

English

## **BINDING AND NON-BINDING AGREEMENTS:**

### **FOURTH REPORT**

(Presented by Dr. Duncan B. Hollis)

#### **INTRODUCTION**

81. At its 89<sup>th</sup> Regular Session, the Inter-American Juridical Committee held an inaugural Meeting with Legal Advisors to the Foreign Ministries of several Member States. During that meeting a proposal was made for the Committee to take up the topic of binding and non-binding agreements.<sup>340</sup> The Committee agreed and appointed the author to serve as Rapporteur at its 90<sup>th</sup> Regular Session.<sup>341</sup>

82. In my preliminary report, I identified three categories of international agreement – treaties, political commitments, and contracts. For each category, I introduced four lines of inquiry – (a) *differentiation* – what are the criteria for each agreement type, and how can States determine what type of agreement they are concluding? (b) *capacity* – in addition to States, when can other entities (e.g., government ministries, sub-national territorial units) conclude agreements? (c) *legal effects* – what legal consequences follow the conclusion of each agreement type? and (d) *procedures* – what mechanisms do States use to authorize, negotiate and conclude each agreement type?<sup>342</sup> In all four areas, I identified areas where the law and practice are well settled and areas where there is outstanding ambiguity or divisions of opinion.

83. In an effort to clarify the relevant law and practice, the Committee forwarded a questionnaire to Member States (Note OEA/2.2/70/17), designed to illuminate their views on this topic. My second report reviewed the responses received from ten Member States: Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.<sup>343</sup> Panama and Paraguay later provided the Committee with

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<sup>340</sup> See *Annual Report of the Inter-American Juridical Committee to the Forty-Seventh Regular Session of the General Assembly*, OEA/Ser.G, CP/doc.5261/17 (31 Jan. 2017) p. 10; *Summarized Minute*, Meeting with the Legal Advisors of the Ministries of Foreign Affairs, 5 Oct. 2016, in *Annual Report*, *supra* pp. 153, 160.

<sup>341</sup> *Annotated Agenda of the Inter-American Juridical Committee*, 91<sup>st</sup> Regular Session, August 7 to 16, 2017, p. 60.

<sup>342</sup> See Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, Inter-American Juridical Committee, 91<sup>st</sup> Regular Session, OAS/Ser.Q, CJI/doc.542.17 (August 6-16, 2017) (hereinafter “Preliminary Report”).

<sup>343</sup> See Duncan B. Hollis, *Second Report on Binding and non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) (hereinafter “Second Report”).

their views as well.<sup>344</sup> These responses provided a useful summary of Member State views on five issues: (i) definitions of the different types of agreement concluded by each State; (ii) methods used to identify each agreement type; (iii) which entities had the capacity or authority to enter into each agreement type; (iv) the international legal effects, if any, of each type of agreement; (v) domestic approval procedures for each type of agreements; and (vi) areas warranting further attention from the Committee. In reviewing this report (and the underlying responses), the Committee endorsed the completion of “*OAS Guidelines for International Agreements*” – a set of best practices for Member States to use in making and applying their various agreements. The aim of the *Guidelines* is to offer a concrete and detailed set of definitions, processes, and methods for identifying and differentiating among three types of international agreements – treaties, political commitments, and contracts – and the various actors who may make them – States, government agencies, and sub-national territorial units. The *Guidelines*, however, do not aspire to legally bind Member States in anyway; they are intended to be entirely voluntarily. And although there are several areas where existing international law is unclear or disputed, the *Guidelines* will leave these issues unresolved. Rather, the project aims to offer a Member State “best practices” to side-step or overcome such challenges via candid and useful advice on the current state of the law and practice and ways to minimize future disagreements or difficulties with other States.

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

- (i) definitions of the three main categories of international agreement – treaties, political commitments and contracts—as well as they more ambiguous category of “inter-institutional agreements”;
- (ii) the capacity of different “State institutions” (e.g., government ministries or agencies, sub-national territorial units) to conclude each type of international agreement; and
- (iii) methods for identifying each agreement type, highlighting how different States may not use the same methods and suggesting therefore a need for greater transparency among States as to their own practices in identifying binding and non-binding agreements.<sup>345</sup>

85. At our last Regular Session, Committee members kindly offered detailed feedback on the first three sections of the draft guidelines and accompanying commentary. In addition, the draft was presented during the Committee’s August 15, 2018 meeting with representatives of the Member State’s Foreign Ministry Legal Advisers.<sup>346</sup> Both groups

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<sup>344</sup> See *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States*, N.V.-A.J.\_MIRE-201813176 [hereinafter “Panama Response”]; *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (June 12, 2018) [hereinafter “Paraguay Response”].

<sup>345</sup> Duncan B. Hollis, *Third Report on Binding and non-Binding Agreements*, OEA/Ser. Q, CJI/doc.563/18 (15 July 2018) (hereinafter “Third Report”).

<sup>346</sup> See Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018.

confirmed the value of the project and provided useful—and often detailed—suggestions, comments and critiques. With one exception, however, the current Report does not engage with this feedback. Rather, it provides new draft guidelines and some of the commentary on topics not covered in the first draft: (i) procedures for approving the negotiation and conclusion of binding and non-binding agreements; (ii) the legal effects of binding and non-binding agreements; and (iii) training and education. As such, this report—combined with the Third Report that preceded it—provides a complete but still “tentative” draft of the *Guidelines*.

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

87. More importantly, I have continued to employ the term “Agreements” in the title and throughout the *Guidelines* to reference the broader concept within which treaties, political commitments, contracts, and inter-institutional agreements all fall. It is true, as one Foreign Ministry’s Legal Adviser’s Office advised, that certain States in their practice employ the term “agreement” as a synonym for a “treaty.” As such, there is a risk that the use of the term “agreement” in the title and contents of these *Guidelines* may be confusing to States used to thinking of “agreements” only in terms of mutual commitments governed by international law.

88. I appreciate the concerns expressed about using “agreements” in this project to refer to the broader concept of a shared commitment. Nonetheless, I have continued to do so for five reasons. First, as a historical matter, at least since the International Law Commission’s seminal work, treaties have been recognized *not* as a synonym for agreement, but as a sub-category of that broader concept.<sup>347</sup>

89. Second, and relatedly, the term “agreement” captures an essential criterion that unites treaties, political commitments, and contracts, and distinguishes them from other

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<sup>347</sup> The idea that all treaties are agreements but not all agreements are treaties was a regular refrain in the International Law Commission’s work on the law of treaties. Henry Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, 1; [1965] YBILC, vol I, 10, 10 (Briggs); J.L. Brierly, *First Report on the Law of Treaties*, [1950] YBILC, vol II, 227 (19-20). The 1969 Vienna Convention on the Law of Treaties that emerged from their work is also widely understood to use the term “agreement” in a conceptual sense, rather than by reference to a particular instrument such as a treaty. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) (“The term ‘agreement’ can refer to (i) the concrete, i.e., a particular text in written form; or (ii) the abstract, i.e., the ‘meeting of the minds’ consisting of an offer and its acceptance between the parties (the *synallagma*). ‘Agreement’ in Article 2, subpara. 1(a) in itself contains no particular requirements and refers to the latter.”); *see also* J.L. Weinstein, *Exchange of Notes*, 29 British Y.BK. INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes”).

international texts (e.g., unilateral declarations, texts lacking normative commitments).<sup>348</sup> I have not been able to identify an alternative (or synonymous) phrase that would do so as well. Although some might suggest the *Guidelines* focus on “instruments” rather than “agreements,” that approach is problematic. Instruments may be formal documents, but they can also lack *both* the mutuality and commitment (*consensus ad idem*) criteria that are essential components of all treaties, political commitments and contracts. One state can produce an “instrument” just as multiple states can sign an instrument without undertaking any normative commitments. s such, recasting this project in terms of instruments would simply replace one potential source of confusion with another, shrouding *the* common element that unites treaties, political commitments and contracts and differentiates them from other international documents. Similar problems arise with respect to other phrasings. Trying to focus on “commitments”, for example, leaves out the concept of mutuality.<sup>349</sup> Other potential synonyms like “accords” or “contracts” are either too obscure or already operate as terms of art in international relations, making them ill-suited substitutes.

90. Third, while State practice may often reserve the term “agreement” to label or otherwise identify a treaty, I believe it would be a mistake to have these Guidelines tie the usage of that term exclusively to the treaty-context. As currently drafted, the *Guidelines*’ central message counsels against any best practice of using (or expecting) “magic words” to dictate a text’s legal status. Certain terms may be indicative as to which category a text belongs. And I would include “agreement” as doing so with respect to treaties. Nonetheless, whatever the practice of some States, it is also possible that other States (or an international tribunal) might regard a text labeled as an “agreement” to qualify as a contract or political commitment rather than a treaty where other indicia suggest these are the more appropriate categorization.

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

92. Fifth, and finally, I believe that any risk of confusion caused by focusing this project on international “agreements” can be mitigated by suitable qualifications in the *Guidelines* and the accompanying commentary. By explaining or signaling to States the different ways in which the term “agreement” can be employed, it may allow for its usage both as a broad-overarching concept *and* as a particular indicator of a treaty in practice. My next—and

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<sup>348</sup> Thus, the topic of unilateral declarations forms a distinct subject of study (and practice) in international law. See, e.g., ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, [2006] YBILC, vol. II, Pt. II, 369. Moreover, although agreements can be one-sided—agreements do not require an exchange of commitments or what the common law calls “consideration”—they do require some normative commitment in terms of a shared expectation of future behavior by at least one of the agreement participants. See, e.g. Duncan B. Hollis and Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VIRGINIA J. INT’L L. 507, 522 (2009); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM J. INT’L L. 581, 584-85 (2005); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 51-53 (1996).

<sup>349</sup> The opposite risk arises with alternative synonyms such as “arrangements” which fail to convey the normative expectations of future behavior inherent in the agreement concept itself.

hopefully complete—draft of the *Guidelines (with Commentary)* will thus do more to highlight and explain these issues.

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

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

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

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

95. As always, I welcome the Committee's feedback on each of the draft guidelines and the accompanying commentary in terms of both substance and structure. Are the best practices I propose an accurate reflection of the diversity of Member State laws and practices today? Are they ordered properly? More importantly, if these *Guidelines* were actually used, would they alleviate the confusion (and potential for inter-State disputes) that currently exists? Finally, are there additional guidelines or topics that this project should incorporate in any ensuing draft of the *Guidelines*?

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

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

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

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

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

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

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

or State institutions as to its institutions' capacities and the relevant procedures under which they operate.

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

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

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

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

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

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

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

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

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

**5.7 Choosing Among Binding and Non-Binding Agreements.** In deciding whether to employ a treaty, contract, or political commitment for an inter-State or inter-institutional



agreement, States and their institutions should contemplate what legal effects, if any, they want to generate.

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

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

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

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

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

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

## ANNEX II

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

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

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

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

The domestic approval procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State’s constitution.<sup>2</sup> Others may be a product of

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<sup>1</sup> See, e.g., Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (“Colombia Response”) (“depending on the subject matter of the legal instrument to be negotiated . . . the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself” are involved in authorizing it).

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

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

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

But there is extensive variation in both the breadth and depth of the required legislative role.<sup>5</sup> For some States, like the Dominican Republic, all treaties require legislative approval.<sup>6</sup> Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.<sup>7</sup> Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive

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*Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response") (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); United States, *Inter-American Juridical Report: Questionnaire for the Member States* ("U.S. Response") (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*(a) confirm a commitment’s non-binding status;*

*(b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement, and*

*(c) notification to—and coordination with—relevant State institutions, including the State’s Foreign Ministry.*

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

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

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

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

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

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

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

*Guideline 4.2* encourages States as a best practice to formalize and regularize their review of political commitments. Doing so would remove the *ad hoc* quality of existing informal review mechanism, where it is unclear exactly how often and in what circumstances a State's internal procedures generate a review of a political commitment before its conclusion. As the *Guideline* suggests these procedures could be designed to confirm the non-binding

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<sup>15</sup> Colombia Response, *supra*. Thus, among Colombia's government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

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

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

nature of the agreements under review and their consistency with the State's laws and foreign policies. These procedures would also alleviate concerns that a particular institution within a State (whether a government ministry or a sub-national territorial unit) concludes a political commitment where the State's government or other institutions are unaware of its existence, let alone its contents.

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

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

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

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

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

formalities established in the applicable national legal framework (federal, state, and municipal).”<sup>20</sup>

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

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

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

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

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

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



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

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

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

Moreover, *Guideline 4.4* suggests that States may include in their procedures mechanisms for differentiating among the institutions' binding agreements. This might include, for example, a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status. Or, a States' procedures might lay out a default

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

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

presumption when two or more State institutions conclude a binding agreement, i.e., establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties. Ideally, States might even include procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (a) the agreement is binding (or not); and (b) what type of binding agreement will be concluded, be it a treaty or a contract.

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

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

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

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

*Guideline 4.6* suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement's existence, but its contents as well. Publicizing binding agreements by the State or

its institutions comports with the rule of law and democratic values, affording the public a window into a key area of State behavior. Public registries might be beneficial to a State internally as well. Government-wide knowledge of a States' binding agreements can help ensure interested government agencies are aware of all binding agreements. That information should ensure more regular tracking of what binding agreements exist and better intra-governmental coordination in their formation. Public registries of treaties and contracts would also have external benefits. These registries would provide a regular information channel for other States, conveying the publicizing States' views on the existence and legal status of its binding agreements. This could lead to quicker (and hopefully easier) recognition of potential differences on the existence of an agreement and its status as a treaty or a contract. Such public registries may even create space for differences of opinion to be resolved in advance rather than in response to a concrete problem or crisis.

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

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

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

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

