#### A. Participation of the President of the Inter-American Juridical Committee, Dr. Ruth StellaCorrea Palacio

##### Documents

- CJI/doc. 589/19 Report of the Chair of the Inter-American Juridical Committee to the Juridical and Political Affairs Committee - (CAPJ)
- CJI/doc. 591/19 Report of the Chair of the Inter-American Juridical Committee before the General Assembly of the Organization of American States
- CJI/doc.590/19 Report of the Chair of the Inter-American Juridical Committee before the International Law Commission of the United Nations Organization

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On April 11, the Chair submitted the Committee's annual report on the activities done by the Committee during 2019 highlighting the practical guides recently elaborated by the Committee: the Practical guide for the application of the jurisdictional immunity of International Organizations and the Guide on the law applicable to international commercial contracts in the Americas. She also dedicated a space to the budget; in this regard she requested to grant the Committee the necessary resources to meet at least twice a year. She finished her presentation describing the activities held in August 2018, the “VII Joint Meeting of the Legal Consultants of the Ministries of Foreign Affairs of the OAS Member States” and the Committee meeting with representatives of The Hague Law Conference Private International whose purpose was to evaluate working methods, coordinate efforts between both institutions in the field of codification and dissemination of private international law.

The exchange with the delegates of the Permanent Missions has been recorded in a document prepared by the Department of International Law, document CP/CAJP/INF. 618/19.

On June 28, the Chair submitted her report to the General Assembly, gathered in Medellin, Colombia.

At the opportunity, the Chair talked mainly about substantive issues, highlighting in particular the adoption of “the Guide on the law applicable to international commercial contracts in the Americas”. She also urged the countries of the Caribbean region to integrate the CJI proposing candidates and partaking in meetings with legal consultants

Regarding her intervention at the United Nations International Law Commission that took place in Geneva on July 10, 2019, the Chair confirmed that she had devoted more time to issues relating to Cybersecurity (cybersecurity) and Immunities of jurisdiction.

All mentioned documents are included below:

**CJI/doc.589/19****REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO  
THE COMMITTEE OF JURIDICAL AND POLITICAL AFFAIRS (CAJP)**

(presented by Dr. Ruth Stella Correa Palacio)

**I. Background and membership**

I would like to express our recognition to the President of the Commission of Legal and Political Affairs (CLPA), Ambassador Leonidas Rosa Bautista, Permanent Representative of Honduras before the OAS and the members present for this space at the CLPA, which allows us to present the annual report of the activities undertaken and the actions fulfilled by the IAJC in the year 2018.

The Inter-American Juridical Committee is one of the main organs through which the OAS carries out its mission, serving as advisory body of the Organization in legal matters, promoting the progressive development and the codification of International Law, and studying the legal problems referring to the integration and harmonization of domestic legislations, taking into consideration the reality of the Continent which witnesses the coexistence of the continental law and of the *common law*.

The Committee is made up of 11 national jurists of the Member States: Luis García-Corrochano Moyano (our Vice-President, from Peru); Carlos Mata Prates (Uruguay); José Antonio Moreno Rodríguez (Paraguay); Duncan B. Hollis (United States); Alix Richard (Haiti); Miguel Angel Espeche-Gil (Argentina); Iñigo Salvador Crespo (Ecuador); Milenko Bertrand (Chile); Mariana Salazar (Mexico); and George Bandeira Galindo (Brazil). I am from Colombia.

**II. Mandates and working sessions**

In 2018, the Inter-American Juridical Committee held two regular sessions, the first of them between February 26 and March 2, in Mexico City, United States of Mexico, while the second one was held on 6-16 August at the Committee's headquarters in Rio de Janeiro, Brazil.

We wish to take this opportunity to thank the Government of Mexico for the premises offered to hold the working session at the Ministry of Foreign Affairs in that country. As customary, on occasions in which we hold our meetings outside headquarters, the Committee was able to hold meetings with several national entities working in areas connected to the international law or to the Inter-American System, and were thus able to meet distinguished public officers working in several government agencies, meeting representatives from the Secretariat of Foreign Affairs, the General Attorney's Office of the Republic, the Secretariat of the Ministry of Home Affairs and members of the Commission of External Advisers of the Secretariat of Foreign Affairs. In addition, as members of the Committee we participated in a conversation with a professor of the Institute of Legal Research at the National Autonomous University of Mexico and we visited to the Supreme Court of the Nation, where we held a meeting with Minister Javier Laynéz Potizek. These meetings allowed us to discuss and exchange opinions on the topics of the Committee's agenda, or on themes of interest for national authorities and members of the academic sector. I take this opportunity to urge the States interested in organizing a session of the Committee in their respective countries, to let us know, because the benefits of taking the IAJC outside headquarters bring relevant opportunities for the exchange of experiences and knowledge.

In the year 2018 and in the first quarter of 2019 the Committee adopted two relevant Guides: a Practical Guide for the Enforcement of Jurisdictional Immunity of International Organizations and a Guide on the Governing Law for International Trade Contracts in the Americas.

The "Practical Guide for the Enforcement of Jurisdictional Immunity of International Organizations", which was adopted in August and distributed among the States in September 2018, proposes 10 guidelines for specific aspects of immunities in topics regarding the purpose, outreach and the limits of jurisdictional immunity; means for the settlement of disputes and their

characteristics; compliance with the domestic legal system; appearing before national courts; the immunity of execution and the waiver of immunity of jurisdiction. While drafting, the IAJC took into consideration the best practices of States, international organizations and international and local courts. Through this Guide the Committee wishes to cooperate with Member States, international organizations and the courts through the different stages for the approval of future agreements, including negotiation and settlement of disputes

The “Guide on the Governing Law for International Trade Contracts in the Americas” is intended to promote substantive aspects on the issue, thus proposing recommendations to a large array of domestic players, including legislators, jurisdictional organs and the parties in a contract, based primarily on existing instruments at the global and regional level, in view of the disparities that exist in the area of contracts in the countries in the region. Therefore, the Committee seeks to provide concrete support for legal harmonization, while encouraging economic integration, growth and development in the Continent. We hope that legislators, jurisdictional organs and the parties in a contract may use the solutions proposed by the Guide, examining their respective legal systems in the area of the Governing Law to contracts.

The international community of experts and academicians has received very positively this contribution of the Committee, which although adopted in February of this year, has been already received with satisfaction by organizations such as The Hague Conference of International Private Law, the American Association of International Private Law and the International Law section of the American Bar Association (ABA/SIL). We hope that the political organs of the Organization may become aware of the guide and that the Representatives of the States may convey it to the Chancelleries and use this work which embodies the most recent advances on the subject and that is the result of a broad process of consultation among experts.

As regards both documents, I very respectfully wish to solicit for them to be duly considered by the political organs of the Organization.

Taking into consideration the approval of the two topics we mentioned before, the current agenda of the Committee comprises nine topics, which three of which correspond to mandates proposed by the General Assembly during the meeting held in Washington DC. In June 2018, namely: “Electronic warehouse receipts for agricultural products”; “Protection of personal data”; and “Access to public information”. Furthermore, the Committee has incorporated three new rapporteurships on its own initiative: “Cyber-security”, “Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of states, response under International Law”, and “Dissolution and liquidation of simplified corporations”. In addition, the Committee decided to maintain the study of the following three topics on its agenda: “Application of the Principle of Conventionality”, “Binding and Non-Binding Agreements”; and “Validity of Foreign Juridical Decisions in light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards”.

### **III. Dissemination of international law**

During the 93<sup>rd</sup> Regular Session held at its headquarters in Rio de Janeiro, Brazil, the Committee organized two events of great importance. On August 15, the Committee held the “VII Joint Meeting of the Legal Consultants of the Ministries of Foreign Affairs of the OAS Member States,” in order to identify issues of interest to the region that may be subject to codification and progressive development by the Committee, in both public and private international law. Through an extensive call, the joint meeting gathered together legal consultants from the Foreign Ministries of ten OAS Member States, namely Argentina, Bolivia, Brazil, Costa Rica, Ecuador, Haiti, the USA, Mexico, Peru and Uruguay. A delegation from the International Law Commission of the African Union also attended. The CJI holds this type of meeting every two years, with the next meeting scheduled for August 2020, when more attendees are expected, especially from the Chancelleries in the Caribbean and Central America. We understand that this requires significant efforts for the States, as the Committee lacks the financial capacity to underwrite the presence of

legal advisors; however, we urge them to consult the reports that have been produced by these meetings, in order to decide on the importance with which these activities might be endowed.

In the field of Private International Law, the Committee held a meeting on August 16 with representatives of The Hague Conference on Private International Law, in order to evaluate working methods, coordinating efforts between these institutions in order to avoid duplication, while determining the added value that the region can offer to codification efforts and the dissemination of private international law at the global level. The event was attended by the Secretary General of the Conference, Dr. Christophe Bernasconi, together with legal consultants, which allowed rich exchanges with important conclusions for the future work of the CJI.

The discussions of both events have been included in the Annual Report of the Committee.

Visits during this August period of sessions included the Committee welcoming academics from Mexico, Brazil and Chile, as well as national authorities such as Francisco Reyes, Corporations Superintendent, Colombia and César Manuel Vallarta from the National Institute for Access to Information and Data Protection in Mexico. Similarly, the Committee welcomed representatives of international organizations from the Office of the UN High Commissioner for Refugees (UNHCR) and the Commission for International Law of the African Union (AUCIL).

As in previous years, the Committee held its traditional International Law Course, with the support of the Department of International Law, in Rio de Janeiro, Brazil, between August 6 and 24, 2018, attended by 44 students from several countries in the hemisphere, with twenty of them receiving economic support from the OAS for their attendance. This Course is designed to for reflecting, discussing and updating assorted topics related to Public and Private International Law, together with new legal developments in the Inter-American System.

Another Course is planned for this year, from July 22 to August 9, 2019. In this regard, I regret to advise you that it will not be possible to offer the traditional fellowships to its students, which formerly paid for at least half their airfares, due to budget cuts for these programs.

With regard to the budget, allow me to express our concern about the budget presented on Thursday April 4, which removed 38.9% of the annual budget of the Committee, now down to \$219500, in a context where the Committee sessions cost some \$225000, whereby we are not in a position to host these sessions next year. The Committee meets for sessions twice a year for a total of two and a half weeks, while the UN International Law Commission holds sessions lasting eleven weeks a year.

Prior to this budget proposal presented by the General Secretariat, we wished to request additional funding earmarked mainly for establishing the position of a Secretary at our headquarters, which was an effective position through to 2009 (while other entities such as the Court or the Commission have an Executive Secretary). Between 2013 and 2016, the Department of International Law obtained an increase in its budget that allowed a person to be hired under temporary work contracts (CPR), but this amount was not renewed. The cost of an employee with P-4 rank is around \$150000.

In this context, when requesting this support, we trust that the current budget will be maintained, with the Committee able to hold sessions twice a year.

#### **IV. Final remarks**

Mr. President, being well aware of the impact that the topics assigned to our mandate may have on citizens and societies in the Americas, I wish to reiterate that the Committee members are quite willing to continue working towards the development of international law, in pursuit of the higher interests of the States and in the light of the mandates that the Generation Assembly may decide to establish.

The next regular session will take place at our headquarters in the city of Rio de Janeiro, Brazil, on July 31 to August 9. Finally, I want to stress the work and professionalism of our Technical Secretary, the Department of International Law at the Secretariat for Legal Affairs, whose employees provide us with constant support and follow-up for our efforts.

The Annual Report of the Committee has been published and distributed in electronic format. Other information on the legal developments of the Committee and the activities described

as herein may be accessed on its website at: <http://www.oas.org/es/sla/cji/default.asp>. Furthermore, the Department of International Law has published a volume of this Report, whose English and Spanish versions have been distributed to the delegations during my presentation.

Thank you very much

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**CJI/doc.591/19**

**REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE  
TO THE OAS GENERAL ASSEMBLY**

(presented by Dr. Ruth Stella Correa Palacio)

Mr. President, I am grateful for this space in which we will make a succinct presentation on the progress of the Committee in the area of codification and the main initiatives involving the dissemination of international law in the past year.

During 2018, the Inter-American Juridical Committee convened two regular sessions, the first between February 26 and March 2, in the City of Mexico, United States of Mexico, while the second was held on August 6 to 16 at the Committee's headquarters in Rio de Janeiro, Brazil. The meetings were held outside the Rio office. Like the session held in Mexico City, this contributes significantly to the work of the Committee, fostering interactions with national and government entities, and also academic entities. This allows first-hand acknowledgement of topics of interest and challenges in the field of international law.

**The Committee's work on Codification**

During the past year, the Committee adopted two non-binding instruments that are intended to serve as references for the States on complex and relevant themes: a Practical Guide for the Enforcement of Jurisdictional Immunity for International Organizations and a Guide on the Governing Law for International Trade Contracts in the Americas.

The "Practical Guide for the Enforcement of Jurisdictional Immunity for International Organizations", which was adopted in August and distributed to the States in September 2018, proposes 10 guidelines for specific aspects of topics related to the purpose, scope and limits of jurisdictional immunity; means for the settlement of disputes and their characteristics; compliance with domestic legal systems; appearing before national courts; immunity of execution and waiver of immunity of jurisdiction. During the drafting stage, the CJI took into consideration the best practices of States, international organizations and international and local courts. What is expected precisely is that that Ministries of Foreign Affairs and Courts use the Committee Guide as necessary, for either negotiating new agreements or settling disputes that may arise.

In turn, the "Guide on the Governing Law for International Trade Contracts in the Americas" is intended to buttress substantive aspects on this issue, thus proposing recommendations to a broad array of domestic players, including legislators, jurisdictional entities and parties to contracts. This instrument promotes economic integration, growth and development in the Americas, with participation in the harmonization of domestic legal systems in the countries of the region, (where disparities are noticeable in the area of contracts). The international community of experts and academicians greeted this contribution from the Committee which, although adopted only in February of this year, has already been welcomed with satisfaction by organizations such as The Hague Conference of International Private Law, the American Association of International Private Law and the International Law section of the American Bar Association (ABA/SIL). We hereby invite the Ministers of Foreign Affairs to make this work known, embodying the most recent advances on this issue at the universal and regional levels, as the outcome of a broad process of consultations among experts.

At present, the Committee agenda encompasses nine topics, three of which correspond to mandates proposed by the General Assembly held in Washington, D. C. in June 2018, namely:

“Electronic warehouse receipts for agricultural products”; “Protection of personal data”; and, “Access to public information”. On the other hand, the Committee included, at its own initiative, three new rapporteurships: “Cyber-security” “Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of States, response under international law”, and “Dissolution and liquidation of simplified corporations”. In addition, the Committee decided to maintain in its agenda the discussion of these three topics: “Application of the principle of conventionality”; “Binding and non-binding agreements”; and, “Validity of foreign judicial decisions in light of the Inter-American Convention on Extraterritorial validity of foreign judgments and arbitral awards”.

#### **Dissemination of international law**

During the 93<sup>rd</sup> Regular Session held at headquarters in Rio de Janeiro, Brazil, the Committee organized three relevant events I am now mentioning. On August 15, the Committee held the “VII Joint Meeting of the Legal Advisers of the Ministries of Foreign Relations of the OAS Member States”, striving to identify themes of interest for the region that may be worth bringing up for codification and progressive development by the Committee, in the areas of both public and private international law. After a general call, the joint meeting gathered together the legal advisers of the Ministries of Foreign Affairs of ten OAS Member States, namely, Argentina, Bolivia, Brazil, Costa Rica, Ecuador, Haiti, United States of America, Mexico, Peru and Uruguay. It also participated in a delegation of the Commission of International Law of the African Union.

There were consultants from the Caribbean and Central America at that meeting, similar to the absences recorded in the current composition of the Committee, whose eleven members include only one representative from that region. I therefore take this opportunity to request the Representatives of the Caribbean and Central American countries in particular, to join the Committee, proposing international law experts from their countries as candidates while also promoting the participation of the legal consultants of their Foreign Ministries in at the biennial meetings held with these officials. Hearing the voices of all regions will endow our work with broader scope and better coverage.

In the area of International Private Law, the Committee held a meeting on August 16 with representatives from The Hague Conference on Private International Law, in order to evaluate working methods, coordinate efforts between both institutions in order to avoid duplication, and determine the added value with which the region may contribute to the efforts involving codification and dissemination of international private law worldwide. The event was attended by the Conference’s Secretary General, Dr. Christophe Bernasconi, and legal advisers, which allowed for a rich exchange of ideas and relevant conclusions for the future work of the CJI.

As in previous years, the Committee conducted its traditional International Law Course, with the support of the Department of International Law, in Rio de Janeiro, Brazil, between August 6 and 24, 2018. This was attended by 44 students from several countries in the hemisphere, of whom twenty received financial support from the OAS for their participation. This Course is intended to reflect, discuss and update various topics in the field of Public and Private International Law, as well as new legal developments in the Inter-American System. For this year, the next course is scheduled for July 22 to August 9, 2019.

Mr. President, being well aware of the contribution that this consultation organ of the OAS has offered to the States in our Hemisphere, I wish to place on record about the interest and availability of my member colleagues in continuing to offer support to the Member States through studies that may prove most useful. I wish now to finish these words by thanking the Department of International Law of the Secretariat of Legal Affairs, together with the Technical Secretariat of the Committee, for their invaluable assistance.

The discussions of the events mentioned above and the details of the instruments drafted during the past year have been included in the Annual Report of the Committee, document CP/doc. 5467/19, which may be consulted on the OAS webpage.

Thank you very much.

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**CJI/doc.590/19****REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE  
TO THE INTERNATIONAL LAW COMMISSION OF THE  
UNITED NATIONS ORGANIZATION**

(presented by Dr. Ruth Stella Correa Palacio)

**I. Background and Membership**

Estimated Mr. President, initially I wish to express our appreciation to you and the members of this Commission for allowing us to present recent developments at the inter-American Juridical Committee in terms of our work.

The Inter-American Juridical Committee is one of the main entities through which Committee pursues its purposes, serving as a consultative body for the Organization on juridical matters, fostering the progressive development and codification of International Law, and studying juridical problems related to the integration and harmonization of national legislations considering the reality of the Americas where continental law co-exists with common law.

The Committee consists of eleven national jurists from the Member States: Luis García-Corrochano Moyano (our Vice President, Peru); Carlos Mata Prates (Uruguay); José Antonio Moreno Rodríguez (Paraguay); Duncan B. Hollis (USA); Alix Richard (Haiti); Miguel Angel Espeche-Gil (Argentina); Iñigo Salvador Crespo (Ecuador); Milenko Bertrand (Chile); Mariana Salazar (Mexico); and George Bandeira Galindo (Brazil). I come from Colombia.

**II. Mandates and Working Sessions**

During 2018, the Inter-American Juridical Committee convened two regular sessions, the first between February 26 and March 2, in Mexico City, United States of Mexico, while the second was held on August 6 to 16 at the Committee's headquarters in Rio de Janeiro, Brazil. The meetings held outside the Rio office - like the session held in Mexico City - are very valuable for us, allowing us to meet with national, government and academic entities engaged in work within the international law field.

During the past year, the Committee adopted two important guides: a Practical Guide for the Enforcement of Jurisdictional Immunity for International Organizations; and a Guide on the Governing Law for International Trade Contracts in the Americas.

The "Practical Guide for the Enforcement of Jurisdictional Immunity for International Organizations" was adopted in August and distributed to the States in September 2018, proposing ten guidelines for specific aspects of immunity for matters related to the purpose, scope and limits of jurisdictional immunity; means for the settlement of disputes and their characteristics; compliance with domestic legal arrangements; appearing before national courts; immunity of execution and waiver of immunity of jurisdiction. During the drafting stage, the IAJC took into consideration the best practices of States, international organizations and international and local courts.

Through this Guide, the Committee expected to cooperate with the Member States, international organizations and courts for the various stages of adopting future agreements, including negotiation and the settlement of disputes.

In turn, the "Guide on the Governing Law for International Trade Contracts in the Americas" is intended to buttress substantive aspects of this matter, proposing specific recommendations to a broad array of domestic players, including legislators, jurisdictional entities and parties to contracts. Based largely on existing instruments at the universal and regional levels, this Guide takes current disparities in contract-related matters into account, for countries in the region. Finally, the Committee strives to buttress juridical harmonization and foster economic integration, growth and development throughout the Continent. It is expected that legislators, jurisdictional entities and parties to contracts will use the solutions proposed by this Guide,

examining their respective juridical regimens in terms of the governing law for contracts. The international community of experts and academics greatly appreciated this contribution from the Committee which, although adopted only in February of this year, has already been welcomed with satisfaction by organizations such as The Hague Conference of Private International Law, the American Association of Private International Law and the International Law chapter of the American Bar Association (ABA/SIL).

The current agenda of the Committee lists nine topics that I explain below in general terms.

a. The first three address mandates proposed by the General Assembly:

- **“Electronic warehouse receipts for Agricultural Products”**: Mandate assigned to Dr. José Moreno Rodríguez (Paraguay), requesting the Committee to update the report on the principles applicable to electronic warehouse receipts for agricultural products, drafted in 2016 “in the light of the new developments produced in relation to the access to credit of the agricultural sector”. This topic provides continuity to the work of the Committee to provide a response primarily to the challenges which had not been resolved in the past, such as devising a neutral language appropriate for both hardcopy and softcopy formats, and overcoming the differences in scope between civil law and common law. It would also be worth reflecting on the issue of financing customs receipts and strengthening the agricultural sector. As this is an issue whose development will be evaluated by both the United Nations Commission for International Trade Development (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT), the Committee will determine its actions based on the decisions of these institutions in order to avoid duplication of work.
- **“Protection of personal data”**: This is the second of the topics proposed by the General Assembly for which Dr. Carlos Mata Prates (Uruguay) is the rapporteur; it consists of updating the “Principles for the Protection of Personal Data” adopted in 2015. On this matter, the Rapporteur has expressed interest in working on particular aspects of these Principles, such as: steps intended to “*prevent the identification or re-identification of a natural person without disproportionate efforts*”; the connection and effects of the effects of the Principles Internal Rights; treatment of personal data for girls, boys and adolescents; the right to *portability* for personal data ; expansion of legitimation for natural persons related other deceased personas or designated thereby; the right to be forgotten. It also expects to include the civil law and common law tradition in its report, in order to encompass all the Member States of the OAS.
- **“Access to public information”**: This is the third of the three mandates handed down by the General Assembly and, like those mentioned previously, there was also an interest in identifying theme-specific areas for “updating or expanding” a document prepared previously by our Committee, more specifically the Model Inter-American Law on Access to Public Information that was adopted in 2010. The Committee elected Dr. Luis García Corrochano-Moyano as the rapporteur, who announced that he will analyze the following six important topics: active transparency, regimen of exceptions, document management (archive and file management), public information in the courts, subjects bound to provide information (political parties and trade unions) and guarantor entities. They arise from a meticulous work of identification by our Technical Secretariat, with the support of public entities, civil society organizations, experts and other entities of the OAS States. The Rapporteur is expected to present his first report at our next session.

b. The following six topics have been included on the Committee agenda, at its own initiative:

- **“Application of the principle of conventionality”**: The main purpose of this topic - for which I am the rapporteur – is to draw up a Guide that clearly demonstrates the practices of the States and in all their expressions, as far as possible, in order to assist States wishing to implement the parameters for the principle of conventionality as adopted by the Inter-American Court of Human Rights. To do so, we have tried to discover the

treatment followed by the States party to the American Convention on Human Rights, in terms of its integration with domestic rules (States were found where this has achieved constitutional status), and their practical application.

- **“Binding and non-binding agreements”**: With Dr. Duncan Hollis (USA) as its Rapporteur, this topic consists of adopting guidelines for identifying and distinguishing three categories of agreements: treaties, political commitments and contracts, based on four specific areas: differentiation criteria, capacity of the States and other subnational entities; juridical effect proceedings for negotiation and signature. It is expected that a tool will be delivered to the States for clarifying the various types of agreements through “best practices” that can serve as benchmarks for defining the nature of an agreement, especially in areas with ambiguity or divergent opinions.
- **“Validity of foreign judicial decisions in the light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards”**: I am the Rapporteur for this topic and the intention is to propose mechanisms and procedures to the States that facilitate recognition among them of the decisions of foreign courts and allow them to produce mandatory effects, including easier authentication of foreign documents. All this is due to the difficulties that arise despite the existence of instruments for arbitration decisions at the universal (New York Convention) and regional (Montevideo Convention) levels. Although there are initiatives within the scope of The Hague Conference, the Committee will not embark on something that duplicates work in other forums, nor on arbitration decisions in which recognition is expedited. Although the nature of the work has not yet been decided, as either a guide or a model law, the issue will be restricted to the domestic recognition of decisions.
- **“Cyber-security”**: The rapporteur of this theme is Dr. Duncan B. Hollis (USA), whose purpose is to explore the opinion of the OAS Member States in the enforcement of international law and cyberspace. To this end, the Committee has sent out a ten-item, questionnaire to the States. In fact, the report of the rapporteur will also serve to supplement the work that the United Nations carries out within a Group that does not include all the OAS members, thus allowing us to project our voice in the global sphere.
- **“Foreign interference in the electoral process of a State: a threat to democracy and State sovereignty. Responses from International Law”**: This is an incipient project carried out by Dr. Alix Richard of Haiti, who has expressed interest in determining best practices and studying effective legal mechanisms to protect States against interference in the electoral field.
- **“Dissolution and liquidation of simplified corporations”**: Under my responsibility, this topic consists of a proposed model law that would facilitate the dissolution of the life cycle of a company, among them clear and expedited rules, with a defined liability regime and including online records. All this is based on the positive experience that the Committee has had in the field of harmonization through the “Model Law on Simplified Corporations” that was adopted by the Committee in 2012, and submitted to the General Assembly in 2017, and which was used in several countries of the region.

### III. Dissemination of international law

During the 93<sup>rd</sup> Regular Session held at its headquarters in Rio de Janeiro, Brazil, the Committee organized two events of great importance. On August 15, the Committee held the “VII Joint Meeting of the Legal Consultants of the Ministries of Foreign Affairs of the OAS Member States,” in order to identify issues of interest to the region that may be subject to codification and progressive development by the Committee, in both public and private international law. After an extensive call, the joint meeting brought together legal consultants from the Foreign Ministries of ten OAS Member States, namely Argentina, Bolivia, Brazil, Costa Rica, Ecuador, Haiti, the USA, Mexico, Peru and Uruguay. A delegation from the International Law Commission of the African Union also attended. The IAJC holds this type of meeting every two years, with the next meeting scheduled for August 2020. In this regard, I recognize here the presence of the Legal Counsel of Peru, Dr. Juan José Ruda, who has attended the two most recent meetings, and I ask now the

nationals of OAS Member States present to disseminate this event among the legal consultants of their respective countries.

In the field of Private International Law, the Committee held a meeting on August 16 with representatives of The Hague Conference on Private International Law, in order to evaluate working methods, coordinating efforts between these institutions in order to avoid duplication, and determining the added value that the region can provide to the efforts of codification and dissemination of private international law at a global level. The event was attended by the Secretary General of the Conference, Dr. Christophe Bernasconi, together with legal consultants, which allowed rich exchanges with important conclusions for the future work of the CJI.

The discussions of both events have been included in the annual report of the Committee.

As in previous years, the Committee will hold its traditional International Law Course, with the support of the Department of International Law, in Rio de Janeiro, Brazil, from July 22 to August 9, 2019, which has been attended by two Commissioners in the past two years, Dr. Mauricio Vázquez from Ecuador in 2017 and Dr. Claudio Grossman from Chile last year. In this regard, considering that we have not had proposals for names for this course and that the time is getting nearer, I formally invite you for next year. On that occasion it would be ideal for the designated person to participate in the working session of the Committee, the Course and the session with legal advisers. Discussions of both events have been included in the annual report of the Committee.

#### **IV. Final remarks**

Mr. President Sturma, when extending our thanks through you to all the Commissioners present here for allowing our presence, I wish to emphasize the interest and availability of the Committee to welcome you at our headquarters, to see in person the development that you are carrying out.

It is important that institutions such as ours - that play an essential role in the progressive development of international law - maintain a close cooperative relationship.

The next regular session will take place at our headquarters in the city of Rio de Janeiro, Brazil, on July 31 to August 9.

All information on the legal developments of the Committee and the activities described herein may be found on the website of the Legal Committee at:

<http://www.oas.org/es/sla/cji/default.asp>.

Thank you very much.

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## **B. International Law Course**

From July 22 to August 9, 2019, the Committee held the forty-sixth edition of the Course on International Law, with the support of the Department of International Law of the Secretariat of Legal Affairs, in Rio de Janeiro, Brazil. The purpose of this course is to ponder, debate, and update various issues pertaining to Public and Private International Law, as well as new legal development in the inter-American system. Among the 23 invited panelists, there were renowned professors from the hemisphere and other continents, judges, diplomats, members of the CJI and officials of international organizations and the OAS. At the opportunity, 43 students from 14 countries of the hemisphere attended the course. All of them financed their participation. It is important to note that the International Law Course was held at the facilities of the Law School of the Federal University of Rio de Janeiro thanks to the support of the Inter-American Human Rights Network (NIDH) of said University.

During the current year, the Committee adopted a resolution with specific guidelines regarding the selection of professors to be invited to the annual Course on International Law.

The resolution and the Program of the Course are included below:

**CJI/RES. 247 (XCIV-O/19)****COURSE ON INTERNATIONAL LAW**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO CONSIDERATION that the Juridical Committee organizes the Course on International Law each year with the support of the General Secretariat;

BEARING IN MIND that the Course on International Law is one of the most important academic activities representative of the Organization of American States that has been conducted for almost fifty years;

RECOGNIZING the need to establish specific guidelines for more effective organization of this activity,

RESOLVES:

1. To request that members of the Inter-American Juridical Committee and the Secretariat for Legal Affairs present, during the regular session of the Committee held in August each year, names of proposed professors who are to be invited to teach at the Course of International Law the following year, so that the program for this activity can be drawn up as ahead as possible.

2. To request that these proposals be accompanied by the respective resúmes of the professors and the topic or topics of the classes that are to be given.

3. To request that members of the Inter-American Juridical Committee indicate their availability to lecture during the Course.

4. To request that the Secretariat for Legal Affairs send a reminder to all members of the Committee to submit their proposals sufficiently in advance so that they can be distributed in a timely manner.

5. That each year during its second regular session, the Inter-American Juridical Committee approve the program and the professors to be invited to the Course in International Law to be held the following year, working jointly with the Secretariat for Legal Affairs on the organization of these activities, including the issuing of the respective invitations.

6. To request members of the Inter-American Juridical Committee to promote measures that will lead to higher levels of student participation.

This resolution was unanimously approved at the regular session held on February 21, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, George Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil and Íñigo Salvador Crespo.

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OEA | OAS



Curso de Derecho  
Internacional

**PROGRAM**

XLVI Course on International Law

July 22 – August 9, 2019

National Law School

Rua Moncorvo Filho, n. 8 – Centro, Rio de Janeiro, Brazil

**WEEK 1**

<b>Monday</b> 22	2:30 pm	<b>Student Registration</b> (Hall, 4 <sup>th</sup> floor)
	3:00 pm	<b>Opening Ceremony</b> Dr. Dante Negro, Director Department of International Law, OAS Dr. Marcia Souza, Associate Professor, National Law School, Coordinator, Laboratory for the Study of Appropriate Methods for the Settlement Disputes (NIDH)
	3:15 pm	<b>Orientation Session for Students</b> ▪ Dr. Jaime Moreno-Valle, Legal Office Department of International Law, OAS Coordinator, Course on International Law
	3:45 pm	<b>Photograph and Welcome Coffee Break</b>
	4:30 pm	<b>End of the Event</b>
<b>Tuesday</b> 23	9:00 am	<b>Introduction to the Inter-American System</b> Professor: Dante Negro
	10:50 am	<b>Break</b>
	11:10 am	<b>The Right to Self-Determination of Peoples: A New Case Law Challenge</b> Professor: Antonio Augusto Cançado Trindade
	1:00 pm	<b>Lunch</b>
	2:30 pm	<b>Key issues in International Trade Arbitration</b> Professor: Sixto Sánchez Lorenzo
<b>Wednesday</b> 24	9:00 am	<b>New Legal Challenges in the Inter-American System</b> Professor: Dante Negro
	10:50 am	<b>Break</b>
	11:10 am	<b>The Right to Self-Determination of Peoples: A New Case Law Challenge (conclusion)</b> Professor: Antonio Augusto Cançado Trindade
	1:00 pm	<b>Lunch</b>
	2:30 pm	<b>Key Issues in International Trade Arbitration (continuation)</b> Professor: Sixto Sánchez Lorenzo
<b>Thursday</b> 25	9:00 am	<b>Work Tools of the Inter-American Human Rights System and their Effectiveness</b> Professor: Paulo Abrão
	10:50 am	<b>Break</b>
	11:10 am	<b>Key Issues in International Trade Arbitration (conclusion)</b> Professor: Sixto Sánchez Lorenzo

	1:00 pm	Lunch
	2:30 pm	<i>Reflections on Sovereign in the Light of the Law of Justice against States Fostering Terrorism</i> Professor: Jaime Moreno-Valle
Friday 26	9:00 am	<i>Work Tools of the Inter-American Human Rights System and their Effectiveness (conclusion)</i> Professor: Paulo Abrão
	10:50 am	Break
	11:10 am	<i>The Human Right not to be Stateless in the Inter-American System for the Protection of Human Rights</i> Professor: Juan Ignacio Mondelli
	1:00 pm	Lunch
	2:30 pm	<i>The Human Right to Seek and Receive Asylum in the Case Law established by the Inter-American Court of Human Rights</i> Professor: Juan Ignacio Mondelli
	4:15 pm	<i>Evaluation</i>
<b>WEEK 2</b>		
Monday 29	9:00 am	<i>International Law Advisory Offices in the Member States of the Council of Europe</i> Professor: Carlos Jiménez Piernas
	10:50 am	Break
	11:10 am	<i>The Changing International Law Regime Governing Foreign Investment</i> Professor: José Álvarez
	1:00 pm	Lunch
	2:30 pm	<i>50 Years of the Inter-American Convention on Human Rights in the light of the Case Law established by the Inter-American Court of Human Rights – Inter-American Corpus Juris, Conventionality Block or Transnational Constitutional ?</i> Professor: Siddharta Legale
Tuesday 30	9:00 am	<i>International Law Advisory Offices in the Member States of the Council of Europe (continuation)</i> Professor: Carlos Jiménez Piernas
	10:50 am	Break
	11:10 am	<i>The Changing International Law Regime Governing Foreign Investment (continued)</i> Professor: José Álvarez
	1:00 pm	Lunch
	2:30 pm	<i>Reflections on the OAS</i> Professor: Jean-Michel Arrighi
Wednesday 31	9:00 am	<i>International Law Advisory Offices in the Member States of the Council of Europe (conclusion)</i> Professor: Carlos Jiménez Piernas
	10:50 am	Break
	11:10 am	<i>The Changing International Law Regime Governing Foreign Investment (conclusion)</i> Professor: José Álvarez

	1:00 pm	Lunch
	2:30 pm	<i>Treaties in the Inter-American System: Evolution and Developments</i> Professor: Luis Toro
Thursday 1	9:00 am	<i>Efficacy of Foreign Judgements and Transnational Access to Justice. Reflections of Global Governance</i> Professor: Javier Ochoa Muñoz
	10:50 am	Break
	11:10 am	<i>The Challenges of Humanitarian International Law, 70 Years after the Adoption of the Geneva conventions</i> Professor: Gabriel Valladares
	1:00 pm	Lunch
	2:30 pm	<i>The Convention of Vienna (1969) on Matters Related to Treaties: Balance Sheet 50 Years After its Signature</i> Professor: Luis Garcia-Corrochano
Friday 2	9:00 am	<i>Efficacy of Foreign Judgements and Transnational Access to Justice. Reflections of Global Governance (conclusion)</i> Professor: Javier Ochoa Muñoz
	10:50 am	Break
	11:10 am	<i>The situation in Venezuela and Nicaragua from the Standpoint of the OAS and the Inter-American Democratic Charter</i> Professor: Hernán Salinas
	1:00 pm	Lunch
	2:30 pm	<i>The situation in Venezuela and Nicaragua from the Standpoint of the OAS and the Inter-American Democratic Charter (conclusion)</i> Professor: Hernán Salinas
	4:15 pm	<i>Evaluation</i>
<b>WEEK 3</b>		
Monday 5	9:00 am	<i>Multilateralism and the World Trade Organization (WTO)</i> Professor: Hugo Cayrús
	10:50 am	Break
	11:10 am	<i>Statehood facing the Challenge of Climate Change</i> Professor: Alejandra Torres Camprubi
	1:00 pm	Lunch
	2:30 pm	<i>The International Criminal Court: Advances and Challenges</i> Professor: Mariana Salazar
Tuesday 6	9:00 am	<i>Multilateralism and the World Trade Organization (WTO) (conclusion)</i> Professor: Hugo Cayrús
	10:50 am	Break
	11:10 am	<i>Statehood facing the Challenge of Climate Change (continuation)</i> Professor: Alejandra Torres Camprubi
	1:00 pm	Lunch
	2:30 pm	<i>Harmonization of Private International Law: Justification and Trends</i> Professor: Ignacio Tirado
Wednesday 7	9:00 am	<i>Access to Business Financing and International Law: the Cape Town Convention</i> Professor: Ignacio Tirado

	10:50 am	Break
	11:10 am	<i>Statehood facing the Challenge of Climate Change (conclusion)</i> Professor: Alejandra Torres Camprubi
	1:00 pm	Lunch
	2:30 pm	<i>Regional Customary International Law</i> Professor: George Rodrigo Bandeira Galindo
Thursday 8	9:00 am	<i>The Inter-American System and the OAS</i> Professor: Jean-Michel Arrighi
	10:50 am	Break
	11:10 am	<i>Human Rights and the Environment as Major Global Issues</i> Professor: Sidney Guerra
	1:00 pm	Lunch
	2:30 pm	<i>International Law and Cybersecurity</i> Professor: Duncan B. Hollis
	4:15 pm	<i>Evaluation</i>
Friday 9	9:00 am	<i>Control Conventionality and its Application</i> Professor: Ruth Correa
	10:30 am	<i>Closing Ceremony and Presentation of Certificates (Great Hall)</i> <ul style="list-style-type: none"> <li>▪ Dr. Ruth Correa, Chair Inter-American Juridical Committee</li> <li>▪ Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, OAS</li> <li>▪ Dr. Dante Negro, Director Department of International Law, OAS</li> </ul>
	11:30 am	Official Photograph
	11:40 pm	Farewell Coffee Break

\*\* All activities will take place in the Pedro Lessa Auditorium, unless otherwise indicated\*\*

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### C. Relations and cooperation with other Inter-American bodies and with regional and global Organizations

#### Meetings sponsored by the Inter-American Juridical Committee during the 95<sup>th</sup> Regular Session, held in Rio de Janeiro, Brazil:

1. July 31, 2019: Visit by Professor Carlos Jiménez Piernas - Director, International Legal Department, Ministry of Foreign Affairs and Cooperation of Spain and Professor at the University of Alcalá, Spain.

Professor Jiménez Piernas referred to the work in the International Legal Department, an ad-hoc body on international law that was created by the Spanish Ministry of Foreign Affairs and Cooperation to advise and inform the General Administration of the State on issues related to international law. He also noted the importance of the Course on International Law and its positive impact on promotion of the rule of law, democracy, and human rights.

2. August 1, 2019: Visit of representatives of the African Union Commission on International Law - The mission from the African Union Commission on International Law was composed of Commissioners Mohamet Barakat and Hager Gueldich, and, for the Secretariat, Yaye Ndieme and Francis Adanlao Olatoundji.

Commissioner Mohamed Barakat was grateful for the opportunity afforded to the African Commission, which served to strengthen the ties between the two institutions. He expressed the interest of the Commission's representatives in participating in the Course on International Law, as well as in activities for the promotion of international law, such as workshops and seminars in areas of common interest. He informed that the Commission would hold its next conference in November that year in Angola.

Commissioner Hager Gueldich referred to the implementation of the Maputo Protocol, various forms of cooperation and legal assistance in criminal matters, such as the development of policies to deal with transnational crimes, practical steps that had been taken, including the drafting of model laws on cooperation and extradition, as well as the sending of questionnaires to member states to learn about the prevailing situation. She concluded by presenting ideas for possible forms of cooperation between the Commission and the Committee, such as the production of publications in areas of common interest, organization of conferences and seminars, and exchange of experience.

3. August 1, 2019: Visit of Ambassador Hernán Salinas Burgos, Permanent Representative of Chile to the OAS

Ambassador Hernán Salinas, who had previously been a member and Chair of the CJI, explained in detail the mandate approved by the General Assembly that instructed the Committee to develop a model law prohibiting the use of fireworks and effective regulations on public displays in which fireworks are used. It was based on the experience of Chile, whose regulations on the responsible use of fireworks had led to a 90% reduction in the number of victims in that country. Having noted the lack of regulations on the subject in the other states of the Hemisphere, the Government of Chile had endorsed the campaign of Corporación del Niño Quemado which works on the rehabilitation of burned children both in Chile and abroad.

4. August 2, 2019: Visit of Professor Javier Ochoa, Faculty of Legal and Political Sciences of the Central University of Venezuela

Professor Javier Ochoa summarized some of the topics of his class that were presented at the Course on International Law, on the expansion of law and its impact on global governance and transnational litigation. He highlighted the role of local courts with respect to national and transnational actors and the values that should guide the effectiveness of foreign judgments. He presented seven concrete ideas that could be used in this area: (i) Eliminate the need for exequatur and the establishment of a special executive procedure; Use the formula of the UNCITRAL model law that gives the local judge jurisdictional competence (on fulfillment of the requirements for its execution); (ii) Extend the object of the exequatur procedure for the purpose of lifting the corporate veil; (iii) Attribute internal competence for exequatur to the courts of first instance or higher courts; (iv) Make the requirements for effectiveness more flexible (autonomous and flexible control of indirect jurisdiction); (v) Restrict the exception of material and procedural public order; (vi) Establish precautionary protection for the enforcement of foreign judgments; and (vii) Promote free or subsidized legal counsel. In thanking the Committee, he offered to support the Committee in studies related to foreign judgments.

5. August 5, 2019: Visit of Ambassador Hugo Cayrús, Permanent Representative of Uruguay to the OAS

Ambassador Hugo Cayrús clarified the budgetary issues that were decided by the General Assembly that year. With regard to the Committee's agenda, he noted the usefulness of the topics being addressed by the Committee. Regarding the Course on International Law, he gave a brief overview of his presentation on multilateralism, including the Uruguay Round and the establishment of the WTO (which included issues of goods, trade, services, and dispute settlement).

6. August 6, 2019: Visit of Professor Alejandra Torres Camprubi, - Associate lawyer with the firm Foley Hoag in Paris

The professor presented the main topics of her class on the challenges of climate change, including, among others, developments in regulations, regional practices, cooperation initiatives, and the situation of island states at risk of losing their territoriality and their possible disappearance.

7. August 7, 2019: Visit of Professor Ignacio Tirado, Secretary-General of UNIDROIT

Professor Tirado described the work of UNIDROIT with respect to the development of rules in the area of private international law, noting some recent developments on "investment contracts for agricultural use" or the drafting of an instrument allowing the financing of small and medium enterprises, as well as initiatives on smart contracts in conjunction with UNCITRAL with respect to digital assets to categorize concepts aimed at bringing the parties together. He expressed his intention to integrate more member states from other regions during his term of office, including both Latin America and Asia-Pacific. He also spoke about efforts to move forward with the MAC Protocol Diplomatic Conference in the mining, agriculture and construction sectors to be held in Pretoria, and urged Committee members to send experts representing their respective countries. At the end of his presentation the UNIDROIT Secretary-General proposed to the ICJ to work together on the development of best practices on procedural law, taking into account the experience of both institutions in that field.

8. August 8, 2019: Visit of Dr. Luis Almagro, Secretary General of the Organization of American States (OAS)

The Committee held a dialogue with the Secretary General in which members briefly presented the work on the Committee's agenda. The SG expressed thanks for the invitation and congratulated the Chair on being the first woman to hold that position. He also referred to the importance of having a Committee that worked on issues that were in line with the Organization's agenda and that served as a direct source of reference for the General Secretariat. He invited the CJI to continue providing a solid legal foundation for challenges that arise. He also offered the use of his Twitter account to raise greater awareness of the Committee's work.

The Secretary General explained that in his view the era of treaties was not over; but that the political crises in both Venezuela and Nicaragua had occupied the attention of the OAS. All of that had led to a rethinking of the past and a search for solutions based on the Organization's Charter and the Inter-American Democratic Charter. The above-mentioned crises would determine the way in which future instruments were developed. The foregoing was in addition to the ongoing humanitarian and migration crises. The Secretary General asked the Committee to identify elements on the current hemispheric agenda that were not regulated. In his opinion, there were opportunities to facilitate the adoption of new mechanisms that allowed for greater efficiency, including the updating of 20th century instruments. Similarly, he noted the existence of issues that give rise to new developments, such as corruption, cybersecurity, and terrorism. In that regard, he recommended that solutions be sought within the Organization and not outside it. Finally, Secretary General Almagro referred to the traumatic nature of budget decisions that had direct consequences on bodies such as the Committee. He urged members to make efforts with their respective foreign ministries to protect the Committee's historical heritage as part of the budget discussions.

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