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BINDING AND NON-BINDING AGREEMENTS: SECOND REPORT

(Presented by Dr. Duncan B. Hollis)

INTRODUCTION

64. At the 89th Regular Session of the Inter-American Juridical Committee, the 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.[81] The Committee subsequently added the topic to its agenda and at its 90th Regular Session appointed the author to serve as Rapporteur.[82]

65. For the Committee's 91st Regular Session, I offered a "Preliminary Report on Binding and Non-Binding Agreements."[83] It explored the three major categories of international agreement – treaties, political commitments, and contracts – along four lines of inquiry.

a. First, in terms of *differentiation*, I identified criteria for different agreement types and discussed methods for identifying the particular type of agreement reached. Most notably, I contrasted the dominant, "manifest intent" test that determines an agreement's status based on the shared intentions of its authors versus the International Court of Justice's suggestion of a more "objective" analysis.[84]

b. Second, I reviewed who has the *capacity* to conclude international agreements beyond the State itself. I found that both government agencies and sub-national units may conclude treaties where they are authorized to do so by the responsible State and potential treaty partners consent to their participation. In contrast, I found no evidence of any limits on who can make political commitments. Moreover, most States' domestic law determines who has contracting capacity.

c. Third, I examined the *legal effects* of all three agreement types, noting the legal (*e.g.*, *pacta sunt servanda,* countermeasures) and political (*e.g.,* retorsion) consequences that flow from a treaty's existence. I noted that political responses may follow political commitments while some scholars ask if a political commitment

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[81] 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* p. 153, 160.

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

[83] Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements,* Inter-American Juridical Committee, 91st Regular Session, OAS/Ser.Q, CJI/doc.542.17 (August 6-16, 2017) (hereinafter "Preliminary Report").

[84] *See, e.g., Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [27].

could trigger a claim of estoppel under international law. I noted that State-to-State contracts may produce legal effects, mostly likely under the domestic law selected.

d. Fourth and finally, States may—and regularly do—dictate specific *procedures* for authorizing treaty-making and contracts. In contrast, I posited that political commitments, appeared to have few, if any, existing procedures for their formation.

66. On all the topics surveyed in the preliminary report, I noted areas of ambiguity over the relevant international and national law as well as divisions of opinion. My report proposed that, before proceeding further, the Committee send a questionnaire to Member States asking them to clarify their views on these topics and respond to the idea of the Committee identifying some general principles and/or best practices for the OAS General Assembly's approval. The Committee authorized me to prepare such a questionnaire, but recommended a shorter and more directed set of questions than those proposed in my Preliminary Report.

67. After the conclusion of the 91st Regular Session, I shortened and revised the draft questionnaire with able assistance from the OAS Secretariat for Legal Affairs' Department of International Law and the Committee's Chair. On 8 September 2017, the Department of International Law sent the questionnaire to all Member States in Note OEA/2.2./70/17. To date, ten Member States have responded to the questionnaire in varying levels of detail.

68. In this Report, I do two things. First, I summarize and analyze the Member State responses to the Committee's Questionnaire and assess their impact on my Preliminary Report. Second, I propose that the Committee take two steps moving forward: (a) we make renewed efforts to obtain the views of initially non-responsive Member States; and (b) we draft a set of best practices – or what I call the "OAS Guidelines for International Agreements" – that may aid Member States in whether, when and how, they make, interpret, and implement binding and non-binding agreements.

I. THE QUESTIONNAIRE AND MEMBER STATE RESPONSES

69. The Committee's questionnaire read (in relevant part) as follows:

BINDING AND NON-BINDING AGREEMENTS:
A QUESTIONNAIRE FOR MEMBER STATES

I. **How do you differentiate among treaties, political commitments and contracts?** How does your State define treaties under international law? Do you have a practice of concluding "non-binding" agreements (often called political commitments or memorandum of understanding)? If so, how do you define such agreements? Do you have a practice of using contracts governed by domestic law in reaching binding agreements with other States, and, if so, how do you define these contracts? Beyond these definitions, do you use specific terminology or include specific clauses to differentiate among various types of binding and non-binding agreements?

II. **Who has the capacity to conclude binding and non-binding agreements?** Under your national law, can ministries and government agencies conclude treaties governed by international law? Under your national law, can sub-national territorial units like states, provinces or municipalities conclude treaties governed by international law? Do your agencies and sub-national units ever conclude non-binding agreements or

contracts? How does your national law or practice deal with agreements made by an agency or a sub-national unit that were not authorized by the national government?

III. **What are the legal effects of your binding agreements?** For any treaties governed by international law concluded at the agency level or by sub-national territorial units, where does international legal responsibility for the performance of those agreements lie – with the concluding party or the State as a whole? Should the State bear responsibility for an agency or sub-national unit's agreement even if those entities did not follow the appropriate domestic procedures before concluding the agreement? How, if at all, does your state regard the legal effects of non-binding agreements or contracts done at the agency or sub-national level?

IV. **What are your National Procedures for Making Binding and Non-Binding Agreements?** What are your internal procedures for deciding whether and when a treaty negotiation may commence or be concluded? If you have a practice of doing binding agreements under international law with agencies or sub-national units, what domestic procedures exist for these entities to receive authorization to negotiate and conclude such agreements? What, if any, procedures do you have for the conclusion of political commitments?

V. **Priorities**: Of the aforementioned topics, does one (or more) of them pose a greater problem for your State than the others? Would you appreciate a set of general principles or best practices on issues of differentiating among binding and non-binding agreements, the capacity to conclude such instruments and/or the procedures employed to do so?

70. As of 31 January 2018, the Secretariat had received official responses from 10 Member States: Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.[85] In this section, I summarize and analyze these responses, with particular attention to identifying areas of convergence and divergence.[86]

A. Categories of Agreement: How Member States differentiate among treaties, political commitments and contracts.

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

[86] Unless otherwise noted, all references to a particular Member State's law or practice in this report are derived from that Member State's Questionnaire Response.

8. In terms of defining different types of international commitments, the Member State responses confirmed the widespread acceptance of the treaty definition in Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties ("VCLT"):

> (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[87]

Nine out of ten Member State responses referenced accepting this definition in their own treaty law or practice.[88]

9. Nonetheless, some variations on this definition were evident in the Member State responses. Colombia, for example, noted that its definition "excludes agreements subject to a domestic legal system and substantive norms prepared by the parties." To the extent that "substantive norms" references a version of the non-binding agreements discussed below, this definition may not actually depart from the VCLT approach.[89] Ecuador's response, however, more clearly adds an additional criterion onto the VLCT definition – suggesting that, in addition to satisfying the international law definition of a treaty, it also limits the term's application to those "binding understandings with subjects of international law that also comply with the formalities required under Ecuadorian domestic laws."

10. For its part, Mexico's 1992 Law on the Conclusion of Treaties enacted a domestic legal definition of a treaty that mirrors in large part the definition in the VCLT.[90] At the same time, that law adds another category of agreements "governed by public international law" – inter-institutional agreements. According to Mexico, inter-institutional agreements are "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 . . ."

11. In addition to treaties, *all* Member State responses acknowledged a separate category of non-binding agreements or what I've called "political commitments."[91] All the Member States concurred that this category is defined in terms of commitments that lack any legal force.[92] Several States also emphasized that political commitments do not require

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[87] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 2(a).

[88] Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay, and the United States all indicated support for the VCLT. Two Member States – Jamaica and Peru – expressed support for the definition of treaties that included agreements with international organizations found in the 1986 Vienna Convention. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543. The Argentina Response did not provide any views on its definition of a treaty.

[89] *See, e.g.*, Preliminary Report, *supra* note 3, at 5 (political commitments "set normative expectations for future behavior among participants, but they invoke morality or political relationships as the basis for any obligation in lieu of law.").

[90] The Mexican definition of a treaty is broader than the VCLT in that it includes agreements, not just with States, but other subjects of international law, while also denying any subject-matter conditions in its definition. *See* Mexico Response, *supra* note 5; *Law Regarding the Making of Treaties*, *reprinted in* 31 ILM 390 (1992), CDLX *Diario Oficial de la Federación* 2 (Jan. 2, 1992), Art. 2.I (defining a treaty as "an agreement governed by public international law, concluded in written form between the Government of the United Mexican States and one or more subjects of public international law, whether or not for its application agreements must be concluded in specific areas, and whatever its designation, by which the United Mexican States assumes obligations.").

[91] Preliminary Report, *supra* note 3, at 5. For the most part, this category is not instantiated in domestic law but appears to be a matter of State practice. *See, e.g.,* Mexico Response, *supra* note 5 (existing national legislation "lacks a concept per se" for non-binding instruments).

[92] *See, e.g.*, Argentina Response, *supra* note 5 ("Such instruments do not create legal obligations for the parties to them"); Colombia Response, *supra* note 5 ("Non-binding agreements . . . differ [from treaties] in that they do not create legally binding obligations (no mandatory terms or obligations)"); Dominican Republic Response, *supra* note

ratification and thus were capable of taking effect at signature.[93] There was no consensus on the proper subjects for political commitments, although Colombia suggested that they were limited to "technical or detailed matters" while Jamaica emphasized that they should not involve "substantial financial undertakings."

12. Despite widespread consensus on the concept of Member State political commitments, Member States appear to denominate these non-binding agreements through an array of different titles, including "memorandum of understanding",[94] statements or letters of intent,[95] "political declaration"[96] and joint declarations and communiqués.[97] As such, the Argentina and Brazil responses suggestion that denomination alone cannot determine an instrument's status appears accurate.

13. Several states – Colombia, Ecuador, Peru and Uruguay – all suggested that they are seeing an increase in the use of this type of agreement. Peru, for example, noted that:

> The practice in Peru shows that "nonbinding" agreements are coming into increasing use both at the State level (with other States or international organizations) and at the interinstitutional level (between Peruvian governmental entities—including municipalities and regional governments—and their foreign counterparts).[98]

Beyond their frequency, Peru's response is noteworthy for placing inter-institutional commitments within the category of non-binding agreements, a view shared by Ecuador and Uruguay as well.[99] Colombia also denies these agreements treaty-status, suggesting they must avoid terminology that would suggest such status (*e.g.*, "parties", "enter into force").

14. As such, there is some potential tension between this categorization and Mexico's suggestion that an inter-institutional agreement may be governed by international law. For its part, Uruguay suggests that inter-institutional agreements could be *either* binding or non-binding, a view that seems reasonable in the sense that it parallels the options for inter-State agreements.[100] As Peru explains it, moreover,

> "interinstitutional agreements" . . . may be concluded, within their purview, by Peruvian governmental entities, including municipalities and regional

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5 ("political agreements are established and do not create a legal obligation for the State, do not require approval by Congress, and as such are not governed by international law"); Jamaica, *supra* note 5 (Political commitments "may be in writing or verbal and are good faith undertakings that are not necessarily made binding in law"); Mexico Response, *supra* note 5 ("these are political documents containing language that does not create obligations capable of enforcement under public international law since these are good faith commitments."); Peru Response, *supra* note 5 (political commitments "do not seek to create a legal relationship either in the international law sphere or in that of domestic law, but simply commitments of a political nature."); U.S. Response, *supra* note 5 ("The United States also has a practice of concluding written instruments with other states that are non-legally binding, in the sense that they are neither governed by, nor give rise to rights and obligations under domestic or international law.").

[93] *See, e.g.*, Colombia Response, *supra* note 5; Ecuador Response, *supra* note 5.

[94] Colombia, the Dominican Republic, Jamaica, Peru, and Uruguay all cited this phrase.

[95] Both Colombia and Peru invoked this form.

[96] Argentina and Peru referenced this term.

[97] Ecuador cited this category of commitment.

[98] *See also* Ecuador Response, *supra* note 5 ("In exercising their powers, lower-level state institutions usually sign with their counterparts or with international organizations non-binding understandings known as inter-institutional instruments, which enter into force the moment they are signed."); Colombia Response, *supra* note 5. Uruguay Response, *supra* note 5.

[99] Furthermore, the Jamaica Response noted that its "parishes, municipalities and other entities may have cooperative arrangements with foreign agencies (such as 'sister cities')" which it designated as "promotional, cooperative ventures supported by the Government of Jamaica" but did not indicate whether they had legal effects, and, if so, whether these arose under international or Jamaican law.

[100] *See* Uruguay Response, *supra* note 5 (listing "Inter-Institutional Agreements" as non-binding agreements, but later noting inter-institutional agreements may "bind not the State but themselves.").

> governments, with their foreign counterparts or even with international organizations. However, such agreements are not considered "treaties" as defined in international law, since they do not aim to create a legal relationship between States, but only for the institutions entering into them. Nonetheless, it should be recognized that these interinstitutional agreements may be governed by international law if they develop international commitments established under treaties in force. [101]

In other words, interinstitutional agreements might be viewed as a category of binding agreements separate and apart from treaties and political commitments. Mexico would have them governed by international law, while Peru envisions them having binding status, but varying its source between domestic and international law depending on whether they "develop" existing treaty commitments. The open question – discussed further below – is *if* inter-institutional agreements are governed by international law, whether Member States can limit any legal responsibility to the institution itself versus the Member State as a whole.[102]

15. The largest diversity of opinions on categorizing among binding and non-binding agreements appeared in the responses relating to contracts concluded by States. Five States – Argentina, Colombia, the Dominican Republic, Peru and Uruguay – all indicated that they had no practice of concluding contracts governed by domestic law for binding agreements among States. Ecuador, Jamaica, Mexico and the United States, in contrast, all acknowledged the possibility of such agreements.[103] 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.[104] Mexico's Constitution (Art. 134) requires certain public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) which require "contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal)." Furthermore, although Colombia suggested that it had no experience with contracts between States, it did have experience with interinstitutional agreements governed by Colombian law.[105]

16. How do the Member States differentiate between their treaties and political commitments (and—for those who make them—contracts)? Five of the Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked "intent" as the deciding criterion.[106] For the Dominican Republic, Jamaica and Uruguay, the agreement's

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[101] Peru Response, *supra* note 5 (citing Article 6 of Supreme Decree No. 031-2007-RE).

[102] *See* Preliminary Report, *supra* note 3, at 10 (Asking "whether international law regards these sub-national units as simply agents of the State (with the State assuming responsibility for the commitments undertaken) or more "independent" treaty-making authorities as "other subjects of international law" (in which case liability rests with the sub-national unit itself). Traditionally, international lawyers have favored the view of State responsibility." (citations omitted).

[103] *See, e.g.,* Jamaica Response, *supra* note 5 ("Contracts may be entered into with investors, goods and service providers, international organizations as well as other States. The law governing contracts may be domestic law depending on the terms of the contract"); U.S. Response, *supra* note 5 ("the United States has a practice of entering into contracts with other states, governed by domestic law rather than international law").

[104] *See, e.g.,* Ecuador Response, *supra* note 5 (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").

[105] *See* Colombia Response, *supra* note 5 (noting that interinstitutional agreements do "create commitments solely for the entities that sign them and their fulfillment is subject to the authorities those entities are accorded under the Constitution and by law.").

[106] Brazil Response, *supra* note 5; (relies "on the intention of the parties"); Colombia Response, *supra* note 5 (looks for "an expression of or an agreement/arrangement on the intent of the States to enter into legally binding

structure and the language used were cited as the determining factors.[107] Yet, it is not clear that the Member States were actually divided on *how* to differentiate among their agreements. Those adhering to the "intent" test also subscribed to the view that the agreement's structure and language provided the best evidence of the authors' intentions.[108] In other words, all the Member States offering views on how to differentiate treaties and political commitments contemplate looking primarily at the text itself.

17. Thus, several Member States emphasized how a treaty will contain articles while non-binding agreements are usually formulated to include paragraphs.[109] Where an agreement contains an entry into force clause, a number of States indicated that suggested a treaty; whereas references to an agreement having "effect" signaled a non-binding agreement.[110] Colombia and Peru further emphasized articles on amendment or denunciation suggested a treaty.

18. Beyond the format and types of clauses used, the Member States also signaled the particular language used to express agreement could differentiate the particular type of agreement concluded. Member State responses emphasized verbs like "agree"[111], "must"[112], and "shall"[113] along with references to "parties"[114] as language used in treaties. In contrast, Member States cited verbs like "should"[115], "promote", "seek", along with words like "best efforts,"[116] "intentions"[117] and "understandings"[118] as indicative of a non-binding agreement.

19. Several Member States – Brazil, Peru, and Uruguay – emphasized that non-binding agreements could best be identified by the inclusion of a clause establishing them as such. Peru, for example, often includes a clause indicating "The present memorandum of

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obligations"); Mexico Response, *supra* note 5 ("'Non-binding' instruments, use words emphasizing the intent of the participants involved"); Peru Response, *supra* note 5 (describing efforts to ensure the agreement records "the common intent of the parties"); U.S. Response, *supra* note 5 (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"); *see also* Preliminary Report, *supra* note 3, at 4 (describing competing "intent" and "objective" tests articulated for differentiating treaties from political commitments).

[107] *See, e.g.,* Jamaica Response, *supra* note 5 ("The language used in an agreement characterizes the type of agreement"); Uruguay Response, *supra* note 5. The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty's status as such, but also highlighted that it defined treaties based on which instruments completed the domestic treaty-approval process set forth in its Constitution and laws. Dominican Republic Response, *supra* note 5 ("binding agreements must be submitted to the ratification procedure"); The Argentina and Ecuador Responses did not offer any views on how those two States distinguish among binding and non-binding agreements.

[108] *See, e.g.,* Brazil Response, *supra* note 5 ("language used in an instrument is key"); Colombia Response, *supra* note 5 ("treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties"); Mexico Response, *supra* note 5 (noting verbs and words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 5 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); Uruguay Response, *supra* note 5; U.S. Response, *supra* note 5.

[109] *See* Colombia Response, *supra* note 5; Peru Response, *supra* note 5; Uruguay, *supra* note 5.

[110] *See* Colombia Response, *supra* note 5; Dominican Republic Response, *supra* note 5 (binding agreements "set forth clearly and expressly . . . for their entry into force"); Peru Response, *supra* note 5 (non-binding agreements do not allude "to entry into 'force' or 'period of force,' since such terms evoke the legal force of an instrument, but instead us[e] an expression such as 'entry into effect'"); U.S. Response, *supra* note 5 ("the presence of provisions governing an instrument's entry into force are generally suggestive of an intention that an instrument create legally binding obligations").

[111] Specifically, Colombia and the United States cited this term.

[112] Mexico cited this term.

[113] Uruguay and the United States emphasized this verb.

[114] The responses of Colombia, Peru, and Uruguay referenced this term.

[115] Uruguay's Response cited this term.

[116] Mexico cited these terms.

[117] The United States referenced this term.

[118] Colombia and the United States referenced this language.

understanding does not give rise to any rights or legal obligations between the participants" or "... is not legally binding." Uruguay suggested a clause that reads, "This Instrument shall not create obligations or international responsibility for the Parties."

20. If there is any real division of opinion among the Member States in how they differentiate treaties and political commitments it may lie in the weight they assign to the language used in an agreement. Certainly, some of the replies (*e.g.,* Colombia) suggest specific terminology will determine the agreement's status.[119] In contrast, Jamaica and the United States take a holistic view. Jamaica suggested that "no specific terminology is used to differentiate among various types of binding and non-binding agreements." And the United States emphasized a contextual approach, where "the text of any instrument must be interpreted in accordance with the ordinary meaning of its terms in their context in order to definitively interpret its meaning and effect." Thus, for some Member States, structure and terminology may be determinative, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for the parties' intentions. In other words, the use of the verb "agree" or an "entry into force" clause may be enough for some Member States to conclude the agreement must be binding. Other Member States, however, might—notwithstanding such wording—treat such an agreement as non-binding if they and their partner(s) did not intend it to be a binding agreement.

21. In sum, the ten Member State responses provide a very informative survey of the different categories of binding and non-binding agreements. There appears to be a broad consensus on the existence and contours of the categories of treaties and political commitments, although the lack of an agreed denomination for the latter category may risk occasional confusion. The concept of inter-state contracting appears less settled.

22. Moreover, the Member State responses did not resolve the question of whether a treaty results from the parties "manifest intent" or a more "objective" analysis, with adherents to both views in evidence. Nonetheless, the responses also revealed that – whatever test they use – Member States clearly favor using the agreements' structure and language to differentiate binding from non-binding agreements. Thus, whatever the theoretical divisions, as a practical matter, there is sufficient overlap to suggest common ground in advising Member States on how to identify and differentiate among different types of binding and non-binding agreements.

B. Capacity: Who Can Make Binding and Non-Binding Agreements?

23. The Member States expressed remarkable uniformity on the capacity to conclude treaties on behalf of the State *vis-à-vis* other States. Most Member States indicated adherence to the provisions of VCLT Article 7, which recognizes actual treaty-making capacity for the Head of State, the Head of Government and the Foreign Minister.[120] Treaty-making capacity is, moreover, usually orchestrated through the Foreign Ministry. Under Peru's Law on Organization and Functions, for example, the Ministry of Foreign Affairs overseas government functions in the area of treaties.[121] For other ministers or government officials to conclude a treaty on behalf of the State requires additional authority is required;

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[119] *See* Colombia Response, *supra* note 5, at 5 (charting "imperatives or words specific to treaties" versus MOUs).
[120] *See, e.g.,* Brazil Response, *supra* note 5; Colombia Response, *supra* note 5; Dominican Republic Response, *supra* note 5; Ecuador Response, *supra* note 5; Jamaica Response, *supra* note 5; Mexico Response, *supra* note 5; Peru Response, *supra* note 5; Uruguay Response, *supra* note 5.
[121] Peru Response, *supra* note 5 (citing Law No. 29357 (article 6)).

in Uruguay for example, "other national authorities can commit the State as long as they are duly authorized to do so."[122]

24. When it comes to the possibility of treaties among or between government agencies or ministries, however, the Member State responses were divided. The United States confirmed that its departments and agencies "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." Jamaica concurred in a similar capacity, noting, however, the need for prior authorization for treaty-making by their ministries/agencies.[123]

25. Other Member States, like the Dominican Republic, were just as clear in denying any experience with their State's agencies or ministries concluding treaties at the agency-level. Some Member States – Colombia and Peru – indicated that their position was due to the lack of domestic legal authority for agency-level treaty-making.[124] Argentina, however, took the view that these sorts of treaties were not available under international law, "[s]ince ministries and governmental entities are not subjects of international law, they are unable to enter into treaties governed by international law."

26. More ambiguous is the position of those countries that have a practice of inter-institutional agreements. Under Mexican law, interinstitutional agreements, including those made by federal entities, are permitted so long as "the scope of their subject matter [is] limited solely to the authorities of the federal . . . entities that sign them."[125] Mexico, moreover, apparently assumes that these agreements are governed by international law, suggesting they warrant treaty status.[126] Member States like Peru and Uruguay also cited a practice of interinstitutional agreements; Uruguay, for example, reports that its state agencies may enter into "inter-institutional agreements without needing any prior authorization, if they undertake to do so within the remit of their respective state entity – which powers are granted them under national provisions." It is not clear, however, whether these inter-institutional agreements would be governed by international law, domestic law, or merely operate as non-binding agreements.[127] Moreover, it is important to recall, that any treaty-making capacity of government agencies is not unilateral – the potential treaty-partner must also accept the capacity of that agency to conclude the treaty on the particular subject-matter in question.[128] In such cases, there is a risk of confusion where it may not be clear to the prospective partner that the interinstitutional agreement sought will be a treaty, a contract, a non-binding agreement or something *sui generis.* As such, there is room for the Committee to offer some best practices to at least mitigate the risk of conflicting views on the nature of any agreements concluded.

27. A similar pattern of responses followed the Committee's questions on treaty-making by sub-national territorial units. Argentina noted that such treaty-making is allowed

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[122] *See also* Colombia Response, *supra* note 5 (**"**the respective ministers whose portfolio corresponds to the subject matter and object of the treaties may be authorized to sign it if, and only if, they are given the respective full powers to represent the Colombian State in that procedure").

[123] Jamaica Response, *supra* note 5 ("Ministries and government agencies can conclude treaties governed by international law; however such action has to be approved by the Cabinet.").

[124] *See, e.g.,* Peru Response, *supra* note 5 ("Peruvian law does not authorize any ministry or governmental entity . . . to enter into treaties governed by international law on behalf of the Republic of Peru").

[125] In addition, Mexico requires that such agreements be coordinated with the Secretary of Foreign Affairs to enable that office to opine on the lawfulness of the agreements to be made and record any agreement subsequently made. Mexico Response, *supra* note 86 (citing Art. 7 of the Law on the Conclusion of Treaties).

[126] There are, however, issues with the legal effects of such treaties – *i.e*., whether international law permits Mexico (or any other Member State) to limit responsibility to the institution itself rather than the State of Mexico as a whole. *See* Preliminary Report, *supra* note 5, at 10.

[127] Peru appears to accept that these agreements are only binding under international law when they develop otherwise existing treaty commitments of Peru. See *supra* note 101 and accompanying text.

[128] Preliminary Report, *supra* note 3, at 10.

so long as it comports with the respective domestic laws. Article 124 of Argentina's Constitution allows its provinces and the Autonomous City of Buenos Aires to 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." In contrast, the Dominican Republic rejected such a capacity. And Brazil, Colombia, and Peru all responded by noting that their domestic law does not authorize subnational treaty-making.[129]

28. A number of Member States appear to have a more nuanced practice when it comes to subnational units concluding international agreements. Consider Mexico again. On the one hand, Article 117.I of the Mexican Constitution expressly prohibits federative entities from entering into partnerships, treaties, or coalitions with other States or with foreign powers. Yet, as noted above inter-institutional agreements governed by international law are permitted not just for federal entities but state-level governments as well. Similarly, the U.S. Constitution denies to U.S. states the power to make treaties, but allows "agreements" and "compacts" with foreign powers where approved by Congress. As a practical matter, however, the prohibition operates to preclude states of the United States from entering into treaties as defined in VCLT Article 2. Likewise, Uruguay's response indicated that its Departmental Governments cannot enter into treaties governed by international law but can enter into "Inter-Institutional Agreements or Memorandums of Understanding within their remit."[130]

29. Member States appear far less restrictive, however, on the question of the capacities of agencies or sub-national units to conclude non-binding agreements. Brazil and the United States, for example, both indicated that there are no obstacles to governmental entities or subnational units signing such non-binding agreements (provided that they did not impinge on constitutional or legal powers).[131] Where the President authorizes it, the Dominican Republic allows the "top official of government agencies" to sign MOUs. Ecuador also noted that its "lower-level state institutions usually sign with their counterparts or with international organizations non-binding understandings known as inter-institutional instruments."[132] Similar capacities were reported by Mexico, Peru, and Uruguay so long as the instruments fell within the authorities of the concluding entities.[133] And in Jamaica, "Sub-national territorial units and agencies may conclude non-binding agreements or contracts as sanctioned by Cabinet and or with the National Contracts Commission with regard to the procurement of goods, services, or works."

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[129] Brazil Response, *supra* note 5 ("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 Response, *supra* note 5 (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."); Peru Response, *supra* note 5.

[130] Uruguay Response, *supra* note 5 (citing Uruguay Constitution, Art. 168.20).

[131] Brazil Response, *supra* note 5; U.S. Response, *supra* note 5 ("[A]gencies of the United States also enter into non-legally binding instruments" while there is no "prohibition on states of the United States entering into instruments with foreign states that are neither governed by, nor give rise to rights and obligations under international law."). Colombia also confirmed non-binding agreements could be concluded among public entities.

[132] Ecuador, *supra* note 5 ("Under articles 262, 263, 264, and 267 of the Constitution of Ecuador, autonomous regional, provincial, municipal, and parish governments can . . . sign inter-institutional instruments, which cannot compromise the Ecuadorian State as such, nor the sovereignty of the Republic of Ecuador.").

[133] Mexico Response, *supra* note 5 ("As regards "non-binding" instruments, federal, state, and municipal authorities may formalize these types of documents with their foreign and international counterparts, provided that the content and scope of those instruments are within the authorities conferred upon those authorities"); Peru Response, *supra* note 5 ("Peruvian governmental entities, including municipalities and regional governments, often enter into "nonbinding" agreements with their foreign counterparts, for matters that are [within] their purview."); Uruguay Response, *supra* note 5 ("state agencies may . . . also enter into non-binding agreements within their remit without the need for full powers.").

30. As noted above, Argentina and Colombia, and Peru all indicated that they had no experience with contracts among States. All three Member States did suggest, however, a capacity for contracting at the inter-institutional level. While noting that ministries and governmental entities may not conclude agreements governed by international law, Argentina reported that they could "conclude interinstitutional agreements with governmental entities of other countries" and that it was "not unusual for Argentine governmental and subnational entities to sign binding agreements." Although not titled as contracts per se, this response suggests that Argentina accepts inter-institutional contract making. Similarly, Colombia recounted "agreements of intent between public legal entities or public bodies with the capacity to enter into contracts" whose "fulfillment is subject to the authorities those entities are accorded under the Constitution and by law." Peru, meanwhile, notes that "Peruvian governmental entities, including municipalities and regional governments (subnational territorial units) are authorized to conclude contracts for the procurement of goods and services" and that a particular agency – the Ministry of Economy and Finance – is authorized to enter into international financial contracts for debt operations or debt management.[134] Taken together with the U.S. response – confirming its agencies capacity to conclude contracts with agencies of other States – and it seems the capacity of agencies and ministries to conclude contracts with other agencies/ministries is less controversial than inter-agency treaty-making.

31. What happens if an agency or sub-national unit enters into an unauthorized agreement? Most of the Member States that responded to this question (*e.g.*, Brazil, the Dominican Republic, Jamaica) indicated that agreement would be without legal effect as far as the Member State was concerned.[135] Mexico suggests that its international institutional agreements "for which the Secretariat of Foreign Affairs has not issued a report [opining on their lawfulness] are the sole responsibility of the official who signed them and that responsibility may have administrative, civil, or even criminal consequences. Colombia's response offered a different perspective, noting the existence of an "endorsement procedure" by which the Colombian President could retroactively confirm an unauthorized agreement.

32. In sum, Member States exhibit uniformity in tracking the VCLT's procedures for designating who has authority to commit the State to a treaty. The concept of binding inter-agency agreements appears more controversial, with at least one State – Argentina – denying that such instruments can ever constitute a treaty. For most other States, the capacity to conclude inter-agency international agreements appeared to be a matter of domestic authority, which some States provide and others deny. Sub-national agreements also appear to be a function of domestic authority (alongside finding willing partners for an agreement).

33. The status of "inter-institutional agreements" is much less clear. Member States suggest that these agreements may be made among agencies of the State *or* its sub-national units. But they differ in how to characterize these commitments. No state labels them as treaties (in the VCLT sense) but at least one (Mexico) suggests that they are governed by international law.[136] Other Member States are more ambiguous on whether these instruments are always non-binding or sometimes binding as a matter of domestic – rather than international – law. This suggests Member States might benefit from greater transparency

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[134] Peru Response, *supra* note 5 (citing State Procurement Law (Law No. 30225) and General National Indebtedness System Law (Law No. 28563)).

[135] Brazil Response, *supra* note 5 (considering such agreements "ipso facto null and void"); Dominican Republic Response, *supra* note 5 (such agreement would be "null and without any legal effect"); Jamaica Response, *supra* note 5 (such agreement would be "without legal effect"). Unfortunately, these responses do not indicate under which legal system—international or domestic—these agreements would lack legal effect.

[136] Although it does not use the term "inter-institutional agreements," the United States recognizes that its government ministries (or agencies) may conclude treaties governed by international law with foreign government agencies.

on when governmental agencies or sub-national units are authorized to conclude such agreements (including non-binding ones), what status they have, and how to distinguish among them.

C. Effects: What Consequences follow the Existence of an International Agreement?

34. In terms of legal effects, the defining feature of a treaty is the way it binds parties as a matter of international law to comply with its contents. Several Member State responses tracked this view. Jamaica and Peru both noted that each was obligated to comply with those obligations assumed in binding agreements. Colombia specifically cited the principles of good faith and *pacta sunt servanda* flowing from its treaty commitments, with the later principle encapsulated in VCLT Article 26.[137]

35. Other States emphasized the domestic legal effects that follow the State's conclusion of a treaty. The Dominican Republic, for example, noted how its Constitution obligated the Dominican Republic to assume "an obligation, once the constitutional ratification procedure is concluded, to comply with a valid treaty or agreement." Peru's response echoed this view at a more granular level, with compliance at the domestic level lying with those governmental departments under whose purview the treaty falls. Ecuador's Response offered the most details on the domestic effects of its treaties. Under Article 417 of its Constitution, various domestic legal doctrines (*e.g.,* direct applicability) apply to "treaties and other instruments for human rights."[138] In Ecuador, moreover, "international human rights treaties ratified by the state that recognize rights that are more favorable than those enshrined in the Constitution" prevail over "any other legal regulatory system or act of public authorities."[139] Other treaties have significant weight within the 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.[140]

36. Member State responses were, on the whole, less clear on the legal effects of binding agreements concluded among government agencies or sub-national territorial units. As noted above, some States (*e.g*., Colombia) do not recognize inter-agency treaty-making.[141] Other States (like Brazil) do not accept treaty-making by their sub-national territorial units.[142] States who do authorize such international agreements, however, evidenced very different views on their legal effects.

37. Three states – Argentina, Jamaica, and the United States – endorsed the view that when a State's ministry or sub-national territorial unit enters into a treaty in its own name, international legal responsibility still lies with the State as a whole.[143] Thus, the United States Response indicated that "The United States considers treaties (as defined in Article 2

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[137] Colombia Response, *supra* note 5 ("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.").
[138] Ecuador Response, *supra* note 5 (Citing 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").
[139] *Id.* (citing the Ecuador Constitution, Art. 424).
[140] *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.").
[141] *See supra* note 124, and accompanying text.
[142] *See supra* note 129, and accompanying text.
[143] Jamaica Response, *supra* note 5 ("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").

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:

> [I]t should be noted that there is no customary rule or treaty in force that answers the questions regarding the responsibility of the State in the situations described. It [is] worth recalling, however, that Article 4.1 of the draft articles on responsibility of States for internationally wrongful acts (AG/56/83) 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."

For these States, therefore, the negotiation and conclusion of binding agreements at a sub-state level (either inter-agency or among sub-national territorial units) is still of concern to the State since their nonperformance could trigger the law of State responsibility.

38. In contrast, Mexico very clearly takes a contrary view. 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." In addition, Mexico claims that "[i]t would also be unlawful 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."

39. Two other States – Peru and Uruguay – offer more nuanced views on their interinstitutional agreements. While denying that its municipalities and regional governments have authority to enter into treaties binding on the Republic of Peru, Peru acknowledges that Peruvian governmental entities may conclude agreements with their foreign counterparts that "are not considered 'treaties' as defined in international law, since they do not aim to create a legal relationship between States, but only for the institutions entering into them." Whether the legal relationship created is one of international law (or not) appears, for Peru, to be a function of whether the interinstitutional agreement develops "international commitments established under treaties in force." By implication, it would appear that the legal effects of most Peruvian interinstitutional agreements will be under domestic law, and thus avoid triggering the state responsibility question.

40. Similarly, in explaining that its government entities and subnational territorial units (departmental governments) can conclude certain inter-institutional agreements, Uruguay indicates that "[s]ince they cannot be referred to as "treaties" in such instances, legal responsibility for compliance with them is therefore more than a matter of public international law.[144] What the legal responsibility is precisely, the Response does not say. But, Uruguay does cite one example – loan agreements by its department units with foreign governments – where its laws provide for extensive approval procedures (*i.e.*, involving departmental legislature approval, a court of auditors report and the consent of the Legislature). The law does this, Uruguay explains, to "provide for the maximum guarantees for a situation whereby a Departmental Government directly undertakes an international obligation in that capacity and not on behalf of the State as a whole." At the same time,

[144] Uruguay Response, *supra* note 5 (noting that inter-institutional agreements must be within the entities' remit and otherwise comport with the Constitution and laws).

however, Uruguay notes that "responsibility in the broad sense . . . may fall to the state" in cases where a state official concludes an agreement that is not authorized by the VCLT or its Constitution. As such, Uruguay, like Peru, appears to accommodate the possibility of State Responsibility applying to these agreements in some cases even if in the first instance it envisions responsibility to lie with the entities concluding them.

41. What about international legal responsibility for a binding agreement among government agencies or sub-national territorial units concluded without following the appropriate domestic procedures? Most Member States denied responsibility for such agreements. As Brazil noted, it has "no domestic laws governing international responsibility" for binding agreements by "governmental entities or subnational territorial units" but still expects its constitutional requirements for agreement-making to be "strictly observed." Similarly, Member States like Colombia, the Dominican Republic and Ecuador took the view that the failure to follow domestic procedures nullified the agreement's status not only within domestic law but perhaps international law as well. As Colombia's response emphasized: "The Republic of Colombia is not responsible for agreements concluded in violation of this legality principle."[145] The Dominican Republic echoed this view, and cited an example where 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 its judicial review and approval by the National Congress. Accordingly, the Dominican Republic Supreme Court treated the MOU as null and void.[146] Mexico emphasized the personal liability of those who sign an interinstitutional agreement where the Secretariat of Foreign Affairs' Legal Department has not issued its views.

42. In contrast, both Jamaica and Peru hinted that they might recognize at least some international legal responsibility for acts taken under an unauthorized agreement by an agency or sub-national unit. Peru, for example, explained that **"**if, in its operation, a Peruvian governmental entity fails to comply with an international obligation assumed by the Republic of Peru, this may generate international liability for the Peruvian State." Of course, this would require the inter-institutional agreement constituting an international obligation of Peru in the first place, which Peru suggests it views as possible in only limited circumstances.[147] For its part, Jamaica indicated that its government's response to an unauthorized inter-agency or sub-national agreement would "depend on the nature of the agreement and circumstances surrounding its conclusion." Certainly, that does not mean Jamaica would accept international legal responsibility in such cases, but it also does not deny that possibility remains.

43. What about the legal effects of contracts done by government agencies or sub-national territorial units? The Member States that responded to this question affirmed that these were legally binding instruments for which compliance was mandatory.[148] Moreover,

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[145] See also Ecuador Response, *supra* note 5.

[146] Dominican Republic Response, *supra* note 5 (citing and quoting from Judgement of the Plenary of the Supreme Court of Justice, of August 10, 2005, B.J. 1 037: "the file compiled in this action does not contain documentation demonstrating that full powers were granted that the President of the Republic must grant to the Deputy Secretary of State for Foreign Affairs, Pichardo Olivier, for signature of the instrument in question, or that establishes that it was submitted to the National Congress for adoption or ratification, in fulfillment of the provisions of . . . constitutional rules; that by mandate of Article 46 of our Fundamental Charter, 'All unconstitutional laws, decrees, regulations, and acts are null and void.'")

[147] See *supra* notes 101-102, 127 and accompanying text.

[148] *See, e.g.,* Peru Response, *supra* note 5.

any legal effects were a matter for their domestic law, and, as Jamaica noted, are "open to the interpretation of domestic courts."[149]

44. Moreover, none of the Member State responses admitted the possibility that a non-binding agreement could have legal effects (*e.g.*, giving rise to a claim of estoppel).[150] On the contrary, the responses addressing the question were uniformly of the view that a non-binding agreement cannot, by definition, generate *any* legal effects.[151]

45. In sum, Member States were unified in recognizing the international legal effects that accompany the conclusion of a treaty, while acknowledging that any domestic legal effects depend on a State's national law. Among those states acknowledging that ministries or sub-national units could conclude binding agreements, however, there is a division of opinion on their legal effects. Some States (*e.g.*, Argentina and the United States) insist that as a matter of international law, these agreements, if binding, trigger the international legal responsibility of the state as a whole. In contrast, Mexico suggests that as a constitutional matter, any international legal responsibility must be limited to the agency or sub-national unit rather than Mexico as a whole. The question this raises for the Committee is whether to try and resolve this debate or perhaps offer guidelines that help states avoid the conflicts that might follow from concluding such an agreement among institutions of States holding such divergent views. This challenge is particularly important given that some Member States (and some sources of international law[152]) accept that international may not allow a State to disavow agreements made by its agencies or sub-national units even if done in violation of that State's domestic law or procedures.

D. Procedures: How do States Authorize Binding and Non-Binding Agreements?

46. Authority to negotiate a treaty on behalf of the State lies with the executive branch for all the Member States who addressed that issue.[153] For a number of States, their Constitution explicitly delineates this authority.[154] This authority is also regularly exercised

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[149] S*ee also* U.S. Response ("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.").

[150] Preliminary Report, *supra* note 3, at 15 (citing Oscar Schachter and Anthony Aust for the idea that non-binding agreements can generate reliance interests in others that estopp the participants in the non-binding agreement from taking actions inconsistent with its contents).

[151] *See, e.g.,* Colombia Response, *supra* note 5 (Non-binding agreements have "no legal implication for the Republic of Colombia as a subject of international law."); Dominican Republic Response, *supra* note 5 (non-binding agreements done at the agency or sub-national level "are in no sense binding"); Mexico Response, *supra* note 5 ("'[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."); Peru Response, *supra* note 5 ("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."); U.S. Response, *supra* note 5 ("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.").

[152] *See, e.g.,* VCLT Art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); *id*. 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 . . ."); ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts" in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), UN Doc A/56/10 55 [3] ['ASR'], Art 4 ("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.").

[153] Argentina, Colombia, the Dominican Republic, Jamaica, Peru and the United States all endorsed this view.

[154] *See* Brazil Response, *supra* note 5 ("authority to initiate the negotiation of a treaty rests exclusively with the President" pursuant to Articles 84.VII and VIII of the Federal Constitution); Mexico Response, *supra* note 5 (citing Article 89.X of the Mexican Constitution); U.S. Response, *supra* note 5 ("a treaty (as defined in Article 2 of the VCLT) may not be signed or otherwise concluded on behalf of the United States without prior consultation with the

by Member States' Ministry of Foreign Affairs.[155] Nonetheless, where an agreement's contents lie within the purview of other government agencies, most Member States reported coordinating their negotiation with such agencies (just as agencies seeking to conclude a treaty on behalf of the State must obtain the requisite full powers to consent on behalf of the State).[156]

47. Two Member States – Peru and the United States –reported detailed procedures in place to coordinate the negotiation (and conclusion) of treaties on behalf of the State. In 2013, Peru's Ministry of Foreign Affairs issued two Directives on the procedures for negotiating and concluding treaties.[157] These directives "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 . . ." For its part, the United States has had procedures in place for several decades ensuring State Department approval prior to the negotiation of binding agreements.[158]

48. Member States also reported extensive domestic procedures associated with the conclusion of treaties. Constitutional provisions loom even larger here, with Argentina, Colombia, the Dominican Republic, Ecuador, Mexico, Peru and the United States all citing specific constitutional provisions on treaty-making.[159] Some of these provisions effectively limit the subject-matter of the Member States' treaty-making.[160] Others are procedural. For example, several Member States recount 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.[161] Other States, like Mexico, note the availability of judicial review when the constitutionality of a treaty is challenged.

49. Most Member States, moreover, reported a need for treaties to receive legislative approval. For some States, like the Dominican Republic, all treaties require such

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Secretary of State" and citing 11 FAM 720 et seq. for detailed procedures governing the negotiation and conclusion of treaties).

[155] *See, e.g.,* Brazil Response, *supra* note 5 (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017); Peru Response, *supra* note 5.

[156] *See, e.g.,* Colombia Response, *supra* note 5 ("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).

[157] Peru Response, *supra* note 5, (citing Ministry of Foreign Affairs issued Directive No. 001-DGT/RE-2013, "General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties," (2013) (covering the Ministry of Foreign Affairs itself); and Directive No. 002-DGT/RE-2013, "General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties" (covering all governmental entities)).

[158] U.S. Response, *supra* note 5 (citing 11 Fam 720 et seq.,). These procedures are colloquially known as the C-175 Process. Preliminary Response, *supra* note 5, at 16-17.

[159] Argentina Response, *supra* note 5 (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 5 ("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 5; (citing Art. 184 requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Ecuador Response, *supra* note 5 (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Mexico Response *supra* note 5 (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); U.S. Response, *supra* note 5 (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

[160] *See, e.g*., Mexico Response, *supra* note 5.

[161] *See, e.g*., Dominican Republic Response, *supra* note 5 (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* note 5 (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.")

approval.[162] Other States, like Ecuador, require legislative approval for certain treaties that address certain subjects or perform certain functions.[163] Several Member States (*e.g.*, Colombia, the United States) reported different sets of domestic procedures for different treaties. Thus, although many of Colombia's treaties must receive legislative approval it 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).[164] In the United States, there are two different pathways for legislative approval – the advice and consent of two-thirds of the U.S. Senate (as expressly provided for in Article II of the U.S. Constitution) and regular legislation (whether ex ante or ex post) authorizing the U.S. conclusion of a treaty on subjects within the purview of federal legislative power. In addition, like Colombia, the United States also recognizes the President's authority under U.S. law to conclude treaties pursuant to Executive Power as well as those agreements implementing treaties concluded with Senate advice and consent.[165]

50. When it comes to treaty-making by agencies or government ministries, only a few states reported detailed domestic procedures.[166] 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. Jamaica reported 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 agreement are then kept on file by the Foreign Ministry Legal Office.

51. Mexico, meanwhile offered the most detail on its inter-institutional agreements, including those made by agencies of the federal government. Under Mexico's 1992 Law on the Conclusion of Treaties, inter-institutional agreements face both subject-matter and functional limits. They can (i) only be made 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 to these constraints, Article 7 of the Law on the Conclusion of Treaties requires Mexican government federal entities to keep the Secretariat of Foreign Affairs informed of any interinstitutional agreement they are seeking to conclude, and, perhaps, most importantly, the need for the Legal Department of the Secretariat of Foreign Affairs to report on the lawfulness of signing such an agreement.

52. With respect to procedures for sub-national treaty-making, some States, like Argentina and the United States do have constitutional provisions detailing the availability and conditions for such agreements. Article 124 of the Argentina Constitution, for example,

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[162] Dominican Republic Response, *supra* note 5 (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive.").

[163] Ecuador Response, *supra* note 5 (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).

[164] Colombia Response, *supra* note 5 (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).

[165] *See also* Preliminary Report, *supra* note 3, at 16.

[166] Indeed, Member States like Brazil, Colombia, the Dominican Republic, and Peru do not authorize binding agreements by their government agencies, ministries or institutions, and thus treated this question as non-applicable. *See, e.g.*, Peru Response, *supra* note 5 ("Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)").

authorizes subnational units to conclude "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." The U.S. Constitution bars treaty-making by U.S. states but sanctions the conclusion of international agreements or compacts with Congressional consent.[167] Jamaica and Mexico meanwhile, signaled the use of the same domestic procedures applicable to inter-agency for inter-institutional agreements at the sub-national level.

53. Finally, in terms of domestic procedures for political commitments, most Member States reported few formal regulations on this topic. Nonetheless, several Member States revealed a similar practice of coordinating the negotiation and conclusion of these commitments with the Foreign Ministry.

54. In Colombia, for example, only those with legal capacity to represent the entity in question can sign memoranda of understanding or letters of intent even though these instruments are non-binding.[168] Moreover, "[w]hen memoranda of understanding or letters/statements of intent are negotiated at the ministerial or institutional level, it must be verified and ensured that the political commitments they contain do not exceed the functions and authorities granted to those entities under the Constitution and by law. That review is conducted by the legal office of the entity pursuing the agreement unless it is to be concluded on behalf of the Colombian government or the Foreign Ministry (in which case the review is by the Department of International Legal Affairs of the Ministry of Foreign Affairs). Ecuador reported a similar 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."

55. In Peru, non-binding agreements 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 interinstitutional 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."[169] Peru also reports that through its treaty office, the Ministry of Foreign affairs is

> Developing training programs for ministries, technical entities, municipalities, and regional governments to build their capacities for concluding interinstitutional agreements and nonbinding agreements so as to create a need to submit draft laws to the Ministry of Foreign Affairs for its consideration, since these agreements must align with State foreign policy.

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. 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

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[167] *See* U.S. Constitution, Art. I, §10, cls. 1, 3.

[168] Colombia Response, *supra* note 5. 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.*

[169] Peru Response, *supra* note 5 (assessment of political commitments "made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording . . .").

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."

56. Taken together, the Member State responses suggest a limited need for guidelines on the procedures for negotiating or concluding treaties. All Member States appear to have a well-developed set of procedures for the negotiation and conclusion of treaties by the State or the Member State's government. These procedures are, moreover, diverse, with varying levels of participation by the legislature and/or a Constitutional Court. At the same time, however the Committee might offer some best practices with respect to agreements by sub-national units, inter-agency, or "inter-institutional agreements." Procedures for these sorts of agreements are less pervasive. Where such procedures exist, some States (*e.g.*, the United States) use the same procedures as employed for other treaties, while others (*e.g.*, Mexico) have a discrete set of procedures for these types of commitments. There are, moreover, apparently few, if any laws, regulating the conclusion of political commitments at any level, but some States (*e.g.*, Colombia, Peru) have practices that ensure Foreign Ministry review of at least some such commitments.

E. Priorities – On which specific aspects of binding and non-binding agreements should the Committee focus its attention?

57. A majority of Member State responses favored the Committee producing general principles or a guide as to best practices. Several Member States (*e.g.*, Mexico, Peru, Uruguay) supported the Committee pursuing either general principle or best practice that focus on distinguishing among binding and non-binding agreements.[170] Peru, for example, supported enabling "the criteria and practice of the States of the region to be standardized, allowing for clarification of the differences between binding and nonbinding treaties, and therefore the definition of criteria for use in their preparation and level of representation, among other matters." In addition to supporting work distinguishing binding and non-binding agreements, Uruguay also supported work on the issues of responsibility.

58. Other Member States (*e.g.*, Brazil, Colombia, United States) concluded that the Committee could make a useful—or even significant—contribution to Member State practice by offering a (non-binding) practical guide as to best practices in identifying binding and non-binding agreements. The United States' support for best practices did not, however, extend to general principles – "[b]ecause these issues involve areas in which state practice may not be uniform and in which states enjoy areas of discretion, the United States does not believe that efforts to articulate general principles of law would be productive."

59. Other States like Ecuador supported more "general guidelines for the signing of instruments." In contrast, Argentina and the Dominican Republic, did not see any of the issues raised in the Committee's questionnaire as problematic and thus did not express an opinion on the need for general principles or best practices.[171]

60. Taken together, therefore, the responding Member States evidence clear support for the Committee to work on some set of best practices for distinguishing binding and non-binding agreements, delineating who can make them with less support for the idea of general principles.

II. NEXT STEPS

A. Encourage Additional Responses to the Committee's Questionnaire

61. The ten Member States that responded to the Committee's Questionnaire represent a significant portion of the Americas in terms of geography and population. They represent different legal traditions and, as their responses show, have a deep and nuanced set of laws and practice for dealing with treaties and other forms of international agreement.

62. At the same time, however, the responses received come from a minority of OAS Member States. Two dozen States did not respond with their views or priorities. Thus, although the existing responses may well be sufficient to ground any guidelines that the Committee wishes to draft for Member States, it would be useful to gather additional views and perspectives.

63. Thus, in terms of next steps, I propose that the Committee request the Department of International Law to reach out to those States that have yet to respond to the Questionnaire and invite them to do so. Assuming the Committee approves my proposal to draft "OAS Guidelines for International Agreements," the Department may wish to call this fact to the attention of Member States. In doing so, it may incentivize some previously non-responsive States to offer their views. Of course, we will not receive responses from all Member States.

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[170] Mexico Response, *supra* note 5; Peru Response, *supra* note 5.

[171] Nothing in their responses, however, suggested any opposition to the Committee pursuing more work in this area. Jamaica did not respond to the question on priorities.

But even a few additional responses may help further illuminate areas of consensus, common practices, and topics in need of further clarification or guidance.

B. OAS Guidelines for International Agreements?

64. The Member State responses suggest that the question is not whether the Committee should do further work on binding and non-binding agreements – there is clear support for such efforts – but rather what kind of work the Committee should undertake. As my Preliminary Report and the Member State responses received to date suggest, there is either ambiguity or division of opinion on a number of key legal questions. It is currently unclear whether a treaty is defined by the manifestation of intent by its parties or some set of objective criteria. Member States also differ as to whether an inter-institutional agreement (by government ministries or sub-national units) triggers the international legal responsibility of the State as a whole (versus the concluding entity alone). And although the Questionnaire responses received to date deny the possibility, there is a credible argument that political commitments may create conditions legally estopping a participating State from violating its terms.

65. Thus, one approach the Committee might take would be to adopt several "General principles of Law regarding Binding and Non-Binding Agreements." The Committee could codify customary international law as it exists beyond the VCLT while engaging in the progressive development of international law by offering principles that Member States could use as a reference point in forming and applying both binding and non-binding agreements. We could, for example, devise some "default legal rules" on whether to treat an agreement among States (or State institutions) as a treaty, a political commitment or a domestic law contract in the absence of evidence to the contrary.

66. I believe a set of General Principles would be of use not just to Member States but globally. And I would certainly be willing to work on such principles if the Committee as a whole supported going down that path. Nonetheless, I am *not* proposing that we draft such principles at the current time. The Member State responses received to date reveal divergent views on some of these questions that would be difficult to reconcile. In such circumstances, it is not clear if Member States would uniformly support any general principles. Like the United States, therefore, I have a concern about whether drafting general principles would be "productive."

67. Whatever the merits of producing general principles, there is clearly value in the Committee drafting a set of "best practices" or what I would dub the "OAS Guidelines for International Agreements." Instead of attempting to clarify or resolve open questions of international law concerning binding and non-binding agreements, we might pursue a document that offers Member States candid and useful advice on the state of the law as it exists and the sorts of behaviors that may minimize future disagreements or difficulties with other States. Such a document could, I submit, be a useful reference work for the Member State Foreign Ministries who requested we take up this topic (and, indeed, if properly publicized, could have a more global impact).

68. Thus, I seek the Committee Members' views on my decisions both to (a) not pursue the drafting of any "General Principles"; and (b) to pursue drafting a set of "OAS Guidelines for International Agreements."

69. For those supporting draft Guidelines, I would welcome further input on what topics these guidelines should cover. My initial assessment is that the guidelines could cover one or more of the following areas and issues:

- **Definitions**: Our guidelines could offer practical, working definitions of treaties, political commitments and contracts that could inform Member State practice. Such definitions could, for example, assist Member States in categorizing differentiate types of "inter-institutional" agreements.

- **Criteria for differentiating among agreement types:** Our guidelines could provide a list of suggested terms, provisions, or features that State should use to constitute a treaty versus those to use in creating a political commitment (or a domestic law contract). To be clear, I would not propose we endorse any specific language as *determinative* (since doing so would imply we endorse the objective approach to the treaty concept over the "manifest intention" approach). Rather, we should recommend such language and features to States as *indicative* of an agreement's status to facilitate their own *holistic* analysis.

- **Identifying the conditions under which Member States should pursue a particular agreement type:** Our guidelines might compare and contrast the costs and benefits of concluding different types of binding and non-binding agreements to give Member States specific considerations in choosing which type of agreement to pursue in a particular case.

- Encouraging transparency among Member States: Our guidelines could encourage States to be more transparent in making binding and non-binding agreements. For example, the Committee could encourage States to express their views of an agreement's status within its text in any case where that status might otherwise be unclear (for example, States could be encouraged to include, where appropriate, a provision expressly declaiming any intention that the commitment give rise to legal rights or obligations; or, in other circumstances, they could be encouraged to include a provision that identifies a particular State's national law as the governing law for an agreement).

- **Limiting Legal Responsibility for Inter-Institutional Agreements**: Our guidelines might endorse a practice where those parties who would otherwise assign legal responsibility to a State as a whole consent to limiting responsibility to the entity concluding an inter-institutional agreement, thereby avoiding the difficult questions of international law raised by States who insist their inter-institutional agreements only bind the institution, not the State.

- **Procedures for Binding Inter-Institutional Agreements under International Law**: Our guidelines could endorse States adopting procedures by which they can assure appropriate authorization for their institutions (be they government ministries or sub-national units) to conclude an agreement governed by international law and to communicate that authority to the State with whose institution(s) that agreement might be concluded. This will allow the other State an opportunity to authorize its institution to conclude that agreement or revisit it if, for example, the other State has not authorized its own institutions to conclude agreements governed by international law. A similar two-step process might be used in cases involving contracts.

- **Procedures for Non-Binding Agreements**: Our guidelines might endorse some minimum procedural requirements for non-binding agreements, including Foreign Ministry review and/or a national registry of all such agreements made by the State, its ministries, or sub-national units.

- **Training and Education:** Our guidelines could endorse Member States undertaking more training and education efforts to ensure that relevant actors within a Foreign Ministry (or outside of it in cases where other institutional actors make agreements) 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 such agreements, (iii) following any and all procedures involved in such agreement making; and (iv) appreciating the legal and non-legal consequences that can flow from different types of international agreements.

70. In closing, the Member State responses to the Committee's Questionnaire comprise a complex but highly valuable data set. They confirm the impressions first conveyed to the Committee during the inaugural meeting with Foreign Ministry Legal Representatives – *i.e.*, that States would benefit from further guidance and creative thinking on the subject of both binding and non-binding agreements. I look forward to the Committee's input and counsel on how best we may do so.

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