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PRELIMINARY REPORT ON BINDING AND NON-BINDING AGREEMENTS

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Introduction

1. 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 Member States. The meeting was attended by representatives from Brazil, Chile, Mexico, Paraguay, Peru, United States, and Uruguay.[1] During the discussions, Brazil's representative suggested that the Committee study "the practice of States regarding memorandum of understanding that are adopted by various national agencies and sent to Congress for approval" with an eye to developing general principles or best practices.[2] Representatives from Chile, Paraguay, and Peru all expressed support for the idea. Chile and Peru's representatives noted open questions about the existence and status of agreements concluded by actors other than the State itself, whether institutions (or agencies) of the State's government or sub-national actors such as provisional/municipal governments. Paraguay's representative emphasized the problem of determining whether and when these agreements would constitute treaties.

2. The Committee subsequently discussed the issue in examining its future agenda.[3] The President noted that the issue of the "juridical nature of inter-institutional agreements" was among the "most pressing" topics identified by the Legal Advisers, and one where the Committee's guidance could be of real use to Member States. The Committee noted the practice of agreements among government agencies and sub-national units as well as the legal and logistical challenges they posed. Legally, there were questions about the status and effects of such agreements under international law (specifically the 1969 Vienna Convention on the Law of Treaties). Logistically, there were questions about how to balance the need for States to oversee international agreements with the need to not overwhelm a Foreign Ministry or to unnecessarily slow the pace of cooperation on important subjects (such as agreements among state power companies). It was noted that Uruguay has drafted a decree on procedures for reviewing this practice while a similar effort has been discussed in Paraguay. As a result of these discussions, the Committee formally agreed to add to its agenda the topic "Legal standing and effects of inter-institutional agreements of international character."

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[1] See *Annual Report of the Inter-American Juridical Committee to the Forty-Seventh Regular Session of the General Assembly*, OEA/Ser.G CP/doc.5261/17 (31 Jan. 2017) at p. 10.
[2] *Summarized Minute,* Meeting with the Legal Advisors of the Ministries of Foreign Affairs, 5 Oct. 2016, in *Annual Report*, *supra* note 1, p. 153, 160.
[3] *Reflection on the work of the Inter-American Juridical Committee: Compilation of topics of Public and Private International Law*, in *Annual* Report, supra note 1, at 124.

3. At its 90th Regular Session, the Committee returned to the subject. It was noted that the issue implicated additional questions regarding differing State practice in concluding "simplified" or "executive agreements" as well as "non-binding" Memoranda of Understanding (MOUs). The Committee recrafted the subject as one of "Binding and Non-Binding Agreements," appointing the author to serve as Rapporteur.[4]

4. At first glance, the topic of binding and non-binding agreements is a broad one, encompassing multiple issues (and problems) for Member States. In this report, I identify four discrete sets of issues: (i) differentiation, (ii) capacity, (iii) effects; and (iv) procedures:

i. *Differentiation:* what are the categories of binding or non-binding commitments that occur in the international context? How can we reliably identify and differentiate among them in practice?
ii. *Capacity:* to what extent do actors other than States themselves (for example, agencies within a national government or sub-national governments) have the capacity to engage in one or more of these types of agreements?
iii. *Effects*: what are the legal effects, if any, of concluding any particular type of international agreement?
iv. *Procedures*: what procedures, if any, does a State employ to coordinate, authorize, or manage each of the different types of international agreement?

I examine each of these topics below. However, as I explain, the resulting analysis is necessarily preliminary due to incomplete information on State priorities, practices and preferences. As a result, I conclude this initial report with a recommendation on next steps. Specifically, I propose that the Committee approve and send to Member States a questionnaire on the subject of binding and non-binding agreements (I attach a rough draft of such a questionnaire in the Appendix). In addition, I seek the Committee's guidance on the appropriateness of drafting general principles or best practices on one or more of the outstanding issues with binding and non-binding agreements.

I. Differentiating Among International Agreements

5. States interested in making international commitments have at least three vehicles for doing so: *treaties*, *political commitments,* and *contracts*.[5] Two of these categories—treaties and contracts—involve "binding" agreements, while the other—political commitments (including MOUs)—bears the label "non-binding" because these instruments seek to avoid the mantle of law entirely. Treaties and contracts are well defined in international and domestic law, while political commitments are most often defined in contradistinction to these other two instruments. Taken together, these definitions suggest a series of subjective or objective criteria for identifying an international agreement and categorizing it appropriately. There remain, however, several unresolved questions about how to apply these criteria as well as the appropriate default rules where evidence of an agreement's status is lacking.

A. Treaties

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

[5] States may also commit themselves through unilateral declarations. *See Nuclear Tests (Australia/New Zealand v France*) [1974] ICJ Rep 267-68 [43]-[50]; International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) 58th Sess., UN Doc A/61/10. Given our focus on "agreements", however, I have left unilateral declarations outside this Report's ambit.

6. Treaties are international legal agreements of ancient origin. In international law, a treaty is usually defined by reference to the 1969 Vienna Convention on the Law of Treaties (VCLT):

> For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[6]

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law, most states endorse it, and scholars frequently cite it.[7]

7. The VCLT definition suggests a treaty has four basic ingredients, namely (a) an international agreement; (b) concluded among States; (c) in writing; (d) governed by international law, while also dismissing the relevance of two other potential ingredients—the number of instruments in an agreement and its title.

8. For starters, the requirement of an "international agreement" is critical, but often overlooked. As "agreements," treaties necessarily involve a mutuality of commitment – an interchange among two or more participants. Moreover, the exchange must be normative—expressing a shared expectation of future behavior. An instrument that merely describes each participant's positions or even their "agreed views" is not likely to qualify as a treaty. That said, treaties may be one-sided; unlike those States whose domestic contract law requires consideration—treaties do not require an exchange of commitments. The meaning of the "international" qualifier is harder to discern. It specifies treaties as a sub-set of all agreements. In other words, all treaties are agreements but not all agreements are treaties. But the "international" adjective has not been read to limit treaties to particular subjects. Rather, it is usually understood to tie treaties to certain actors and international law itself, even though the VCLT definition otherwise deals with both of those issues expressly.[8]

9. Second, beyond an "international agreement" the VCLT defines a treaty by the nature of those who conclude it, namely States.[9] It is clear, however, that the VCLT offers States as an illustrative example, rather than the only category of treaty-makers. As VCLT Article 3 makes clear, "other subjects of international law" may have the capacity to form treaties.[10] Who are these "other subjects"? International organizations (IOs) are the most obvious candidates, with practice widely recognizing their treaty-making capacity.[11] Beyond

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[6] 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).

[7] *See, e.g., Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* [2002] ICJ Rep 249 [263]; *Texaco v. Libyan Arab Republic* (1977) 53 ILR 389, 474; Duncan B. Hollis, "A Comparative Approach to Treaty Law and Practice" in *National Treaty Law and Practice* (DB Hollis et al, eds., Nijhoff, 2005) (hereinafter "NTLP") 9 (in survey of 19 states including Canada, Chile, Colombia, Mexico and the United States, "virtually every state surveyed" accepts the VCLT definition); Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer, 1996) 40; Anthony Aust, *Modern Treaty Law & Practice* (2nd edn CUP, Cambridge 2007) 14; Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven Int'l Publishing, 2005) p. 6-25.

[8] *See* H Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol II, 32 art 1(a) (defining an 'international agreement' as 'an agreement *intended* to be governed by international law and concluded between two or more States or other subjects of international law') (emphasis added).

[9] A treaty is usually considered "concluded" when the parties adopt the text or it is opened for signature.

[10] VCLT Art. 3 ("The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law . . . shall not affect: (a) The legal force of such agreements . . .").

[11] *See, e.g.,* 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.

IOs, however, other non-State actors have concluded treaties, including overseas territories, insurgent groups, and—arguably—even private persons (in the context of investor-state arbitration). Below, I consider further the specific treaty-making capacities of government agencies, ministries, and sub-national units like a province or municipality.

10. Third, the VCLT suggests a treaty must be in writing. In other words, there must be some permanent and readable evidence of agreement. The form of the writing does not appear to matter. State practice has not required either signature or publication. VCLT Article 3 also acknowledges that a treaty might exist even without a writing.[12] Thus, there remains a theoretical possibility of States concluding oral treaties, although the actual practice is sparse.[13] Moreover, the domestic laws of some Member States may preclude the State from making such treaties even if international law allows them.[14]

11. Undoubtedly, the most important (and most controversial) ingredient of a treaty is the fourth one—the requirement that it be "governed by international law." If questions arise about whether a particular text constitutes a treaty, this is almost always the criterion under debate. The reason lies in ambiguity about whether this criterion can be satisfied by objective or subjective evidence. The U.N. International Law Commission (ILC) favored using a subjective test – the intentions of the agreement's negotiators—to ascertain its treaty status.[15] Today, many States and scholars appear to view this condition along similar lines, assuming a requirement that the participants intend to create a treaty is subsumed in the "governed by international law" criterion. Under this view, if qualified parties intend their agreement to be a treaty, it is a treaty; if they lack this intent (or affirmatively have an intent *not* to create one), the agreement will be denied treaty status.

12. Despite such widespread emphasis, however, the intent test is not without controversy. As Roberto Ago once suggested, there are strong arguments that agreements on certain topics (e.g., territorial boundaries) should be treaties whatever the parties intend to the contrary.[16] Moreover, the International Court of Justice has in several cases overlooked evidence of party intent in ascribing treaty status to an instrument. In *Qatar v Bahrain*, the ICJ found the parties had concluded a legally binding agreement accepting ICJ jurisdiction, notwithstanding protestations by Bahrain's Foreign Minister that he had not intended to do so.[17] The Court based the agreement's existence on the "terms of the instrument itself and

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[12] VCLT art 3 ('The fact that the present Convention does not apply … to agreements not in written form, shall not affect: … (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention).

[13] A U.S. statute, for example, contemplates the existence of oral international agreements, requiring that any such instruments must be promptly reduced to writing. *See* Case-Zablocki Act, 1 USC §112b.

[14] *See, e.g.,* Germán Cavalier, *National Treaty Law & Practice: Colombia*, in NTLP, *supra* note 7, at 196 ("In international matters, the Colombian state and its agencies are not bound by verbal agreements because the citizens and civil servants are not obliged to observe rules that have not been duly promulgated in print by the *Official Journal*.").

[15] UN Conference on the Law of Treaties, *Summary Records of Second Session*, A/CONF.39/11, Add.1, 225 [13] (Drafting Committee "considered the expression 'agreement . . . governed by international law' ... covered the element of intention to create obligations and rights in international law"); [1966] YBILC, vol, II, 189 [6] (ILC "concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase 'governed by international law', and it decided not to make any mention of the element of intention in the definition").

[16] *See* [1962] YBILC, vol I, 52 [19] (resisting the idea "that states could always pick and choose from among various legal systems" since international law might regard agreements on certain subjects (e.g., boundaries, territorial seas) as treaties regardless of what States parties intended).

[17] *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [27]. The reasoning behind the Court's decision, however, remains in dispute. Scholars debate whether (a) the ICJ was giving effect to the parties manifest intentions in the text over subsequent statements to the contrary, (b) adopting an objective approach to identifying a treaty, or (c) articulating a *sui generis* rule

the circumstances of its conclusion, not from what the parties say afterwards was their intention."[18] At a minimum, therefore, the framework and contents of an instrument may be invoked as better evidence of the participants' "manifest" intentions than their subsequent statements of intent. Or one could go further and read the Court to suggest that an instrument might qualify as a treaty if its architecture and language objectively signal that status without regard to intent at all.

13. The VCLT definition also helpfully clarifies certain criteria that should not be determinative of treaty status. It makes clear, for example, a treaty's existence will not turn on the number of instruments employed. A treaty can be in a single text or a series of instruments. The North American Free Trade Agreement (NAFTA), for example, consists of an original agreement along with a series of subsequent notes, signed on December 8, 11, 14 and 17, 1992.[19]. Meanwhile, although a text's designation (that is, its title) may aid in categorization, it will not be determinative. Treaties bear all sorts of titles, including act, agreed minute, charter, convention, covenant, declaration, memorandum of agreement, memorandum of understanding, note verbale, protocol, statute, and, of course, treaty. At the same time, some of these titles (especially Memorandum of Understanding) are used in political commitments. As such, it is important not to assume treaty status (or its absence) because of the title used.

B. Political commitments

14. During their preparatory work on the law of treaties, the ILC took care to exclude from the treaty concept agreements not governed by law. [20] Today, such agreements are called "political commitments." Political commitments are agreements among States (or international actors more generally) that are intended to establish non-legal commitments of an exclusively political or moral nature. Thus, they 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. As such, political commitments exist in contradistinction to the "binding" nature of treaties and contracts, covering agreements that fall outside the corpus of law, whether international or domestic.

15. Compared to treaties, political commitments are a relatively new category of agreements, first recognized in the "gentleman's agreements" of the late nineteenth and early twentieth centuries.[21] The visibility of such commitments has grown over time from the Shanghai Communique and the Helsinki Accords to more recent texts like the "Iran Deal"

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for agreements accepting the Court's jurisdiction. See Duncan B. Hollis, "Defining Treaties," in *The Oxford Guide to Treaties* (DB Hollis, ed., OUP, 2012) 28 (reviewing competing views of Aust, Klabbers, Chinkin, Fitzmaurice and Elias).

[18] *Qatar v. Bahrain*, 1994 ICJ Rep. at [27]. In the *Aegean Sea Continental Shelf Case*, the ICJ found no intent to submit a dispute to the Court under the agreement presented, although it was not clear if the Court reasoned that the text was not legally binding or its scope failed to trigger ICJ jurisdiction on the facts presented. *Compare* Aust, *supra* note 7, at 51-2; *with* Christine Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" 10 Leiden J. Int'l L. 223, 234 (1997).

[19] NAFTA (Canada-Mexico-US) (signed 8, 11, 14 and 17 December 1992, entered into force 1 January 1994) [1993] 32 ILM 296 and [1993] 32 ILM 605.

[20] Eg [1959] YBILC, vol II, 96-97 [8] ('instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties'); Efforts to make this distinction explicit at the Vienna Conference were, however, unavailing. U.N. Conference, Second Session, *supra* note 15, at [13], [21]-[22].

[21] The historical practice of "personal" treaties, sponsions and informal agreements suggests, however, that political commitments have earlier origins. See Hugo Grotius, *The Rights of War and Peace* 167 (K. Haakonssen & R, Tuck, eds., Liberty 2005) (1626); Emerich de Vattel, *The Law of Nations* §§ 209-11.

on nuclear non-proliferation.[22] Today, there is increasing evidence that in many circumstances States prefer to pursue political commitments in lieu of treaties.[23] Trading off the credibility that accompanies a treaty, States often pursue political commitments because of their flexibility – they can usually be formed, amended and exited more quickly than treaties. Although substantively, they can address matters just as important (or insubstantial) as a treaty text, political commitments generally do not trigger domestic approval procedures or publication requirements, allowing them to be confidential if so desired.

16. Like treaties, political commitments bear many names, including "memorandum of understanding" – a title regularly used by Commonwealth countries to signal a political commitment. However, I employ the term "political commitment" here because there are examples of such instruments that do not bear the MOU header. Moreover, as noted in discussing the treaty definition, there are instances of treaties bearing the MOU title as well.

17. Several OAS Member States evidently have a practice of concluding political commitments, including both Canada and the United States.[24] However, the absence of domestic procedures for cataloging these agreements make it difficult to ascertain the full depth and scope of the practice. It is also unclear whether and how often other OAS Member States employ political commitments. We might assume that, in addition to Canada, the eleven OAS Member States that participate in the Commonwealth of Nations do so. But this is only an assumption. Moreover, although the October 2016 meeting with the Legal Advisers suggests that some of the other OAS Member States have a familiarity with political commitments (especially MOUs), we lack both empirical data and formal statements from Member States on how they view this phenomenon.

18. What identifies an agreement as a political commitment? Like treaties, political commitments require some form of mutuality and a shared expectation as to future behavior. But, unlike its controversial role in the treaty context, manifest intent takes center stage in defining the political commitment. States appear to assume that they can create a political commitment either by affirmatively expressing an intention to do so, or, alternatively, by making clear that their agreement is not intended to give rise to rights or obligations under international law.

C. Contracts

19. The existence of a binding international agreement may prevent it from qualifying as a political commitment, but it will not always constitute a treaty. In its treaty work, the ILC emphasized that States (and presumably IOs and other subjects of international law) can choose legal systems besides international law to govern the formation, application, and interpretation of an agreement.[25] Thus, contracts concluded under the domestic law of one or more States serve as an alternative to treaty-making. In such cases, the agreement is governed exclusively by domestic law (I say "exclusively" to

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[22] Joint Comprehensive Plan of Action among China, France, Germany, Iran, Russian Federation, United Kingdom and United States (July 14, 2015), *available at* http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/; The Final Act of the Conference on Security and Cooperation in Europe, 73 Dep't. St. Bull. 323 (1975); U.S.-China Joint Communique, 66 Dep't. St. Bull. 435 (1972).

[23] See Joost Pauweln, Ramses Wessel, and Jan Wouters, eds., *Informal International Law-Making* (OUP, 2012).

[24] *See* Duncan B. Hollis & Joshua Newcomer, "'Political' Commitments and the Constitution, 49 Va J. Int'l L. 507 (2009) (providing examples from U.S. practice); Maurice Copithorne, "National Treaty Law & Practice: Canada," in NTLP, *supra* note 7, at 91, 92-93 (noting with respect to Canadian MOUs, that Canada has "traditionally considered that such documents do not create a legal relationship").

[25] *See* [1966] YBILC, vol II, 189 [6].

account for the fact that many treaties enjoy a legal status under both domestic and international law).

20. At least some OAS Member States have developed a practice of concluding contracts among government agencies. The United States, for example, has a whole domestic legal regime for foreign military sales contracts while Colombian law "recognizes and regulates the adoption, approval, and effect of contracts entered into by the government of Colombia with foreign government agencies" including the possibility that foreign law may govern in certain contexts.[26]

D. How to Differentiate among Treaties, Contracts and Political Commitments?

21. How can States discern whether an international agreement is a treaty, a political commitment or a contract? I suggest a two-step process. First, we must determine if the text is binding or non-binding. Where the agreement is non-binding, it is a political agreement. But where it is binding, a second step requires determining if the instrument is a treaty or a contract.

22. To identify an agreement as binding (or not), we could endorse and employ the intent test, looking for manifestations of States' shared intentions in the text or the circumstances of an agreement's conclusion. In some cases, States may short-circuit this inquiry by including express language on whether they regard an agreement as binding or non-binding. Treaties do not usually contain such expressions of intent, but contracts and political commitments sometimes do. For example, a 1998 Agreement between the U.S. National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) indicates in section 9.0:

> The Parties hereby designate the United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement, the meaning of its provisions, and the rights, obligations and remedies of the Parties. . .[27]

A 2008 MOU between the U.S. Department of the Interior and Environment Canada on Shared Polar Bear Populations stated "This Memorandum of Understanding is not legally binding and creates no legally binding obligations on the Participants."[28] Or, consider the 1986 CSCE Document on Confidence and Security Building Measures in Europe, which indicated "the measures adopted in this document are politically binding and will come into force on 1 January 1987".[29]

23. In other cases, indications of intent may reside in the specific words used. In English, for example, the use of the verb "shall" almost always signifies an intent to create legal rights or obligations. In contrast, the verb "should" just as often signifies a preference that does not include any binding commitment. In practice, there are many words and

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[26] *See* U.S. Foreign Military Sales program, available at http://www.dsca.mil/programs/foreign-military-sales-fms; Cavalier, *supra* note 14, at 196 (citing Law 80 of 1993, Art. 13). Canada also recognizes that States can choose between a treaty and a contract to regulate inter-state sales deals or land leases. Copithorne, *supra* note 24, at 93.

[27] Agreement between the U.S. National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist (Nov. 19, 1998), available at http://www.aeb.gov.br/wp-content/uploads/2012/09/AcordoEUA1998-2.pdf. What happens, however, if the selected domestic law does not recognize the agreement as a contract is an open question.

[28] **Memorandum of Understanding between Environment Canada and the US Department of the Interior for the Conservation and Management of Shared Polar Bear Populations** (2008) at http://graphics8.nytimes.com/packages/pdf/national/20080515polar_memo.pdf.

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

phrases used in treaties (e.g., article, agree, authentic, done at, enter into force, obligations, parties) that sophisticated negotiators will avoid using where they intend a non-binding political commitment. Over time, certain terms and phrases have also become common in political commitments to signal non-binding intent. For example, instead of treaty "parties", political commitments often refer to "participants"; instead of "entering into force" a political commitment will "come into effect"; and instead of articles, political commitments may have paragraphs.[30]

24. Beyond terminology, other aspects of an agreement can offer evidence of the authors' intentions.

- Both treaties and political commitments may contain provisions on dispute settlement, but compulsory third party dispute settlement usually signals a treaty.
- Treaties often contain elaborate provisions for consenting to be bound (usually a specific clause offering options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval) that will not be used in a political commitment. Indeed, although many political commitments are signed, some forgo signature, with the text simply released to the press or otherwise published.
- If the agreement has a designated depository or there are provisions for its registration with the United Nations (as required by Article 102 of the Charter), that suggests an intention to create a treaty.[31]
- Treaties regularly incorporate notice requirements for termination or withdrawal (for example, requiring 6 or 12 months advance written notice). Since it is non-binding, however, a political commitment may have a provision allowing for a participant's immediate withdrawal. Some care is required here, however, since the VCLT acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.[32]

These practices must be understood as guidelines more than fixed rules. There are examples where States intend to create a political commitment but still use treaty language (see, for example, the reference to "entry into force" in the 1986 CSCE Document quoted above). Current practice thus suggests a holistic inquiry – identifying the authors' manifest intent by looking at the whole agreement and the circumstances of its conclusion.

25. Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding, since a political commitment cannot, by definition, be binding in any part. State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—which (famously) uses the verb "should" to define the parties' central obligation to set economy-wide emission reduction targets, while using the verb "shall" in other provisions on future meetings and reporting.[33] In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any

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[30] For a more elaborate explanation of the practice from a U.K. perspective, see Aust, *supra* note 7.

[31] Note, however, that the failure to register an agreement with the United Nations is not determinative of its status. And although the Charter suggests unregistered treaties may not be invoked before the U.N. or its organs, the ICJ has not done much (if anything) to implement that condition. *See Qatar v. Bahrain*, 1994 ICJ Rep. at [17]-[29].

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

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

application of the intent test, since it requires evaluating intent on a provision-by-provision basis.

26. Unfortunately, State practice suggests that in some cases negotiators will fail (or purposefully avoid) addressing what kind of agreement they intend to make. This can lead to disputes. For example, for many years, the United Kingdom and other Commonwealth States like Canada employed the verb "will" to signal an intention to create a non-binding agreement, while the United States insisted that "will" could be indicative of a binding agreement in the right context. This led the United States to regard as treaties a number of defense-related MOUs that its partners (Australia, Canada, and the United Kingdom) regarded as non-binding. The situation caused some significant tensions among the States involved, particularly for the United States as its domestic law required these agreements to be treaties. Eventually, the parties concluded new "Chapeau" treaties that clarified the binding status of the commitments made.[34]

27. Such disputes—combined with the possibility that even a holistic analysis may prove inconclusive—suggests the need for a default presumption. When States enter into an agreement without explicitly manifesting any intention that it is binding or not, States could adopt a presumption in favor of its bindingness. Or, States could presume such agreements are political commitments. In either case, a presumption could be overcome by countervailing evidence. Thus, the Committee may wish to consider supporting a default rule on which States and other actors could rely to help resolve some of the confusion in current practice.

28. Assuming a binding agreement, how do we discern if the parties intended to create a treaty or a contract? Like the first step, this second one may require attention to the parties' intentions. As noted above, States seeking a contract can specify that status by designating the governing (domestic) law of the agreement. Problems arise, however, where the text is silent. [35] When two states conclude what looks like a binding agreement, is the presumption that it constitutes a treaty or a contract? The majority view appears to be that, absent a manifest intention to the contrary, the agreement will be a treaty by default.[36] But there have been suggestions of "hybrid" agreements that are generally governed by international law, but with certain specific aspects subject to national law.[37]

29. Of course, it is not certain that a manifest intent test will be universally applied to differentiate binding from non-binding agreements, let alone treaties from contracts. As *Qatar v. Bahrain* suggests, there is support for a more objective test for determining a treaty's status, whether based on its specific contents or the context of its conclusion.[38] And domestic law may recognize the existence of a contract "in fact" or "in law" independent of

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[34] J McNeill, "International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding," 88 Am. J. Int'l L. 821 (1994);

[35] Other problems might arise if the domestic legal system does not recognize the contract's validity. Moreover, there can be private international law issues if it is not clear whether States opting for a particular domestic law are selecting only its substantive provisions, or if they also meant to select its conflicts of law provisions.

[36] Professor Jan Klabbers devoted an entire book to establishing this presumption. *See* Klabbers, *supra* note 7. For others favoring it, see Anthony Aust, "The Theory & Practice of Informal International Instruments," 35 Int'l & Comp. L. Q 787, 798 (1986); K Widdows, "What is an Agreement in International Law," 50 Brit. Ybk Int'l L. 117, 142 (1979); Hersh Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, vol II, 125. Other scholars suggest that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). *See* Oscar Schachter, "The Twilight Existence of Nonbinding International Agreements," 71 Am. J. Int'l L. 296, 297 (1977); JES Fawcett, "The Legal Character of International Agreements" 30 Brit. Ybk Int'l L. 381, 400 (1953).

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

[38] *See supra* note 17-18, and accompanying text.

party intentions. To date, we have yet to see an international court or tribunal overrule the parties' intentions expressed in the agreement itself. Still, the possibility of competing tests for differentiating among agreement types suggests there might be room for the Committee to offer its views on the preferred approach as a general principle or best practice.

II. Capacity: Who Can Make International Agreements?

A. The Capacity to Make Treaties: Government Agencies and Sub-National Units

30. Writing in 1923, the PCIJ's *Wimbledon* judgment characterized treaty-making as "an attribute of State sovereignty."[39] As such, States clearly have the capacity to make treaties. International law is less clear, however, as to who may represent—or serve as agents of—a State in treaty-making. State practice suggests that national ministries (also known as government agencies) may do so. Outside of the OAS Region, States like Austria, China, Germany, India, and Russia have a practice of concluding treaties at three levels: State-to-State, government-to-government, and agency-to-agency.[40] Other States like Canada, Switzerland, the United Kingdom and the United States authorize their government agencies to conclude international agreements they recognize as treaties.[41] At the same time, it appears that States like Egypt and South Africa deny their government agencies the capacity to conclude treaties, while other States like Japan and Israel allow them only where they are duly authorized by existing treaties or domestic law.[42]

31. Thus, existing State practice appear to recognize a treaty-making capacity in government agencies only to the extent the State of which that agency is a part does so. Moreover, any such treaty-making would presumably also require the consent of any prospective treaty partner. For example, States that deny treaty-making to their own agencies may refused to conclude a treaty with a foreign government agency, even if that agency's government has authorized it to do so (a government-to-government treaty is usually concluded instead). Taken together, State practice suggests that international law permits agency-level treaties where there is both "internal" authorization from the State of which the agency is a part as well as the "external" consent of any treaty partners.

32. This rule, however, comes with several caveats. For starters, the State practice surveyed is limited. Particularly among OAS Member States, it is not clear which States authorize agency-level treaty-making and which preclude the practice? It would be good to clarify the position and practice of Member States before the Committee crafts any general principles or best practices.

33. Second, is not clear if international law will defer to the authorizing State entirely. For example, international law traditionally attributes legal responsibility to the State even when the agreement is concluded by one if its agencies. Several states, however, have authorized their agencies to make international agreements on the understanding that any such agreements would only bind the agency and not the State as a whole.[43] Mexico, for example, passed a Treaty Law in 1991 that authorizes "inter-institutional agreements", defined as

> [A]n agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal,

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[39] *The S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (June 28).
[40] Hollis, *supra* note 7, at 17.
[41] *Id*.
[42] *Id*.
[43] France allows its government agencies to conclude agreements—dubbed *arrangements administratifs*—with their counterparts. These agreements are authorized within an agency's scope of activities and "do not bind the State, only the signatory agency." Pierre Michel Eiesmann and Raphaël Rivier, "National Treaty Law & Practice: France," in NTLP, *supra* note 7, at 254-5.

> State or Municipal Public Administration and one or more foreign government agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty.

These inter-institutional agreements are only authorized within the agency's scope of activities, and, more importantly, are regarded by Mexico as "only binding upon those agencies, which have entered into them, and not upon the federation…"[44] It is not clear, however, if international law permits Mexico to limit the agreement's binding quality—not to mention legal responsibility—to the agency alone. International law might thus independently limit *how* a State can authorize agency-level treaty making.

34. Third, there is the additional problem where agency-to-agency agreements lack any domestic authorization. It is not clear how international law regards such "extra-constitutional" agreements. Considered alongside efforts to associate bindingness with the agency alone, unauthorized agency-level agreements might suggest that these entities are operating not so much as agents of the State but as "other subjects" of international law in their own right? At present, there is little available information on how widespread the practice of unauthorized agency-level agreements has become, making it hard to judge its implications.

35. A similar set of questions surrounds the treaty-making capacity of sub-national units, including federal states, provinces, municipalities and semi-autonomous territorial entities, which are all legally dependent upon, or associated with, a sovereign State.[45] As with agency-level agreements, international law has long favored two prerequisites for sub-national treaty-making: (1) the consent of the State responsible for the sub-national unit; and (2) the willingness of treaty partners to accept the sub-national unit's treaty-making capacity.[46] The first element is usually the more important one as the willingness of the treaty partner's to conclude a treaty is evident from the existence of the treaty or a provision assenting to future sub-national treaty-making.[47] Moreover, there are a number of States that appear to restrict sub-national treaty making. Article 126 of Argentina's constitution for example indicates "The Provinces do not exercise the power delegated to the Nation. They may not enter into partial treaties of a political nature …"[48]

36. Where it occurs, State authorization for sub-national treaty-making may be ad hoc or general. In 1981, Canada authorized Quebec to conclude a separate treaty with the United States on pension payments as part of its own treaty with the United States.[49] For its

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[44] Luis Miguel Díaz, "National Treaty Law & Practice: Mexico," in NTLP, *supra* note 7, at 450.

[45] Here I am focused on the capacity of the sub-national unit to conclude treaties in its own name. In some domestic systems, the sub-national unit may play an important role in national treaty-making as well. *See, e.g.,* J.G. Brouwer, "National Treaty Law & Practice: The Netherlands," in NTLP, *supra* note 7, at 497 (describing Netherlands Antilles and Aruba's role in Dutch treaties); Copithorne, *supra* note 7, at 97-98 (describing provincial role in Canadian treaties).

[46] Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties,* III *Recueil des Cours* 66-71, 84 (1968); [1966] YBILC, vol. II, 172, 191, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (ILC's draft art. 5.2 acknowledged members of a federal union may have a treaty-making capacity).

[47] For examples of treaties with clauses inviting sub-national participation, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII, 1867 U.N.T.S. 3, 162; United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 305(1)(c)-(e), 306, 1833 U.N.T.S. 396, 517-18.

[48] Constitution of Argentina, *available in English at* https://www.constituteproject.org/constitution/Argentina_1994.

[49] *See* Agreement With Respect to Social Security, Mar. 11, 1981, U.S.-Can., art. XX, 35 U.S.T. 3403, 3417; Understanding and Administrative Arrangement with the Government of Quebec, Mar. 30, 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

part, the United States has given similar delegations as when it authorized Puerto Rico to join the Caribbean Development Bank in 1986.[50] In other cases, the authorization is more categorical. The 1991 Mexican Treaty Law discussed above authorizes Mexican state and municipal inter-institutional agreements alongside those at the Federal agency level. The U.S. Constitution, meanwhile, authorizes U.S. states to enter into "Agreements or Compacts" with foreign powers so long as the U.S. Congress consents.[51] Historically, this authority has been exercised rarely by U.S. states and even more infrequently in recent years.[52]

37. What U.S. states are doing, however, is concluding unauthorized agreements with foreign powers.[53] My own 2009 study found 340 U.S. state agreements with foreign powers only a handful of which had received consent from the U.S. Congress. Some of these agreements might have been political commitments. But a number of them contain texts suggesting a binding intent. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba to oppose certain inter-basin water transfer projects contemplated by U.S. federal law.[54] Other sovereign states are experiencing similar problems. Before the end of the twentieth century, for example, Quebec had reportedly concluded some 230 "ententes" with foreign governments, nearly 60% of which were with foreign states.[55]

38. As with agency-level agreements, therefore, any description of sub-national treaty-making capacity suffers from both logistical and legal challenges. Logistically, there are open questions about whether and how sub-national units are concluding international agreements, whether they are authorized to do so as "treaties" or what status they themselves envision for such agreements. Legally, there are questions about the status of agreements made by sub-national units, most notably whether they are binding or not.[56] There is also the question of 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).[57] Traditionally, international lawyers have favored the view of State responsibility.[58] But a different answer may be possible as

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[50] "Self-Governing and Non-Self-Governing Territories," 1981-1988 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, vol. 1, § 5, at 436, 438-40. Puerto Rico subsequently withdrew from the Bank.

[51] U.S. CONST. art. 1, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power."). The U.S. Constitution also bars U.S. states from making "treaties." U.S. CONST. art. 1, § 10, cl. 1 ("No State shall enter into any Treaty"). But that prohibition has been interpreted to apply only to those agreements labeled "treaties" under the U.S. Constitution (those receiving the advice and consent of the U.S. Senate) *not* all treaties within the international law sense of that term.

[52] Duncan B. Hollis, "Unpacking the Compact Clause", 88 Tex. L. Rev. 741 (2010); Duncan B. Hollis, "The Elusive Foreign Compact", 73 Mo. L. Rev. 1071 (2008).

[53] *See, e.g.*, AUST, *supra* note 35, at 48-49.

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

[55] Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

[56] Canada, for example, denies international legal effect to Quebec's ententes, while France has regarded them as binding under international law. *Id.* at 242, 250-51.

[57] Lissitzyn was the first to pose this question. See Lissitzyn, *supra* note 46, at 15.

[58] Self-Governing and Non-Self-Governing Territories, *supra* note 50, at 431 ("the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the states of the Union. Thus the Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met."); *but see* Díaz,

more information becomes available. If we find that most sub-national agreements that qualify as treaties are authorized by the relevant State, it lends support to characterizing sub-national units as mere agents of the State.[59] Conversely, however, if we find that States have failed to authorize most sub-national agreements (and those agreements are otherwise treaties) it may build support for recognizing independent legal personality for at least some sub-national units.

B. The Capacity to Make Political Commitments

39. Although scholarship has tended to focus on political commitments among States, it has largely done so for practical reasons.[60] Since political commitments are defined as agreements that are *not* treaties or contracts, they are not subject to the capacity limitations on binding agreements. Thus, at present, it appears there are no limitations on which actors may conclude a political commitment; they can be made between and among all sorts of actors and entities. For example, in 1999, the Andean Community—an international organization—concluded a political commitment with Canada on Trade and Investment Cooperation.[61] Similar evidence exists of non-binding agreements involving sub-national units, such as the Oil Spill Memorandum of Cooperation involving British Columbia and several U.S. States.[62] And we've already seen several examples of agency-level political commitments like the 1998 NASA-AEB Agreement or the 2008 MOU between the U.S. Department of the Interior and Environment Canada on Shared Polar Bear Populations.[63] Indeed, there is nothing about political commitments that limits them to public actors—private firms or non-governmental organizations presumably may negotiate and conclude political commitments as well. Thus, the Committee might consider recommending the political commitment form in circumstances calling for an agreement among a mix of public and private entities.

C. The Capacity to Make Contracts

40. Contracting capacity is a function of the law of the contract. Domestic legal systems each have their own rules for who can form a valid contract. As such, whether a foreign State (or agency, or sub-national unit) can conclude a contract will depend on a domestic legal analysis of the applicable law (that is, the law selected by the parties, or, in appropriate circumstances, the governing law determined according to conflicts of law principles).

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

A. Treaties: Legal and Non-Legal Effects

41. The primary effect of a treaty's existence lies in the principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by

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supra note 54, at 111 (noting Mexico does not view sub-national international agreements as binding on the Mexican federation)

[59] There is some evidence that, on occasion, nation States may step in to ratify an agreement. *See, e.g.,* Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088.

[60] *See* Hollis and Newcomer, *supra* note 24, at 521.

[61] Trade and Investment Cooperation Arrangements between the Government of Canada and the Governments of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) (May 31, 1999), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2488.

[62] Oil Spill Memorandum of Cooperation (between Alaska, British Columbia, California, Hawaii, Oregon and Washington), May 8, 2001, available at http://oilspilltaskforce.org/wp-content/uploads/2014/06/2001-OSTF-Memorandum-of-Cooperation.pdf.

[63] See *supra* notes 27-28, and accompanying text.

them in good faith."[64] Thus, a treaty's primary effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own enforcement—e.g., the American Convention on Human Rights—States are obligated to accept these as well. Moreover, as a matter of domestic law, many treaty texts (if approved in accordance with the appropriate domestic procedures) can have the same legal effects as a statute, or even in some cases, a constitutional provision.[65]

42. Beyond the treat text, there are at least three additional sources for generating effects from a treaty: (i) the law of treaties, (ii) acts of retorsion, and (iii) the law of State responsibility. Where an agreement is a treaty, all the VCLT's rules apply, including those on validity, interpretation, application, breach, and termination. For example, VCLT Article 29 provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." This provision creates room, *if* all the parties agree, for treaties to contain "federal" or "territorial" clauses that allow a State to designate to which sub-national territorial units a treaty does (or does not) apply.[66] On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire territory.[67]

43. The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party's "material breach."[68] In addition, States always remain free to engage in acts of *retorsion* – unfriendly, but intrinsically lawful behavior that a State might perform to incentive the breaching State back into treaty compliance. For example, a State may opt to halt the provision of financial assistance (which it otherwise has no obligation to provide) to a State in response to that State's treaty breach.

44. Beyond the VCLT and retorsion, the laws of State responsibility, detailed in the 2001 Draft Articles on State Responsibility ("ASR"), provide additional remedies for internationally wrongful acts, which include treaty breaches. Most notably, the ASR affords States the right to engage in "countermeasures"—unlawful acts that are justified (i.e., lawful) because that State was negatively impacted by the prior internationally wrongful act.[69] By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for either political commitments or contracts.

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[64] VCLT, art. 26. Some of a treaty's clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

[65] See, e.g., Argentina Constitution, *supra* note 48, art. 31 ("This Constitution, the laws of the Nation that as a result thereof may be enacted by the Congress, and treaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain . . ."); *id.,* art. 75(22) (giving treaties on human rights "standing on the same level as the Constitution"); Constitution of Peru, art. 55, *English translation available at* https://www.constituteproject.org/constitution/Peru_2009#s202 ("Treaties formalized by the State and in force are part of national law.").

[66] *See, e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG) (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3, Art. 93(1); European Convention on Human Rights (ECHR), Art. 56(1); Constitution of the International Labour Organization (9 October 1946) 15 UNTS 35, Article 19(7).

[67] International Covenant on Civil and Political Rights ('ICCPR') (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 50; American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 June 1978) 1144 UNTS 123, art. 28(2).

[68] VCLT Art. 60.

[69] 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']. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

45. Moreover, the ASR also provides additional—and perhaps dispositive—guidance on the question of where legal responsibility lies for treaty-making by government agencies and sub-national units. Article 4(1) provides:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.[70]

Thus, international law suggests that, when a government agency or sub-national unit concludes a treaty, international law attaches responsibility to the State as a whole.

B. The Effects of a Political Commitment

46. Unlike treaties, political commitments do not trigger any particular legal regimes; neither the law of treaties nor the ASR apply to these agreements. But it would be a mistake to assume this means that political commitments have no effects. Political commitments can be quite credible, exerting a conformance pull on participants whether because of the political context in which they exist, or more generally, the moral force of any promise. Thus, political commitments can directly affect State behavior, as, for example, the commitments of the Financial Action Task Force to combat terrorist financing.[71] And even though political commitments can be short-lived, others—e.g., the Helsinki Accords—have proved quite durable.[72]

47. Moreover, political commitments can generate political effects; the same acts of retorsion States frequently employ to restore compliance for a treaty breach are available for the violation of a political commitment. Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.[73]

48. More importantly, although political commitments are not binding, they can sometimes still have legal effects, albeit indirectly. Some political commitments—e.g., the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law.[74] There is even a possibility where political commitments generate legal effects under international law. If the circumstances of a political commitment cause others, to rely on certain behavior by a State, the principle of good faith could create a circumstance where that State is estopped from changing its behavior. Although there are no clear examples in international practice to date, it is the same principle that explains the binding force of unilateral declarations. As such, there is no reason it could not apply to at

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[70] *Id*; see also ASR, art. 4(2) ("Any organ includes any person or entity which has that status in accordance with the internal law of the State.").

[71] *See, e.g.,* The Financial Action Task Force (FATF), *at* http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html (FATF issues "recommendations' that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

[72] *See* Helsinki Accords, *supra* note 22.

[73] Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFFAIRS (Mar./Apr. 2001).

[74] See, e.g., Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the "Kimberley Process," which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arragenment, *at* http://www.wassenaar.org.

least some political commitments. [75] In such a case, the "non-binding" nature of a political commitment might therefore prove misleading. The matter remains open to debate, however, and might be an appropriate topic for the Committee to address if a consensus position is possible.

C. Effects of a contract

49. As with questions of capacity, the primary effects of a contract will depend on the relevant domestic law. Domestic contract law delineates whether and how contracts will operate as well as the available remedies for breach, including judicial means. As with political commitments, however, a contract breach could generate international consequences. Given the right circumstances, a State might engage in retorsion. It is also possible to envision that a contract could create conditions for reasonable reliance that might generate the same estoppel arguments discussed above in the political commitment context.

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

50. Just as states must determine how to resolve the substantive questions about binding and non-binding agreements—how to differentiate them, who has the capacity to make them, and what legal (and non-legal) effects they generate—so too must States decide on appropriate procedures for their formation. What steps are required domestically for a State to conclude a binding or a non-binding agreement?

51. Of the three categories—treaties, political commitments, and contracts—the procedures are most visible (and developed) in the treaty-context. States generally assign the power to negotiate and conclude treaties to their 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.

52. Moreover, States regularly require the Executive to coordinate the making of at least some of its treaties with various other governmental actors (e.g., the legislature, the courts, sub-national units, or even the general populace via a referendum). The specific procedures vary from State to State, with some procedures mandated by law (e.g., constitutional distributions of authority).[76] In other cases, the procedures have emerged as a "political" practice. In Canada, for example, although the Prime Minister could 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.[77] 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

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[75] *See, e.g.,* Schachter, *supra* note 36, at 301 (suggesting estoppel might apply where there is a gentleman's agreement and reasonable reliance on it); Aust, *supra* note 36, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will).

[76] In prior scholarship, I noted at least four different approaches to legislative involvement in treaty-making. First, many states require that the entire legislature (i.e., one or both chambers, depending on the state's system) give its approval to a treaty. For a second group of States, both chambers of the legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of the two legislative chambers give its approval, as in the United States or Mexico where the Senate approves some or all treaties, respectively. Fourth and finally, for those states focused on legislative implementation instead of actual approval (e.g., Canada), the implementing legislation follows normal parliamentary procedures. Hollis, *supra* note 7, at 36.

[77] Copithorne, *supra* note 24, at 95-6.

exclusively by the Executive; and (4) where a treaty is authorized by an earlier treaty that received Senate advice and consent.

53. States may also impose notification requirements for those 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 international agreements unless they have first consulted with the U.S. Secretary of State.[78] These procedures (which usually entail a memorandum to the Secretary of State or his designee cleared by all relevant offices and other government agencies) fulfil several functions. First, and foremost, they confirm that the proposed agreement will constitute a treaty (in the international law sense of that term). They also review the agreement's contents to ensure it can be carried out within U.S. constitutional and other statutory limits. And, they detail what, if any, consultations are necessary with the U.S. Congress as well as what particular method of authorization will be used before the United States joins the treaty. Interestingly, the C-175 can be used to approve the negotiation or conclusion of a single agreement or whole classes of binding commitments. It is not clear, however, whether other States have similar procedures or practices in place, let alone their effectiveness. I would be happy to make a copy of these procedures available if the Committee believes they could be of further use.

54. If there is a lack of information on the full range of approval procedures for treaties, there is a vacuum of data on political commitments. I am unaware of any formal procedures States use to coordinate the negotiation and conclusion of political commitments. Indeed, one of the reasons political commitments are so popular among States is that they are perceived to be entirely free from any domestic procedural requirements.[79] The problem with this approach, however, is that we are left in a situation where we know very little about whether and how States are concluding these agreements. We have no good resources on which States are pursuing political commitments, what procedures (if any) they employ to coordinate their conclusion, how often they do so, let alone what sorts of subjects and commitments they do (or do not) contain. It is this lack of information about the procedures for non-binding agreements that drives, at least in part, the recent calls by Member State Legal Advisers for the Committee to take on the topic of binding and non-binding agreements.

55. In contrast, there does appear to be several existing programs in place that lay out procedures for contracting among States. The United States, for example, has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.[80] Although I have not researched these procedures extensively, I am also not aware that there is any perceived problems with these agreements in the same vein as questions over differentiating and approving treaties and political commitments.

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[78] 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.

[79] 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).

[80] See FMS Program, *supra* note 26.

Conclusion: Recommendations and Caveats

56. In this preliminary report, I have attempted to explore the three major categories of international agreement—treaties, political commitments, and contracts—along four distinct lines of inquiry. First, in terms of differentiation, I have identified the criteria for each agreement type and discussed methods for identifying the particular type of agreement reached (whether the dominant, "manifest intent" test or the ICJ's suggestion of a more "objective" analysis). Second, I reviewed who has the capacity to conclude international agreements beyond the State itself. 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, there appear to be no limits on who can make political commitments while most States' domestic law will determine who has contracting capacity. Third, I've examined the legal effects of all three agreement types, noting both the legal (e.g., *pacta sunt servanda,* law of treaties, countermeasures) and political (e.g., retorsion) consequences that may flow from a treaty's existence. Political responses may also follow political commitments although there is the additional possibility that, under the right circumstances, a political commitment may trigger a legal claim of estoppel under international law. State-to-state contracts may do so as well, although the more likely effects are to be found under the domestic law selected. Finally, States may—and regularly do—dictate specific procedures for authorizing treaty-making and contracts. Political commitments, in contrast, appear to have few, if any, existing procedures for their formation.

57. This report has also identified a number of areas where there is ambiguity in international law or a division of opinions. Thus, there is room for the Committee to improve Member State practices by proposing some general principles and/or best practices for the approval of the OAS General Assembly. I would recommend that the Committee consider one or more of the following ideas as potential general principles relating to binding and non-binding agreements:

i) Defining each of the three categories of international agreements – treaties, political commitments, and contracts;
ii) Endorsing the idea that the type of agreement concluded will depend on the mutual, manifest intent of its authors;
iii) Proposing a default presumption that an international agreement among States or entities affiliated with a State (e.g., government agencies, sub-national units) will constitute a treaty where there is no shared manifest intentions to the contrary. This presumption could be overcome if there is evidence that the parties intended to constitute either a contract binding under one or more domestic legal systems or a political commitment;
iv) Offering a two-part test for determining whether an entity affiliated with a State such as a government agency or sub-national unit may conclude a treaty: (i) "internal" authorization from the State with which the entity is affiliated to negotiate and conclude treaties on subjects within the entity's competence; and (ii) the "external" consent of the potential treaty partners to the entity's participation. The Committee could also articulate the legal consequences for any "unauthorized" agreements that fail this test;
v) Affirming that legal responsibility for any treaties concluded by an entity affiliated with the State runs to the State as a whole;
vi) Endorsing the use of political commitments when the agreement requires flexibility or the participation of non-State actors;

vii) Denouncing the use of political commitments where the primary purpose is to avoid domestic procedures for authorizing the State's conclusion of an international agreement; and/or

viii) Taking a position on the question of whether a political commitment can give rise to conditions of estoppel under international law.

58. In addition, I recommend that the Committee consider developing a set of best practices on one or more of the following issues related to binding and non-binding agreements:

a) To suggest that States or other entities should be explicit about the type of agreement intended in the text of the agreement to avoid confusion about its status as a treaty, political commitment, or contract;

b) To offer a list of criteria that States should use to manifest their intent to create a treaty, including terminology (e.g., "shall") and clauses (entry into force, third party dispute settlement) that should be reserved for treaties;

c) To offer a list of criteria that States should use to manifest their intention to create a political commitment, including the terminology (e.g., "should") that is not indicative of a binding agreement;

d) To offer a list of criteria that States should use to manifest their intention to create a contract, including a governing law clause whenever possible;

e) To offer a set of model procedures States may use to organize the authorization and oversight of agreement-making within a government, including by government ministries or sub-national units; and/or

f) To identify conditions under which a political commitment might be more appropriate than a treaty or vice versa.

59. The foregoing analysis and recommendations come, however, with at least three, key caveats. First, I suffer from incomplete information. Although most Member States have formal constitutional or other regulatory structures for some of their international agreements, that information often fails to fully capture the actual State practice. In the United States, for example, the Constitutional text (Article II, cl. 2, sec. 2) suggests only a single procedure for treaty-making—ratification following the advice and consent of a more than two-thirds majority of the U.S. Senate. That text, however, does not convey either the Senate's limited advisory role or, more importantly, the emergence of the three other alternative mechanisms I described above for authorizing the conclusion of treaties under international law. Thus, the Committee might prefer to obtain more information on Member State laws and practices (whether through further research or responses to the proposed questionnaire) before agreeing on any general principles or best practices.

60. Second, on some issues, the law and practice remains unclear. For example, the legal effects, if any, of non-binding agreements remain underdeveloped. This creates opportunities for the Committee to participate in the progressive development of international law. And some of my proposed general principles and best practices clearly would do so. At the same time, however, the Committee might benefit from knowing what opinions, if any, Member States have on how the law should develop or what procedures they might find most useful before proceeding to develop these ideas further.

61. Third, and finally, I need more guidance on how to prioritize among the various issues relating to binding and non-binding agreements. This preliminary report offers a broad view of a very important and complex set of issues. Given sufficient time and space, we could, of course, produce a document that contains guiding principles and best practices across all the topics discussed in this report. It is not clear to me, however, if Member States would equally value such efforts. We might be better served to prioritize work on those

aspects of these issues that Member States indicate are most important or where the Committee's work is most likely to add value to the existing international legal discourse.

62. Taken together, these three caveats lead me to conclude this report with a recommendation: that our next step should be to approve and send a questionnaire to Member States to gain more information on (i) their existing law and practice, (ii) what preferences or opinions they may have on open questions, and (iii) what priorities they have for addressing the topic of binding and non-binding agreements. I propose a draft of such a questionnaire in the Appendix.

63. I look forward to the Committee's reactions and guidance on these subjects.

APPENDIX

DRAFT QUESTIONNAIRE ON BINDING AND NON-BINDING AGREEMENTS

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 Member States, including those from Brazil, Chile, Mexico, Paraguay, Peru, United States, and Uruguay. At that meeting, several Member States suggested that the Committee should study the law and practice of binding and non-binding international agreements. The Committee agreed to take up the topic and, as a result of its initial work, has identified three categories of international agreements for its attention – treaties, political commitments and state-to-state contracts. In particular, the Committee is focused on improving the ability of Member States to differentiate binding from non-binding agreements and to identify the relevant status and appropriate procedures for international agreement making by government agencies and a State's sub-national territorial units.

The current questionnaire is needed for the Committee to perform its work. At present, the Committee lacks sufficient information on Member State practices, preferences, and priorities. First, much of the existing practice within Member States on organizing and approving agreement-making is not public or easily obtainable. The Committee would benefit immensely from further information from the Member State's treaty office or other relevant government officials on its existing law and practice relating to international agreements. Second, there are a number of areas where the Committee is considering recommendations that would take a position on open questions of international law. As such, the Committee could benefit from Member State preferences on how to resolve existing ambiguities in international law. Finally, the Committee would like to make its work as relevant to Member State concerns as possible. Thus, this Questionnaire asks Member States to prioritize among issues relating to binding and non-binding agreements to better inform the Committee's own future work. The following questions are grouped around these issues of practice, preferences, and priorities.

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?