Views from the United States on the
"Guidelines of the Inter-American Juridical Committee
on Binding and Non-Binding Agreements"

November 22, 2021

The United States welcomes this opportunity to provide views on the "Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements" ("the Guidelines"). These views reflect general observations on the Guidelines and the Inter-American Juridical Committee's work on them. They are not intended to address all topics included in the Guidelines and their accompanying commentaries, or to imply agreement or disagreement with the Juridical Committee's treatment of matters not specifically addressed.

As an initial matter, the United States notes two considerations related to the character of the Guidelines and the process by which they were produced.

First, the Guidelines reflect the views of the Members of the Inter-American Juridical Committee, who serve on the Committee in their individual capacities. They have not been adopted by any Member State organs of the Organization of American States and should not be understood as having been endorsed by the OAS or by its Member States. Of particular note in this regard, the Juridical Committee adopted these Guidelines without providing any other OAS entity or Member States an adequate opportunity to review or comment on them. The Juridical Committee did circulate a near-final draft of the Guidelines to OAS Member States for their input in March, 2020, but provided a brief two-month timeframe for providing comments, which coincided with the early stages of the COVID-19 pandemic and did not provide states a meaningful opportunity to review and comment on the Guidelines and their extensive commentary.

These aspects of the process by which the Guidelines were adopted are unfortunate. The Guidelines address matters of great interest to OAS Member States and in which those states engage in extensive practice. The Juridical Committee's failure to engage other OAS bodies and OAS Member States more meaningfully in review of the Guidelines deprived it of important perspective and insight on the matters addressed in the Guidelines. Similar projects conducted by the UN's International Law Commission are adopted only after extensive opportunity for comment and debate by UN Member States. The United States urges the Juridical Committee to revise its procedures to avoid similar shortcomings in its future work.

Second, and relatedly, the Guidelines reflect only suggestions by the Juridical Committee's members on the matters they address. As the Guidelines themselves note, they "in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development." To the extent that the Guidelines and their commentaries express views on legal issues, those views reflect only the views of the Committee's members and do not amount to authoritative statements regarding the content or meaning of domestic or international law. The OAS General Assembly did not endorse the Guidelines, but rather merely took note of them and requested the Department of International

Law to compile views of Member States (such as these U.S. views) for dissemination with the Guidelines. OAS Member States are in no way bound to follow the Guidelines, nor should the Guidelines be assumed to reflect the actual practice of states with regard to the negotiation and conclusion of written instruments.

These process concerns aside, the United States shares the general view reflected in the Guidelines that clarity in written instruments entered into by states can help prevent misunderstandings regarding the meaning and effect of such instruments and can make such instruments more effective in helping states to advance shared objectives. The United States agrees, in particular, about the importance of states drafting written instruments in a manner that reflects as clearly as possible their intentions regarding the legal character and effect of the instrument. In this regard, the Guidelines' suggestions about drafting approaches that states may take to distinguish between those instruments intended to create legal rights and obligations, and those instruments that are not intended to have such effects, may be particularly useful. By contrast, the utility of the Guidelines' suggestion (in Guideline 3.2) that states should select a specific interpretive philosophy for determining an instrument's legal character is less clear. As the text of an instrument is the most reliable means to establish and identify its legal character, a focus on sound drafting approaches that reflect the parties' shared intentions has far more practical value than encouraging states to dwell on or debate more abstract theoretical concepts.

In other respects, the Guidelines risk creating confusion and undermining these objectives and make recommendations that go well beyond applicable legal requirements and regular state practice with respect to making both international agreements and non-binding instruments. Below are some illustrative examples in this regard.

The Guidelines use the phrase "non-binding agreements" to refer to instruments not intended to give rise to legal rights and obligations. At the same time, the Guidelines, appropriately, observe that the term "agreement" is generally reserved in international practice to refer to instruments that do give rise to legal rights and obligations. Thus, the incorporation of the word "agreement" into the term used to refer to instruments that do not have legal effect unnecessarily gives rise to potential confusion on this important point, thereby undermining a key objective of the Guidelines. It is not the practice of the United States to use the term "political agreement" to refer to instruments that do not give rise to legal rights or obligations, and the United States urges other states similarly to avoid its use.

Guideline 2.3 goes beyond applicable legal requirements and regular state practice in suggesting that states should affirmatively seek to confirm that another state's institution is sufficiently authorized by the state to conclude a treaty before entering into a treaty with that institution. In general, as reflected in Article 46 of the Vienna Convention on the Law of Treaties (VCLT), 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. While states must conduct themselves in accordance with normal practice and good faith in such matters, international law does not create an affirmative requirement to confirm a state institution's competence to enter into an agreement in

every case, and a state's failure to do so would not be presumed to invalidate the agreement. On a related point, we note the statement in the Commentary to Guideline 5.4 that "[a] number of Member States … believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects." In general and subject to the considerations noted above, the United States regards such views as legally incorrect. As noted above, except in extraordinary circumstances described in Article 46 of the VCLT, a state's failure to comport with its domestic procedures for concluding agreements does not affect the legal validity and effectiveness of the agreement. And the relevant legal framework in this regard is not different for inter-institutional agreements than for government-to-government agreements.

Similarly, there is no requirement in international law that states specify explicitly in the text of each instrument what its legal character is, as is proposed in Guideline 3.3. While such statements can be helpful on occasion, they will often be unnecessary as other elements of the instrument's drafting will be sufficient to reflect the states' intentions with regard to its legal character. The absence of such a specific statement does not give rise to any inference with regard to the legal character of the instrument, and the inclusion of such a statement is not a condition to the instrument having a particular legal character.

Finally, consistent with the commentary to Guideline 5.4.1, an inter-institutional treaty creates international legal obligations for the state as a whole unless otherwise agreed by the parties. Furthermore, the scope of responsibility for breaching a contract concluded between state institutions, including national ministries or sub-national territorial units, of two or more states, will generally be as specified in the contract or as otherwise provided in the law governing the contract. Nevertheless, we appreciate the sensible, practical advice provided in the Guidelines about ensuring that the views of the parties are aligned.

The United States urges OAS Member States and other readers of the Guidelines to bear these considerations in mind as they consider the views of the Members of the Inter-American Juridical Committee reflected in the Guidelines.