

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

(Presented by Professor Duncan B. Hollis)

### **INTRODUCTION**

**106.** This is my sixth report on binding and non-binding agreements. The increasing prevalence of non-binding agreements generally—and ministry-level and sub-national level binding and non-binding agreements specifically—has generated calls from OAS Member States to better understand the various forms of international agreement in use today. The complexity and diversity of current practice provide an increasing number of ways to coordinate and cooperate, but also raise real risks of inconsistent understandings, unaligned expectations, and disputes.

**107.** This project seeks to assist OAS Member States in making, implementing, and interpreting international agreements by generating *OAS Guidelines on Binding and Non-Binding Agreements, with Commentaries*. If approved by the OAS General Assembly, these *Guidelines* may offer a concrete and detailed set of definitions, understandings and “best practices” for OAS Member States (and others) to employ in pursuing different types of international agreements and engaging with the various actors – States, government agencies, and sub-national territorial units – who make them. In doing so, these *Guidelines* will not aspire to codify or develop international law (although they do note several areas where existing international law is unclear or disputed). Rather, they aim to provide a set of voluntary understandings and practices that Member States may employ to improve knowledge in these areas and reduce the risk of future difficulties with other States in the region and beyond.

**108.** The current project adopts as its fundamental premise the idea that international agreements may be divided into (i) those that are “binding” in the sense of being governed by law—whether international law (i.e., “treaties”) or domestic law (i.e., contracts)—and (ii) those that are not binding (i.e., “political commitments”) in the sense that law provides none of the normative force for the agreement’s formation or operation. The rule of law governs the first set of agreements, while the second is a matter of international politics or morality.

**109.** My first, preliminary report responded to a request from Member State Foreign Ministry Legal Advisers to explore the topic and identify the issues in need of attention.<sup>240</sup> My

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<sup>240</sup> See Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17 (24 July 2017) (“Preliminary Report”).

second report reviewed responses to a questionnaire on the subject sent by the Committee to Member States.<sup>241</sup> Specifically, it assessed responses received from Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.<sup>242</sup> Since then, Canada, Panama and Paraguay provided responses reflected in subsequent reports, including this one.<sup>243</sup>

110. My third report offered initial draft text for a set of *OAS Guidelines on Binding and Non-Binding Agreements*. Specifically, it laid out guidelines and commentary on (a) definitions for different forms of international agreement; (b) which entities have the capacity to conclude each agreement type; and (c) methods for identifying each agreement type.<sup>244</sup> My fourth report continued that effort with additional guidelines on (d) domestic procedures for concluding binding and non-binding agreements; (e) the international legal effects, if any, of concluding different types of international agreements; and (f) training and education programs relating to binding and non-binding agreements.<sup>245</sup> It responded to various issues raised regarding this project during the IAJC's second meeting with Foreign Ministry Legal Advisers.<sup>246</sup> The fourth

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<sup>241</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Second Report*, OEA/Ser.Q, CJI/doc.553/18 (6 February 2018) ("Second Report").

<sup>242</sup> See Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* ("Argentina Response"); Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Brazil Response"); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* ("Colombia Response"); Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 ("Dominican Republic Response"); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* ("Ecuador Response"); Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 December 2017 ("Jamaica Response"); Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response"); Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Peru Response"); Uruguay, *Reply to questionnaire on "binding and non-binding agreements"* ("Uruguay Response"); United States, *Inter-American Juridical Report: Questionnaire for the Member States* ("U.S. Response").

<sup>243</sup> See Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 Sept. 2019) ("Canada Response"); Panama, Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States, N.V.-A.J.\_MIRE-201813176 ("Panama Response"); Paraguay, *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) ("Paraguay Response").

<sup>244</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Third Report*, OEA/Ser.Q, CJI/doc.563/18 (15 July 2018) ("Third Report").

<sup>245</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fourth Report*, OEA/Ser.Q, CJI/doc. 580/19 (11 February 2019) ("Fourth Report").

<sup>246</sup> See OAS Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States, Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018 (IAJC-Legal Advisers 2018 Joint Meeting).

report also addressed several comments on the use of the term “agreement” in the Guidelines for both binding and non-binding categories.<sup>247</sup>

111. My fifth report provided a complete “first draft” of *The OAS Guidelines for Binding and Non-Binding Agreements, with Commentary* (“*Draft Guidelines*”).<sup>248</sup> In doing so, it added commentary on the issues of effects and training/education. It also provided a revised text of the other guidelines and commentary, including revisions and adjustments in light of many helpful comments and suggestions received from Committee Members and OAS Foreign Ministry Legal Advisers.<sup>249</sup> It reflected additional input received from presentations made on this project at the United Nations: (i) to the UN General Assembly’s 29<sup>th</sup> Informal Meeting of Legal Advisers held on 23 October 2018 and (ii) to an informal working group of treaty experts and practitioners hosted by the governments of Canada and Colombia in concert with UN General Assembly events marking the 50<sup>th</sup> Anniversary of the conclusion of the Vienna Convention on the Law of Treaties. Both events confirmed that concerns about issues associated with binding and non-binding agreements extend well beyond Member States.

112. Among other things, the 5<sup>th</sup> Report *Draft Guidelines* added (i) a new chapeau to clarify that the *Guidelines* present a set of working definitions, understandings and best practices that are not intended to codify existing international law or progressively develop it in some way; (ii) a revised definition of “agreement” that encompasses the broad concept under which treaties, political commitments, contracts, and inter-institutional agreements fall while acknowledging that, in practice, the term “agreement” is frequently employed only in concert with treaty texts; (iii) sample clauses and a table of words and phrases that Member States (or others) may use in an instrument as evidence that it is a treaty, a political commitment, or a contract; and (iv) a new guideline encouraging States to honor their political commitments (while recognizing they have no legal obligation to do so).

113. In this, my sixth report, I present a revised version of the *Draft Guidelines*. It responds to further input received from Committee Members during the Committee’s 95<sup>th</sup> Regular Session, particularly with respect to

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<sup>247</sup> Fourth Report, *supra* note 31, ¶¶7-13 (noting five arguments in favor of scoping the *Draft Guidelines* in terms of binding and non-binding “agreements”—(i) the ILC and others never viewed treaties as synonymous with agreements, but rather as a sub-set of the broader agreement category; (ii) the criterion of an agreement unites treaties, political commitments, and contracts *and* distinguishes them from alternatives (e.g., unilateral declarations) in ways that alternative labels like “instruments” cannot); (iii) State practice counsels against using “magic words” to define or identify treaties; using the term “agreement” in a text cannot guarantee its status as a treaty; (iv) to overcome current confusion it is important that States become more aware of the *concept* of agreement independent of its usage; and (v) any risk of confusion over the use of the term may be mitigated if the *Guidelines* and accompanying *Commentary* adopt a transparent approach to the issue and the risks of confusion they might pose).

<sup>248</sup> See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fifth Report*, OEA/Ser.Q, CJI/doc. 593/19 (22 July 2019) (“Fifth Report”).

<sup>249</sup> For the records of these questions and comments, *see, e.g.*, IAJC-Legal Advisers 2018 Joint Meeting, *supra* note 246; *Summarized Minute*, 91st Regular Session of the Inter-American Juridical Committee, 9 Aug. 2017; *Summarized Minute*, 92nd Regular Session of the Inter-American Juridical Committee, 27 Feb. 2018; *Summarized Minute*, 93rd Regular Session of the Inter-American Juridical Committee, 9, 15-16 Aug. 2018; *Summarized Minute*, 94th Regular Session of the Inter-American Juridical Committee, 20 Feb. 2019. *Summarized Minute 6*, 95<sup>th</sup> Regular Session of the Inter-American Juridical Committee, 7 Aug. 2019.

- Revising the definition of an “agreement” to remove the reference to a “normative commitment” (which in Spanish posed a potential tautology) and replacing it with the idea of a “commitment to future behavior.” This change is not, however, intended to be substantive as “norms”, by definition, reference shared expectations of future behavior.
- Revising the definition of a “contract” to align more closely with the definition offered in the Committee’s recently approved *Guide on the Law applicable to International Commercial Contracts in the Americas*.<sup>250</sup>
- Reworking *Draft Guideline 3.2* to acknowledge that subjective and objective evidence may become entangled and to encourage a best practice where States are transparent in their own test and work to align outcomes under both tests where possible.
- Adding commentary to *Guideline 4.1* to differentiate Colombian executive agreements from simplified procedure agreements, while noting that exceeding the scope of authority in either case would be unconstitutional.
- Clarifying that the “displacement” term used in the earlier version of *Draft Guideline 5.2* referred to the capacity for a contract to supplant the default rules provided by a State’s domestic law.
- Adding commentary to *Draft Guideline 5.3.2* to differentiate (a) how political commitments may have legal relevance where they are converted (through a discretionary act) into an international or domestic legal instrument and (b) those cases where the political commitment may serve as an interpretative reference point without any additional discretionary acts.
- Proposing a presumption of unitary state responsibility for binding inter-institutional agreements (*i.e.*, that an institution’s binding agreement triggers the responsibility of the State as a whole, rather than only the responsibility of the concluding institution). The earlier version has listed unitary state responsibility as an “expectation.” Given a majority of States clearly follow this approach, it seems that as a best practice, States should operate on the assumption that this rule holds. Nonetheless, the *Draft Guidelines* continue to acknowledge that some States may not accept this presumption and deny unitary state responsibility for their inter-institutional agreements. As such, the current version continues to offer several guidelines for how States adopting divergent views on State responsibility may reconcile them in agreements *inter se*.
- Revising *Draft Guideline 4.2* on developing domestic procedures for political commitments: The earlier draft had suggested two options – Member States should either have domestic procedures for (a) “all” their political commitments or (b) only their “most significant” ones. The revised version directs States to have domestic procedures for these commitments without any qualification. This language should allow States to choose whether to craft such procedures for all their political commitments or only some specified sub-set of them.
- Adding language to *Draft Guideline 6.1* to make it clear that training on binding and non-binding agreements should be offered not only to Foreign Ministry officials but

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<sup>250</sup> See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

also to officials from other relevant ministries or agencies involved in a State's international agreement practice.

114. The new version of the *Draft Guidelines* also incorporates responses received from Canada to the Committee's Questionnaire, including

- Clarifying that although Canada uses the term "Memorandum of Understanding" (or "MOU") for its non-binding legally binding political commitments, it does not regard that title as determinative since other States may consider an MOU as a treaty.
- Delineating a political commitment by its political or moral character.
- Elaborating on Canada's practice of doing inter-institutional agreements as non-binding, political commitments or contracts rather than as treaties.
- Referencing Canada's policies for reviewing political commitments within the Foreign Ministry and maintaining a database of such non-binding agreements.
- Recounting Canada's efforts to obtain waivers of privileges and immunities in its inter-State contracts, the absence of which (along with the absence of governing law or forum selection clauses) may be the basis for denying an agreement contract status.
- Reviewing Canada's equivocal position on the intent/objective tests for identifying treaties, while also noting its characterization of the test for identifying a political commitment as one of party intent.

115. In addition to its own response, Canada made available responses to a questionnaire of its own on topics relevant to this project with the understanding that these could be made public.<sup>251</sup> Those responses include further views from two OAS Member States (Canada and Mexico) as well as explanations from Finland, Germany, Israel, Japan, the Republic of Korea, and Spain. Where relevant, those responses have been incorporated into the *Guidelines*, including by

- Citing all 8 States surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico and Spain – for the idea that title of an agreement is not determinative of its binding or non-binding legal status.
- Flagging that all 8 States agreed on the rising number and significance of political commitments in international relations.
- Noting that South Korea treats its agency-to-agency agreements as non-binding.
- Referencing the different internal approval and archiving procedures States have adopted for their political commitments, while noting a general sense within the working group that there is a need to improve internal coordination on the quality and effectiveness of non-binding agreements.

116. Annex I contains a complete revised draft of *OAS Guidelines for Binding and Non-Binding Agreements*. Annex II provides the *Guidelines* along with accompanying *Commentary*.

117. I would welcome any additional Committee feedback on each of the *Draft Guidelines* and the accompanying *Commentary* in terms of both substance and structure.

118. With the Committee's approval, I believe the time has come to seek more formal feedback. I would suggest that the Committee approve either (a) forwarding these guidelines to

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<sup>251</sup> Treaty Law Division, Global Affairs Canada, *Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments* (18 Sept. 2019) ("Working Group on Treaty Practice").

the OAS General Assembly for review and (hopefully) approval; or (b) as an alternative, interim step, approving the formal circulation of the current draft to OAS Member States for reactions and suggestions. In the latter case, I would undertake to synthesize and respond to any further suggested edits, amendments, or adjustments, with an eye to obtaining final Committee approval at our next regular session meeting in July-August 2020.

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

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

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

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

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and

perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

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

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

**1.2 Treaty** – a binding international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.

**1.3 Political Commitment** – A non-legally binding agreement between States, State institutions, or other actors intended to establish commitments of an exclusively political or moral nature.

**1.4 Contract** – A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national law or non-State law.

**1.5 Inter-Institutional Agreement** – An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms, the surrounding circumstances, and subsequent conduct, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.

## 6. The Capacity to Conclude International Agreements

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

**6.2 The Treaty-Making Capacity of State Institutions:** States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.

**6.3 Confirming Treaty-Making Capacity:** States or authorized State institutions contemplating a treaty with another State's institution should endeavor to confirm that the institution has sufficient competence over the treaty's subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.

**6.4 The Capacity to Make Political Commitments:** States or State institutions should be able to make political commitments to the extent political circumstances allow.

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

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

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



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

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

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

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

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

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

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (e.g., a treaty) but external evidence suggests another (e.g., contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

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

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

**3.2.3** A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems

that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.

**3.10 Specifying the Type of Agreement Concluded:** To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement's status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.

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

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

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

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

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

**3.8 Ambiguous or inconsistent evidence of an agreement’s status:** Where evidence indicative of an agreement’s status is ambiguous or inconsistent, the agreement’s status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants’ shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).

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

	Termination Compulsory Dispute Settlement	Modifications
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## 8. Procedures for Making Binding and Non-Binding Agreements

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

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

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

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

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

**4.5. Domestic Approval Procedures for Binding Inter-Institutional Agreements.** States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State's own domestic law, the domestic law of another State, or non-State law.

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

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

### 4.7 Publicizing Institutional Capacities to Conclude Binding Agreements.

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

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

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

#### **4.8 Publicizing Registries of Binding and Non-Binding Agreements**

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

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

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

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

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

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

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

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

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

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

**5.4.2** States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:

- (iv) incorporated into other international legal acts such as treaties or decisions of international organizations;

- (v) incorporated into domestic legal acts such as statutes or other regulations; or
- (vi) the basis for interpretation or guidance of other legally binding agreements.

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

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

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

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

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

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

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

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

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

- (ix) identifying and differentiating among the various types of binding and non-binding agreements;
- (x) understanding who within the State has the capacity to negotiate and conclude which agreements;



- (xi) following any and all domestic procedures involved in such agreement making;  
and
- (xii) appreciating the legal and non-legal effects that can flow from different types of international agreements.

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

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

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

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

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

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

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

**Commentary:** The concept of an agreement has not been well defined in international law. In preparing the draft that became the 1969 Vienna Convention on the Law of Treaties (VCLT), the International Law Commission (ILC) gave the idea little attention even as they used it regularly throughout their discussions.<sup>636</sup> Nor did any of the OAS Member States responding to the Committee’s Questionnaire address it. Nonetheless, there are at least two core elements to any agreement: *mutuality* and *commitment*.

In terms of *mutuality*, the First ILC Rapporteur for the Law of Treaties, J.L. Brierly, noted that defining treaties as “agreements” excludes “unilateral declarations.”<sup>637</sup> Agreements thus do not arise *sua sponte* from a single actor, but are the product of a mutual interchange or communication.<sup>638</sup> Brierly also identified the “essence of a ‘treaty’” not in the instrument or document recording it, but in the “agreement or *consensus* brought into

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<sup>636</sup> Although they used the term “agreement” throughout their work, none of the four ILC Special Rapporteurs offered a specific definition for the term. See J.L. Brierly, *First Report on the Law of Treaties* [1950] YBILC, vol. II, 227 (¶¶19-20); Hersch Lauterpacht, *First Report on the Law of Treaties* [1953] YBILC, vol. II, 90, 93-94 (Art. 1); Gerald G. Fitzmaurice, *First Report on the Law of Treaties* [1956] YBILC, vol. II, 117; Humphrey Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol. II, 31 (Art. 1(a)).

<sup>637</sup> Brierly, *supra* note 195, at 227, ¶¶19-20. International law has come to treat certain unilateral declarations as a form of international legal commitment. In the *Nuclear Tests* case, the ICJ found that France was bound under international law by public statements of its President and Foreign and Defense Ministers to cease nuclear tests in the South Pacific, obviating the need for the Court to rule on the case at hand. *Nuclear Tests (Australia/New Zealand v. France)* [1974] I.C.J. Rep. 267–8, ¶¶43–50. Based on this ruling, in 2006, the ILC articulated a basic *Guiding Principle*—“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.” ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) 58th Session, U.N. Doc. A/61/10, Guiding Principle 1. Examples of unilateral declarations include Egypt’s 1957 Declaration on the Suez Canal, Jordan’s 1988 waiver of claims to the West Bank, U.S. representations before the WTO Dispute Settlement Body in the *1974 Trade Act* case, and (at least potentially) Cuba’s 2002 declarations about the supply of vaccines to Uruguay. VR Cedeño, ‘Eighth Report on Unilateral Acts of States’ (26 May 2005) U.N. Doc. A/CN.4/557; *United States—Sections 301–310 of the Trade Act of 1974* (Report of the Panel) (1999) WT/DS152/R [7.118]–[7.123].

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

<sup>638</sup> Duncan B. Hollis and Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VIRG. J. INT’L L. 507, 522 (2009); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 51-53 (1996).

existence by the act of its formal conclusion.”<sup>639</sup> By linking agreement to a “consensus,” the concept is thus tied to having a “meeting of the minds” or *consensus ad idem*.<sup>640</sup>

Beyond mutuality, the *consensus ad idem* must also incorporate some commitment. *Commitment* refers to the idea that an agreement encompasses shared expectations of future behavior. It is not enough for an agreement’s participants to explain their respective positions or even list an “agreed view” – commitments elaborate how participants will change their behavior from the status quo or continue existing behavior.<sup>641</sup> Of course, the precision of commitments can vary; some encompass clear rules that participants are able to fully implement *ex ante* while others are standards where compliance requires an *ex post* analysis in light of all the circumstances. Nor should the mutuality of commitments be confused with reciprocity. Agreements can be one-sided; they do not require an exchange of commitments (or what the common law calls “consideration”); a single commitment by one participant to another participant (or participants) can suffice.<sup>642</sup>

**1.2 Treaty** – *an international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.*

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

For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>643</sup>

<sup>639</sup> [1950] YBILC, vol. II, 227, ¶19-20.

<sup>640</sup> See, e.g., J.L. Weinstein, *Exchange of Notes*, 29 BRITISH YBK INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes”); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) (same); Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRITISH YBK INT’L L. 117, 119 (1979) (same).

<sup>641</sup> See, e.g., Hollis and Newcomer, *supra* note 197, at 522; KLABBERS, *supra* note 197, at 51-53; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 584-85 (2005).

<sup>642</sup> See Duncan B. Hollis, *Defining Treaties*, in THE OXFORD GUIDE TO TREATIES 20 (Duncan B. Hollis, ed., 2012).

<sup>643</sup> Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 2(1)(a) (“VCLT”).

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law.<sup>644</sup> Most States endorse it.<sup>645</sup> And scholars regularly cite it when defining the treaty concept.<sup>646</sup>

At the same time, the VCLT treaty definition is widely recognized as incomplete. It fails to include agreements by other subjects of international law. And yet, no one seriously disputes that agreements with or among international organizations qualify as treaties.<sup>647</sup> The VCLT definition also references issues that once were controversial (*i.e.*, that an exchange of notes may constitute a treaty) that are no longer open to serious question.<sup>648</sup> Treaties can exist in a single instrument or two or more related instruments.<sup>649</sup>

The *Guidelines'* treaty definition thus expands upon the VCLT definition to accommodate modern treaty law and practice. For the purposes of these *Guidelines*, a treaty has the following elements: (i) an international agreement; (ii) concluded; (iii) among States, State institutions or other appropriate subjects; (iv) that is recorded in writing; (v) governed by international law; and without regard to (vi) its designation; (vii) registration; or (viii) the domestic legal procedures States employ to consent to be bound by it.

(p) *An international agreement.* A treaty constitutes a specific type of agreement: *all treaties are agreements, but not all agreements qualify as treaties.*<sup>650</sup> It is not clear, however, what other work the “international” qualifier does. It has not been employed to limit the subject-matter for treaty-making. Today, requiring an “international” agreement may best be read to reinforce the treaty’s scope, whether in terms of cabining who can conclude one (*i.e.*, those actors with international legal personality) or the international legal basis for the obligations that result.<sup>651</sup>

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<sup>644</sup> See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgement) [2017] I.C.J. Rep. 3, 21, ¶42; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)* [2002] I.C.J. Rep. 249, ¶263. Other international tribunals take a similar position. See, e.g., *Texaco v. Libyan Arab Republic*, 53 INT’L L. REP. 389, 474 (1977).

<sup>645</sup> Duncan B. Hollis, *Second Report on Binding and Non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) ¶8 (“Hollis, Second Report”) (9 of 10 OAS Member States responding accept VCLT definition in their own treaty law and practice, while the tenth State did not address the issue); Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis et al., eds., 2005) (among 19 representative States, “virtually every state surveyed” accepts the VCLT treaty definition).

<sup>646</sup> See, e.g., ANTHONY AUST, MODERN TREATY LAW & PRACTICE 14 (3rd ed., 2013); MALGOSIA FITZMAURICE AND OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 6-25 (2005); KLABBERS, *supra* note 197, at 40.

<sup>647</sup> See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force), 25 ILM 543 (1986) (“1986 VCLT”); A. MCNAIR, THE LAW OF TREATIES 755 (1961) (“Fifty years ago it might have been possible to say that only States could conclude treaties, but today any such statement would be out of date.”).

<sup>648</sup> The 1935 *Harvard Draft Convention on the Law of Treaties*, for example, originally excluded exchanges of notes from its treaty definition. 29 AM. J. INT’L L. (SUPP.) 653, 698 (1935). Today, however, treaties can be comprised by single or repeated exchanges of notes. See, e.g., Philippe Gautier, *Article 2, Convention of 1969*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES 35 (Oliver Corten and Pierre Klein, eds., 2011); VILLIGER, *supra* note 199, at 200.

<sup>649</sup> VCLT Art. 2(1)(a).

<sup>650</sup> See VILLIGER, *supra* note 199, at 77. This point was repeated throughout the ILC’s preparatory work. See Brierly, *First Report*, *supra* note 195, at 227, ¶19; Humphrey Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, ¶1; [1965] YBILC, vol. I, 10, ¶10 (Briggs).

<sup>651</sup> This follows from Waldock’s earlier understanding. Waldock, *First Report*, *supra* note 195, at 31 (Art. 1(a)); see also VILLIGER, *supra* note 199, at 78.

(q) ... *concluded* ... When is an international agreement concluded? The term may be used loosely to refer to any point from the negotiations' end to a "definitive engagement that the parties are bound by the instrument under international law."<sup>652</sup> Both the VCLT and State practice define conclusion as the point at which parties adopt the treaty text or when it is opened for signature.<sup>653</sup> For purposes of these *Guidelines*, it is important to emphasize that a treaty can be "concluded" even if it has not entered into force (or never will).<sup>654</sup> Conclusion and entry into force are not synonymous.<sup>655</sup> Thus, it is important to differentiate the legal effects that arise when a treaty merely exists from those effects imposed upon its entry into force (*i.e.*, *pacta sunt servanda* only applies to the latter subset of treaties).<sup>656</sup>

(r) ... *among States, State institutions and other appropriate subjects* ... The VCLT defines a treaty as an agreement between States. In practice, a State may conclude a treaty directly in its own name (an inter-State agreement) or via one of its institutions – whether the national government as a whole (a government-to-government agreement), a national ministry (an agency-to-agency agreement), or via a sub-national territorial unit (*e.g.*, a province-to-province agreement).<sup>657</sup> At the same time, the VCLT recognizes that "other subjects of international law" may also conclude treaties.<sup>658</sup> This category encompasses entities such as international organizations, which form the subject of the 1986 Vienna Convention.<sup>659</sup> In addition, other subjects of international law may have sufficient legal personality to conclude treaties on certain subjects (*i.e.*, insurgent groups can conclude treaties regarding the conduct of hostilities).<sup>660</sup> These *Guidelines* employ the label "appropriate subjects" to acknowledge that not all entities that aspire to be subjects of international law may qualify as such. Some States claim that a State institution (*e.g.*, overseas territory, regional government) can be treated as an "other subject" of international law, that is, capable of concluding a treaty directly in their own name. That position is, however, disputed and these *Guidelines* do not purport to resolve that dispute.<sup>661</sup> Thus, the treaty definition simply lists State institutions among the actors that conclude treaties without clarifying whether they can do so independently or only as agents of a State.

<sup>652</sup> Waldock adopted the latter view. Waldock, *First Report*, *supra* note 195, at 30, ¶9. Brierly supported linking a treaty's conclusion to the establishment of the agreed text in final form. J.L. Brierly, *Second Report on the Law of Treaties* [1951] YBILC, vol. II, 70-71; *see also* VILLIGER, *supra* note 199, at 78-9.

<sup>653</sup> The VCLT's structure favors this view – VCLT Articles 7-10 discuss the "text of the treaty" when referring to full powers, adoption and authentication of a treaty text, but to the "treaty" in those articles (Arts. 11-18) elaborating various means of expressing consent to be bound. The 1986 VCLT adopts the same approach. *See* RICHARD GARDINER, *TREATY INTERPRETATION* 232-33 (2<sup>nd</sup> ed., 2015); AUST, *supra* note 205, at 86.

<sup>654</sup> Unperfected treaties—those that do not enter into force—are thus still considered treaties. *See, e.g.*, 1986 VCLT, *supra* note 206 (not yet in force).

<sup>655</sup> AUST, *supra* note 205, at 86; VILLIGER, *supra* note 199, at 79.

<sup>656</sup> *See, e.g.*, VCLT Art. 24(4) (noting various provisions of "a treaty" that "apply from the time of the adoption of its text" rather than on entry into force).

<sup>657</sup> *See, e.g.*, Hollis, Second Report, *supra* note 10, at 8, ¶24 (United States and Jamaica report support for agency-level agreements as treaties); *id* at ¶26 (Mexican law permits federal entities to conclude inter-institutional agreements governed by international law).

<sup>658</sup> *See* VCLT Art. 3 (VCLT's treaty definition does not preclude the legal force of agreements concluded by States with other subjects of international law or among such subjects); Waldock, *First Report*, *supra* note 195, at 30.

<sup>659</sup> 1986 VCLT, *supra* note 206.

<sup>660</sup> *See* Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, in *THE OXFORD GUIDE TO TREATIES* 125-26 (Duncan B. Hollis, ed., 2012).

<sup>661</sup> Hollis, Second Report, *supra* note 10, at 8, ¶25 (Argentina denies government ministries can conclude treaties since they do not qualify as subjects of international law).

(s) ... *that is recorded in writing* ... The VCLT requires all treaties to be in writing – with permanent and readable evidence of the agreement. But it does not impose any particular requirements of form.<sup>662</sup> There is, for example, no requirement that treaties be signed.<sup>663</sup> Nor must they be published.<sup>664</sup> There are, moreover, many different ways to record a treaty, including the most obvious, traditional means – typewriting and printing. Modern communication methods, including e-mail, texts, social media accounts (e.g., Twitter), may provide additional mechanisms for recording future treaties.<sup>665</sup>

The VCLT excludes oral agreements from its ambit (primarily for practical reasons).<sup>666</sup> Today, many—but not all—States understand customary international law to allow for oral treaties.<sup>667</sup> U.S. domestic law, for example, provides that oral international agreements, once made, must be committed to writing.<sup>668</sup> By providing that a treaty be “*recorded in writing*,” these *Guidelines* avoid endorsing the oral treaty concept specifically. At the same time, however, the definition may include any oral treaties once they are subsequently recorded in written form.

(t) ... *and governed by international law*, ... This is the essential criterion of the treaty definition. Simply put, *if an international agreement is governed by international law, it is a treaty*. The challenge, however, lies in understanding what this phrase means. Using the “governed by international law” qualifier clearly distinguishes treaties from two other categories of international agreement: contracts (agreements governed by national law) and political commitments (agreements not governed by law at all).<sup>669</sup> But it is not clear precisely how it does so. For starters, the idea that treaties are governed by international law may be read as more of a consequence of treaty-making rather than a constitutive element of the concept.<sup>670</sup> And, as discussed further below, States and

<sup>662</sup> AUST, *supra* note 205, at 16.

<sup>663</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment, 20 April 2010) [2010] I.C.J. Rep. ¶¶132-50 (treating an unsigned joint press communique as an “agreement”); Gautier, *supra* note 207, at 38; AUST, *supra* note 205, at 20-21.

<sup>664</sup> FITZMAURICE AND ELIAS, *supra* note 205, at 23-24; KLABBERS, *supra* note 197, at 85-86.

<sup>665</sup> AUST, *supra* note 205, at 16 (supporting the idea that a treaty could be concluded via e-mail).

<sup>666</sup> See VCLT Art. 3. The ILC emphasized it focused exclusively on written agreements “in the interests of clarity and simplicity” and had “not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission’s draft articles on the law of treaties may not have relevance in regard to oral agreements.” [1966] YBILC, vol. II, 189, ¶7.

<sup>667</sup> See, e.g., Hollis, *A Comparative Approach*, *supra* note 204, at 12-13 (surveying treaty law and practice of Canada, Germany, Japan, Switzerland, and the United Kingdom); Jan G. Brower, *The Netherlands*, in NATIONAL TREATY LAW & PRACTICE 486 (Duncan B. Hollis et al., eds., 2005) (Dutch Government has opposed practice of oral agreements since 1983); K. Thakore, *India*, in NATIONAL TREATY LAW & PRACTICE 352 (Duncan B. Hollis et al., eds., 2005) (oral agreements “are not resorted to in Indian practice”); Neville Botha, *South Africa*, in NATIONAL TREATY LAW & PRACTICE 583 (Duncan B. Hollis et al., eds., 2005) (neither South African law nor practice makes any provision for oral agreements and they lack official sanction).

<sup>668</sup> See 1 U.S.C. §112b.

<sup>669</sup> Both distinctions were raised at the ILC and in the Vienna Conference. On the distinction between treaties and contracts, see [1966] YBILC, vol. II, 189, ¶6; [1959] YBILC, vol. II, 95, ¶3; U.N. Conference on the Law of Treaties, *Official Records: Documents of the Conference*, U.N. Doc. A/CONF.39/11/Add.2, 9, ¶6 (“Vienna Conference, Official Records”). On the distinction between treaties and political commitments see [1959] YBILC, vol. II, 96-97, ¶8 (“instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *vœux*, would not be treaties”); Vienna Conference, *Official Records*, *supra*, at 111-112; U.N. Conference on the Law of Treaties, *Summary Records of First Session*, U.N. Doc. A/CONF.39/11, 23, ¶26 (“Vienna Conference, First Session”) (Mexican delegate distinguishes treaties from “declarations of principle or political instruments”); *id* at 28, ¶65.

<sup>670</sup> That perspective was clearly at work in the ILC’s origination of the phrase. See [1959] YBILC, vol. II, 95, ¶3.

scholars have never fully resolved how to decide which agreements are governed by international law. Today, there are two different camps. The first favors subjective indicators to discern when an agreement is governed by international law based on the intention of the States (or other subjects) who make it. In other words, an agreement is a treaty where that reflects the shared intentions of its authors. In contrast, a second camp contemplates an agreement's objective markers (whether its subject-matter or the use of certain text) as more indicative of when it is governed by international law. As a practical matter, therefore, applying this treaty criterion evidences an "oscillation between subjective and objective approaches."<sup>671</sup>

(u) ... *regardless of its designation* ... International law has not imposed any requirements of form or formalities for concluding treaties.<sup>672</sup> Thus, a treaty need not bear the title "treaty." In practice, treaties bear many different titles, including "act," "agreed minute," "charter," "convention," "covenant," "declaration," "memorandum," "note verbale," "protocol," "statute," and, of course, "treaty." International tribunals have classified instruments as treaties notwithstanding the agreement being housed in very different forms. In *Qatar v. Bahrain*, the International Court of Justice analyzed the 1990 "Agreed Minutes" of a meeting among Foreign Ministers as a treaty.<sup>673</sup> More recently, in the *Pulp Mills* case, the Court concluded that a press release constituted a binding agreement for the parties.<sup>674</sup>

At most, an agreement's title may provide some indication of its status. It may, for example, indicate its authors' intentions. When two States use the title "treaty," it suggests that they anticipated making one. But, the fact an agreement bears a particular title is not determinative of whether it is (or is not) a treaty. Thus, although some States like Canada prefer to use "Memorandum of Understanding" (MOU) as the title for their political commitments, the fact that an agreement bears that heading does not automatically make it non-binding. MOUs can still be treaties.<sup>675</sup>

<sup>671</sup> Martti Koskenniemi, *Theory: implications for the practitioner*, in *THEORY AND INTERNATIONAL LAW: AN INTRODUCTION* 19-20 (Philip Allott et al., eds., 1991).

<sup>672</sup> See, e.g., *An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction, PCA Case No. 2013-19 (Oct. 29, 2015) ¶214 ("*South China Sea Arbitration*") ("The form or designation of an instrument is . . . not decisive of its status as an agreement."); *South West Africa (Ethiopia/Liberia v. South Africa)* (Preliminary Objections) [1962] I.C.J. Rep. 319, 331 ("terminology is not a determinant factor as to the character of an international agreement").

<sup>673</sup> *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] I.C.J. Rep. 112, ¶21-30.

<sup>674</sup> *Pulp Mills*, *supra* note 218, at 138.

<sup>675</sup> Global Affairs Canada, *Policy on Tabling of Treaties in Parliament*, at <https://treaty-accord.gc.ca/procedures.aspx?lang=eng>, Annex C ("Canada Treaty Policy") ("while Canadian recent practice dictates that Memorandum of Understanding or Arrangements are not legally binding, not all States view these instruments as such. Simply labeling a document as a "Memorandum of Understanding" or "Arrangement" is not enough to ensure that it will not be considered as an agreement governed by public international law"); Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 September 2019) ("Canada Response"); Treaty Law Division, Global Affairs Canada, *Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments* (18 Sept. 2019) 5, 23 ("*Working Group on Treaty Practice*") (Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain all indicate that the title of an agreement is not determinative of its binding or non-binding status, although Spain noted that it does not consider MOUs to be legally binding in accordance with Article 43 of its Treaty Law 25/2014).

Moreover, States may ascribe a different status to the same MOU as the United States and its treaty partners did with respect to certain defense-related MOUs. The United States considered them treaties, while its partners (Australia, Canada, and the United Kingdom) regarded them as non-binding, political commitments. See J.



(v) ... *registration* ... UN Charter Article 102(1) requires that “[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”<sup>676</sup> Does this mean all unregistered agreements are not treaties? The answer is clearly in the negative.<sup>677</sup> Neither the U.N. Charter nor the VCLT explicitly tie treaty registration to an agreement’s legal status. For its part, the United Nations is careful to regularly indicate that the Secretariat’s acceptance of an instrument for registration “does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status.”<sup>678</sup> Similarly, a failure to register will generally not deny an agreement the status of a treaty. As the ICJ noted in *Qatar v. Bahrain*, “[n]on-registration or late registration ... does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties.”<sup>679</sup> In short, registration is not a required criterion for defining treaties.

Even if it is not determinative, the fact of registration may be indicative of a treaty’s existence. Like the title, registration indicates an intent (albeit of only the registering party) that the agreement will be a treaty. But since States do not regularly monitor treaty registrations, registration often says little, if anything, about the other State(s)’ intentions. Nonetheless, the ICJ recently signaled in *Somalia v. Kenya* that registration is among the factors it considers in identifying treaties, particularly where the other party did not subsequently object to registration.<sup>680</sup>

(w) ... *or the domestic legal procedures States employ to consent to be bound by it.* The definition of a “treaty” may vary depending on the context in which is used. For purposes of these *Guidelines*, it is important to differentiate how Member States may define treaties for purposes of their domestic law and how international law and practice define the concept. As a matter of domestic law, some States limit the definition of a treaty within their domestic legal order to agreements authorized through specific domestic procedures, most often legislative approval.<sup>681</sup> International agreements that do

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McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT’L L. 821 (1994).

<sup>676</sup> UN Charter, Art. 102(1); *see also* VCLT Art. 80(1) (“Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and publication”). In contrast, Article 18 of the League of Nations’ Covenant went further, indicating that “a treaty or international engagement” was not binding until registered.

<sup>677</sup> Accord AUST, *supra* note 205, at 302-03; FITZMAURICE AND ELIAS, *supra* note 205, at 23; KLABBERS, *supra* note 197, at 84; D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty*, CURRENT LEGAL PROBLEMS 257, 265-276 (1993).

<sup>678</sup> U.N. Secretary-General, *Note by the Secretariat*, in 2856 TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS VII (2012). In cases of doubt, the United Nations favors registration. But it has occasionally refused to register a text that it did not consider a treaty.

<sup>679</sup> *Qatar v. Bahrain*, *supra* note 228, at ¶29. The failure to register or publish a 1983 U.S.-U.K. MOU was, however, a factor in the Heathrow Arbitration’s decision to regard it as non-legally binding. *Award on the First Question, US/UK Arbitration concerning Heathrow Airport User Charges* (1992) ch. 5 155, ¶6.5.

<sup>680</sup> *See Somalia v. Kenya*, *supra* note 9, at 21, ¶42 (citing Kenya’s registration and the lack of any Somali objection for five years as among the reasons the MOU qualified as a treaty).

<sup>681</sup> Which agreements require legislative approval—if any—varies from State to State. *See, e.g.*, Hollis, *A Comparative Approach*, *supra* note 204 (surveying how nineteen states address a legislative role in treaty-making). Some States (*e.g.*, Dominican Republic) require legislative approval for all their international agreements; other States like Canada do not require legislative approval to conclude any international agreement (legislation may, however, be required to implement certain agreements domestically). Canada Response, *supra* note 40, at 6. Other States adopt different domestic procedures for international agreements on different subjects or in light of other domestic authorities. *See, e.g.*, Dominican Republic, Legal Department,

not require or receive legislative approval will not be defined as treaties for domestic law purposes, but rather comprise a discrete category. Many States refer to these as “executive agreements.”<sup>682</sup> Other States, particularly those belonging to the Commonwealth, use the term “treaty” to refer to their international agreements even though they do not require any advance legislative authorization.<sup>683</sup> Thus, the fact that a State mandates a particular set of domestic procedures for an international agreement will not accurately predict its status as a binding agreement under international law. Hence, these *Guidelines* adhere to the broader formulation where a treaty encompasses *all* binding agreements governed by international law independent of how States decide to authorize their consent to it.

**1.3 Political Commitment** – *A non-legally binding agreement between States, State institutions or other actors intended to establish commitments of an exclusively political or moral nature.*

**Commentary:** Unlike the treaty, international law lacks a widely accepted definition for political commitments. Nonetheless, States and scholars have recognized these non-binding agreements for more than a century, albeit under different headers: *e.g.*, gentleman’s agreements, informal agreements, *de facto* agreements, non-binding agreements, political texts, extra-legal agreements, non-legal agreements, international understandings, and political commitments.<sup>684</sup> The “political commitment” label captures all of these variations and corresponds to the category of non-binding international agreements generally.

Today, States clearly support the practice of concluding mutual commitments whose normative force lies outside of any sense of legal obligation.<sup>685</sup> The practice, moreover, appears to reflect increasing State usage of this vehicle for agreement.<sup>686</sup> Political commitments are, by definition, non-binding. These are commitments for which compliance derives not from law, but rather a sense of moral duty or the political relations from which

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Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (citing Art. 93 of the 2015 Constitution) (“Dominican Republic Response”); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”) (legislative approval required for certain international agreements on topics involving, for example, territorial or border delimitations, alliances, and trade agreements).

<sup>682</sup> In the United States, for example, only agreements that receive “advice and consent” from a two thirds majority of the upper chamber of its legislature (the Senate) are called treaties; agreements approved by a simple majority of both chambers are called “congressional-executive agreements” while those done under the President’s own constitutional powers are titled “sole executive agreements.”

<sup>683</sup> See Canada Treaty Policy, *supra* note 40 (adopting a treaty definition that applies to “any type of instrument governed by public international law”).

<sup>684</sup> See KLABBERS, *supra* note 197, at 18; see also Hollis and Newcomer, *supra* note 197, at 516-24; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT’L L. 65, 95 (1980); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296 (1977).

<sup>685</sup> See, *e.g.*, AUST, *supra* note 205, at 28-29, 35-39; MCNAIR, *supra* note 206, at 6; Bothe, *supra* note 235, at 66 (using empirical approach to reveal political commitment practice); PAUL REUTER, AN INTRODUCTION TO THE LAW OF TREATIES ¶74 (J. Mico and P. Haggemacher, trans., 1989). Debates continue from a jurisprudential view as to whether States can choose to form non-binding agreements. See KLABBERS, *supra* note 197, at 119 (“[I]f states wish to become bound, they have no choice but to become legally bound.”); Ian Sinclair, *Book Review—The Concept of Treaty in International Law*, 81 AM. J. INT’L L. 748 (1997) (disputing Klabbbers’s views).

<sup>686</sup> Working Group on Treaty Practice, *supra* note 40, at 13, 31 (all 8 states surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – agree that the frequency and significance of political commitments is increasing).

the agreement originated. Political commitments stand in contrast to binding agreements governed by law whether international (for treaties) or national (for contracts). The difference is an important one as the U.S. State Department described it in referencing several political commitments concluded alongside the START Treaty:

An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A “political” undertaking is not governed by international law .... Until and unless a party extricates itself from its “political” undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.<sup>687</sup>

Of course, political force may also attach to legal norms. A treaty breach can, for example, generate *both* legal and political consequences. Thus, what separates treaties from political commitments is the *additional* application of international law to treaties (*e.g.*, the law of State responsibility).

The concept of a political commitment should not, however, be confused with “soft law.” Although the term “soft law” has multiple meanings, it essentially views law not as a binary phenomenon—where something is/is not law—but as existing along a spectrum of different degrees of bindingness or enforceability ranging from soft to hard.<sup>688</sup> Soft law thus incorporates two different ideas: (a) norms that, while precise, are not intended to give rise to obligations under international law; and (b) legal norms incapable of enforcement because they are too vague or lack monitoring or enforcement mechanisms.<sup>689</sup> Political commitments involve agreements on norms of the first, but not the second, type.

Moreover, as elaborated in Part 2 below, because political commitments do not depend on international or national law for their authority, they are not constrained by legal rules on capacity. States can, of course, conclude political commitments. So too can sub-national territorial units.<sup>690</sup> But since political commitments do not derive from international law,

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<sup>687</sup> Transmittal of the Treaty with the U.S.S.R. on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), Nov. 25, 1991, S. TREATY DOC. NO. 102-20, at 1086; CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 58-59 (Comm. Print 2001); *see also* Canada Response, *supra* note 40, at 3.

<sup>688</sup> *See, e.g.*, Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901 (1999); Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850, 865-66 (1989).

<sup>689</sup> *See* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 414-415, n7 (1983). Others have offered a narrow definition limiting soft law to non-legally binding normative agreements. *See, e.g.*, Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 76 n3 (Dinah Shelton, ed., 2000).

<sup>690</sup> *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEXAS L. REV. 741 (2010) (surveying U.S. state agreements with foreign counterparts and noting that they have “heartily endorsed the political commitment form”).

there is no reason to limit political commitment-making to the entities that can conclude treaties.<sup>691</sup>

Thus, the *Guidelines*' definition of a political commitment includes all other actors who have the capacity to engage in a political or moral undertaking. This would presumably include business firms and/or individuals. Political commitments can be concluded, moreover, among a group of participants with a shared identity (*i.e.*, only States, or only firms). Or, they can be concluded by a range of different actors in a multi-stakeholder framework. For a recent example, see the 1000-plus signatories of the Paris Call for Trust and Security in Cyberspace, including States, firms, academic institutions, and various representatives of civil society.<sup>692</sup>

**1.4 Contract:** *A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national or non-State law.*

**Commentary:** Like treaties (and unlike political commitments), contracts generate legally binding obligations. Instead of international law, however, a national legal system usually governs the formation, interpretation, and operation of the contract.<sup>693</sup> Alternatively, in a number of commercial contexts, parties may select non-State law (*e.g.*, customs, usages and practices, principles, and *lex mercatoria*) to govern their contracts in lieu of—or in addition to—a national legal system. The OAS Inter-American Juridical Committee recently prepared a *Guide on the Law applicable to International Commercial Contracts in the Americas* that elaborates on the concept of a “contract.”<sup>694</sup> The definition used here is meant to parallel the definition in that *Guide*.<sup>695</sup>

Contracts are usually defined as agreements by private actors (firms or individuals) that are governed by the relevant national legal system or private international law.<sup>696</sup> But as the ILC acknowledged, States may choose to use laws other than international law to

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<sup>691</sup> See Hollis & Newcomer, *supra* note 197, at 521.

<sup>692</sup> See Paris Call for Trust and Security in Cyberspace (12 November 2018) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

<sup>693</sup> Widdows, *supra* note 199, at 144-49. To say a contract is governed by domestic law does not mean it can never have international legal effect. Depending on the circumstances, international legal responsibility may follow a State's breach of contract. But, as the ILC noted, “this did not entail the consequence that the undertaking itself, or rather the instrument embodying it, was . . . a treaty or international agreement. While the obligation to carry out the undertaking might be an international law obligation, the incidents of its execution would not be governed by international law.” [1959] YBILC, vol. II, 95, ¶3.

<sup>694</sup> See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

<sup>695</sup> *Id.* The one difference is that in the international commercial context, the definition emphasized the need for contracts to be “enforceable.” *Id.* at ¶108. Where, however, States conclude contracts *inter-se* (or even contracts among State agencies or sub-national institutions) enforceability may not be guaranteed; issues of sovereign immunity, for example may preclude a court from taking jurisdiction over a dispute under such contracts. As such, the current definition does not require enforceability for a contract to exist.

<sup>696</sup> Each nation's legal system dictates which contracts fall within its jurisdiction, whether because the parties choose that legal system or because of that system's contacts with the parties. Where contracts involve actors from different States, multiple States may assume jurisdiction over that agreement. In such cases, conflict of law rules dictate which legal system takes priority in cases of conflict.

govern their agreements.<sup>697</sup> Thus, public actors, whether States as a whole or their various institutions, may choose to conclude their agreements as contracts.

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<sup>697</sup> [1966] YBILC, vol. II, 189, ¶6.

The existence of an inter-State (or inter-institutional) contract will often be a function of intent – did the parties intend their agreement to be governed by national law (and, if so, which one)? At the same time, however, the relevant national legal system will have its own rules on which agreements qualify as contracts and how to choose which law governs them.<sup>698</sup> Thus, there is a possibility that States could desire to create a contract that is invalid under the selected (or otherwise applicable) governing law. In such cases, there is an open question whether international law would step in to govern the agreement.<sup>699</sup>

**1.5 Inter-Institutional Agreement** – *An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms, the surrounding circumstances, and subsequent conduct, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.*

**Commentary:** States currently use the term inter-institutional agreement to reference international agreements concluded among State institutions, whether (i) national ministries or agencies or (ii) sub-national territorial units like regions or provinces. Mexico, for example, defines the scope of its inter-institutional agreements as those “concluded in written form between any area or decentralized entity of the federal, state, or municipal public administration and one or more foreign government entities or international entities ...”<sup>700</sup> Peru indicates “‘interinstitutional agreements’ ... may be concluded, within their purview, by Peruvian governmental entities, including municipalities and regional governments, with their foreign counterparts or even with international organizations.”<sup>701</sup>

The concept of inter-institutional agreements has received relatively little attention from international law. Practice, moreover, appears quite diverse in terms of whether these agreements are viewed as binding or non-binding. Some States, like Mexico, classify inter-institutional agreements as “governed by public international law,” making them binding treaties as that term is defined in these *Guidelines*.<sup>702</sup> Ecuador, in contrast, indicates that its

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<sup>698</sup> In Paraguay, for example, Law No. 5393/201 governs the law applicable to international contracts. See *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) (“Paraguay Response”). The Inter-American Juridical Committee has recently concluded a *Guide on the Law Applicable to International Commercial Contracts* that extensively addresses international contracting. Although it focuses on commercial contracts (rather than those involving States and State institutions with which these *Guidelines* deal), it contains extensive guidance of general utility for all international contracts. See INTERNATIONAL COMMERCIAL CONTRACTS GUIDE, *supra* note 58.

<sup>699</sup> Lauterpacht was of this view, as was the ILC, at least initially. Lauterpacht, *First Report*, *supra* note 195, 100; [1959] YBILC, vol. II, 95.

<sup>700</sup> See *Law Regarding the Making of Treaties*, reprinted in 31 I.L.M. 390 (1992), CDLX *Diario Oficial de la Federación* 2 (2 Jan. 1992) (1992 Mexican Law Regarding the Making of Treaties).

<sup>701</sup> Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Peru Response”); see also Hollis, Second Report, *supra* note 204, at ¶14.

<sup>702</sup> 1992 Mexican Law Regarding the Making of Treaties, *supra* note 247. Labeling inter-institutional agreements as treaties may not accord with the label they have within a domestic legal order. In both Mexico and the United States, for example, only instruments that receive parliamentary approval are called treaties even as both states conclude other “international agreements” that would qualify as treaties as a matter of international law. Thus, these *Guidelines* refer to certain inter-institutional agreements as treaties in the

“lower-level state institutions usually sign with their counterparts or with international organizations *non-binding* understandings known as inter-institutional instruments.”<sup>703</sup> Other States take a hybrid approach. Uruguay provides that inter-institutional agreements may be *either* binding or non-binding.<sup>704</sup> Peru suggests that inter-institutional agreements may be “governed by international law” if “they develop international commitments established under treaties in force”; otherwise inter-institutional agreements may be political commitments or contracts.<sup>705</sup> Jamaica, in contrast, does not view its institution’s agreements as treaties, but notes that “[s]ub-national territorial units and agencies may conclude non-binding agreements *or* contracts ...”<sup>706</sup> The United States, meanwhile, indicates that its national ministries may conclude inter-institutional agreements that can be either treaties, “non-binding” political commitments, or contracts.<sup>707</sup>

The diversity of State practice suggests that the category of inter-institutional agreements cannot be exclusively associated with any single category of binding (or non-binding) agreements. Simply put, an inter-institutional agreement may be a binding treaty or a binding contract, or it may be a non-binding political commitment. Its legal (or non-legal) status should, therefore, be determined by reference to the institution’s capacity to conclude international agreements and the same methods of identification employed to

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international law sense of that term, notwithstanding that as a matter of constitutional law they would not bear such a label.

<sup>703</sup> Ecuador Response, *supra* note 46 (emphasis added); Hollis, Second Report, *supra* note 204, at ¶13; see also Canada Response, *supra* note 40, at 6 (non-binding MOUs “and similar arrangements can be between Canada and another sovereign State, but more commonly are between a Canadian government department, agency, province, other subnational government, or para-statal organization, and a similar body in another country.”).

<sup>704</sup> See Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“Uruguay Response”) (listing “Inter-Institutional Agreements” as non-binding agreements, but later noting inter-institutional agreements may “bind not the State but themselves.”). Panama advises that representatives of its territorial units may enter into treaties if they receive full powers from the Foreign Ministry. Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States, N.V.-A.J. MIRE-201813176 (“Panama Response”).

<sup>705</sup> Peru Response *supra* note 248 (citing Article 6 of Supreme Decree No. 031-2007-RE). Peru notes “‘nonbinding’ agreements . . . coming into increasing use . . . at the interinstitutional level (between Peruvian governmental entities—including municipalities and regional governments—and their foreign counterparts)” at the same time these entities “are authorized to conclude contracts for the procurement of goods and services.” *Id.*

<sup>706</sup> Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 Dec. 2017 (“Jamaica Response”) (emphasis added).

<sup>707</sup> See United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“U.S. Response”) (“Departments and agencies of the United States may enter into agreements with agencies of other states that fall within the definition of a treaty contained in Article 2 of the Vienna Convention on the Law of Treaties. Departments and agencies of the United States also enter into non-legally binding instruments and contracts governed by domestic law with agencies of other states.”). U.S. practice with respect to its sub-national territorial units (that is, U.S. states) is more complex. U.S. states are denied a treaty-making capacity under the U.S. Constitution but can conclude agreements or compacts with foreign counterparts where authorized by its Congress. *Id.* In contrast, Argentina allows its sub-national territorial units to conclude some “partial” treaties but denies that capacity to its national ministries or agencies. Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”).

differentiate among inter-State agreements (i.e., the text, the surrounding circumstances, and subsequent conduct).

#### 4. The Capacity to Conclude International Agreements

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

**Commentary:** By virtue of their sovereignty, all States have the capacity to enter into treaties.<sup>708</sup> Through both the VCLT and custom, international law has devised a robust set of default rules on the treaty-making capacities of States. VCLT Article 7, for example, indicates who can consent to a treaty on a State's behalf – its head of government, head of state, foreign minister, and anyone else granted “full powers” to do so.

A treaty's terms may, however, limit which States are capable of joining. Multilateral treaties, for example, may be open to all States, only to States from a specific region,<sup>709</sup> or only to States engaged in a specific activity.<sup>710</sup> States only have the capacity to join treaties where the treaty's terms allow them to do so.<sup>711</sup>

International law also recognizes that every State has domestic laws and procedures governing its treaty-making. In theory, these rules may only rarely (if ever, in practice) override a State's consent to be bound to a particular treaty. To date, VCLT Article 46 has not provided legal grounds for a State to walk back its consent to be bound to a treaty (even in the face of allegations of significant breaches of domestic law or procedures).<sup>712</sup> That said, a State should—as a best practice—only exercise its capacity to join treaties that have been approved through its domestic laws and procedures. In other words, if a State's constitution requires a particular treaty to receive prior legislative approval, the State should not exercise its capacity to consent to be bound to that treaty until after the legislature has given that approval.

<sup>708</sup> See, e.g., *Case of the SS Wimbledon (Great Britain v. Germany)* [1923] P.C.I.J. Rep. Ser. A No. 1 25, ¶35 (“the right of entering into international engagements is an attribute of State sovereignty”).

<sup>709</sup> See, e.g., *Inter-American Convention to Prevent and Punish Torture* (1985) OAS Treaty Series No. 67, Arts. 18, 20 (participation limited to American States).

<sup>710</sup> See *Constitution of the Association of Natural Rubber Producing Countries* (1968) 1045 U.N.T.S. 173, ¶21 (treaty open to “countries producing natural rubber”). In addition, some treaties are open to additional States only by invitation. See *International Sugar Agreement* (1992) 1703 U.N.T.S. 203, Art. 37 (Agreement open to governments “invited to the United Nations Sugar Conference, 1992”).

<sup>711</sup> A treaty's terms may, of course, empower existing States parties to decide whether or not to admit a new State as a party; this is often the case with respect to the constituent treaties of international organizations.

<sup>712</sup> See VCLT Art. 46(1) (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”). Efforts to invoke Article 46 in practice have not proved terribly successful. See *Somalia v. Kenya*, *supra* note 9, at 21 ¶¶48-50. (rejecting Somalia's arguments that the MOU's failure to receive approvals required under its domestic law allowed it to invoke VCLT Article 46 or otherwise deny its consent to be bound); *accord Cameroon v. Nigeria*, *supra* note 114, at ¶¶265-67; KLABBERS, *supra* note 197, at 564 (“Whether Article 46 qualifies as customary international law would seem debatable. There is little practice, after all, and while the rule is sometimes invoked, it is rarely honoured.”)



States should be sensitive, moreover, to the fact that other States' domestic laws and procedures may either facilitate or restrict their capacity to conclude treaties. States should not assume equivalence between their own domestic rules and those of prospective treaty partners. One State may only have the capacity to conclude a particular treaty with prior legislative approval, while another State's domestic law or practice may authorize the conclusion of the same treaty without any legislative involvement. States should thus exercise their treaty-making capacity in ways that ensure each of the participating States is given an opportunity to complete the necessary domestic approvals before it gives its consent to be bound by a treaty.

**2.7 The Treaty-Making Capacity of State Institutions:** *States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.*

**Commentary:** Unlike questions surrounding the treaty-making capacity of international organizations, international law has devoted little attention to treaty-making by a State's institutions.<sup>713</sup> Nonetheless, State institutions – whether national ministries or sub-national territorial units – clearly do conclude instruments that at least some States (including those States of which these institutions form a part) regard as treaties (*i.e.*, agreements governed by international law).<sup>714</sup> When should these institutions have the capacity to do so? For starters, the subject-matter of the agreement should be one over which the institution has competence. For example, a State's Finance Ministry may have the competence to engage in tax information sharing with its counterparts but would not have the competence to share defense related data. In federal States, moreover, some matters fall within the exclusive competence of a sub-national territorial unit (*e.g.*, a province or region), which may create incentives for that territorial unit to conclude a treaty directly rather than having the State consent to doing so on the unit's behalf.

It would be a mistake, however, to conflate competence over a treaty's subject-matter with the capacity to make treaties on that matter. For institutions to enter into treaties, States appear to endorse two additional conditions: (1) the State responsible for the institution should consent to it making a treaty on matters within the institution's competence; and (2) the potential treaty partners should be willing to enter into that treaty with the institution.<sup>715</sup>

As a first order consideration, it is up to each State to decide whether to authorize any of its institutions to engage in treaty-making. Some States like Canada and Paraguay may opt not to do so at all.<sup>716</sup> In such cases, the institution should presumptively lack any treaty-making capacity.

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<sup>713</sup> Compare 1986 VCLT, *supra* note 206.

<sup>714</sup> See, *e.g.*, Grant, *supra* note 216, at 127-131; Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J INTL L 137, 146-47 (2005).

<sup>715</sup> Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71, 84 (1968); see also [1962] YBILC, vol. I, 59, ¶20 (Briggs) (laying out a similar two part test); Grant, *supra* note 216, at 131.

<sup>716</sup> See Canada Response, *supra* note 40, at 7-8 (indicating that “only the Canadian federal government can bind Canada” to treaties rather than government ministries or provinces; “provinces and territories can only conclude non-binding instruments”); Paraguay Response, *supra* note 245 (“Under domestic law, the Ministry of Foreign Affairs is the only agency with the capacity to conclude treaties governed by international law”).

When States do authorize treaty-making by their institutions, they can do so for all their institutions or only some of them. Mexico, for example, has authorized treaty-making by all types of State institutions.<sup>717</sup> Other States have focused on authorizing (or denying authority) to make treaties to specific categories of institutions. For example, several States in the region (*e.g.*, Jamaica, Panama, the United States) report authorizing their national ministries to conclude treaties, while other States (*e.g.*, Colombia, the Dominican Republic, Peru) report a lack of any domestic authority for those ministries to do so.<sup>718</sup> Meanwhile, States like Argentina authorize their sub-national territorial units to conclude certain types of “partial” treaties, but deny their ministries can do so.<sup>719</sup> Other Member States, in contrast, have not authorized sub-national territorial units to engage in any treaty-making.<sup>720</sup>

States may, moreover, authorize their institutions to negotiate and conclude treaties in various ways. Some – particularly European States – have constitutional provisions delineating the authority of certain State institutions to make treaties with respect to matters falling within their exclusive competence.<sup>721</sup> Others, like Mexico, have used a statute to lay out procedures for authorizing certain treaty-making by federal agencies and sub-national

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<sup>717</sup> See *supra* note 247, and accompanying text.

<sup>718</sup> Hollis, Second Report, *supra* note 204, at ¶¶24-25; See also Panama Response, *supra* note 251. Similar State practice exists outside the region; South Korea, for example, reports limiting its agency-to-agency agreements to those that do not create binding rights or obligations for nations under international law.” Working Group on Treaty Practice, *supra* note 40, at 21.

<sup>719</sup> See Argentina Response, *supra* note 254 (suggesting that since Argentina’s ministries are not subjects of international law, they cannot conclude treaties while noting that under Article 12[5] of Argentina’s Constitution its provinces and the Autonomous City of Buenos Aires can enter into “international agreements provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation”); see also Argentina Constitution of 1853, Reinstated in 1983, with Amendments through 1994, Arts. 125-26, *English translation available at [www.constituteproject.org](http://www.constituteproject.org)*.

<sup>720</sup> See, *e.g.*, Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Brazil Response”) (“Subnational entities (states, municipalities, and the Federal District) do not have the power, under the Brazilian Constitution, to conclude international legal acts that bind the Brazilian state”); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (“Colombia Response”) (domestic Colombian legislation does not authorize “sub-national territorial units” (*e.g.*, Colombian departments, districts, municipalities and indigenous territories) to conclude treaties governed by international law.”).

<sup>721</sup> See, *e.g.*, Austria Constitution 1920 (reinst. 1945, rev. 2013), B-VG Art. 16 (Eng. trans. from [www.constituteproject.org](http://www.constituteproject.org)) (“In matters within their own sphere of competence, the Länder can conclude treaties with states, or their constituent states, bordering on Austria to conclude treaties with states, or their constituent states”); Belgian Constitution 1883 (rev. 2014), Art. 167(3) (Eng. trans. from [www.constituteproject.org](http://www.constituteproject.org)) (“The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament.”); Germany, Basic Law of 1949 (rev. 2014) Art. 32(3) (Eng. trans. from [www.constituteproject.org](http://www.constituteproject.org)) (“Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.”); Swiss Constitution (1999), Art. 56(1) (Eng. trans. from [www.constituteproject.org](http://www.constituteproject.org)) (“A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers.”). Such authorization is not an entirely European phenomena; States like Russia also authorize treaty-making by certain sub-state units (*e.g.*, Yaroslavl, Tatarstan). See W.E. Butler, *Russia*, in NATIONAL TREATY LAW AND PRACTICE 151, 152-53 (D. Hollis et al., eds., 2005); Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

territorial units. Several states offer their consent on a more *ad hoc* basis. Under a 1981 Social Security treaty with the United States, for example, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec's distinct pension system.<sup>722</sup> And in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.<sup>723</sup>

Second, in addition to having the “internal” consent from the State of which it forms a part, an institution's capacity to make treaties should also turn on the “external” consent of the other State(s) or institution(s) with which it seeks to form a treaty. Just because one State has authorized a national ministry (or a province) to conclude treaties on certain matters should not mean potential treaty-partners must accept that authority. States can—and do—regularly decline to conclude such treaties or insist that the other State conclude the treaty on the institution's behalf (*i.e.*, in the form of a state-to-state treaty or a government-to-government one). To avoid unaligned expectations, a State authorizing its own institution to conclude treaties should ensure that it or its institution obtains the consent of other treaty parties that the State's institution will join such treaties (rather than the State itself doing so).

In addition to inter-institutional agreements, States may conclude bilateral treaties with a foreign State institution. Hong Kong, for example, has a number of treaties with OAS Member States.<sup>724</sup> In the multilateral treaty context, such authorizations are infrequent, but there are several cases where States have agreed to accept a treaty relationship with sub-state actors. For example, Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated States and territories to sign and ratify the Convention with all the attendant rights and obligations the Convention provides.<sup>725</sup> And the Agreement Establishing the World Trade Organization is open to any “customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements.”<sup>726</sup>

**2.8 Confirming Treaty-Making Capacity:** *States or authorized State institutions contemplating a treaty with another State's institution should endeavor to confirm that the institution has sufficient competence over the treaty's subject-matter and authorization from*

<sup>722</sup> See Agreement With Respect to Social Security, 11 Mar. 1981, U.S.-Can., Art. XX, 35 U.S.T. 3403, 3417. Quebec and the United States concluded that agreement in 1983, which the United States includes in its official treaty series. See Understanding and Administrative Arrangement with the Government of Quebec, 30 Mar. 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

<sup>723</sup> *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 (July 17, 1986 testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs). Subsequently, Puerto Rico withdrew from the Bank.

<sup>724</sup> See Agreement between the Government of Canada and the Government of Hong Kong for the surrender of fugitive offenders, 7 September 1993, U.K.-Hong Kong, 2313 U.N.T.S. 415.

<sup>725</sup> United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 396, Arts. 305(1)(c)-(e), (“UNCLOS”) (authorizing ratification or acceptance of the Convention by (1) “self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations” . . . and (3) “territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence”). The same approach was followed in the U.N. Fish Stocks Agreement. See Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 Aug. 1995, 2167 U.N.T.S. 88, Arts. 1(2)(b), 37-40.

<sup>726</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 3, Art. XII.

*the State of which it forms a part to enter into a treaty on such matters.*

**Commentary:** States currently have very different views on whether State institutions have the capacity to conclude inter-institutional agreements as treaties.<sup>727</sup> Some States clearly contemplate their national ministries and/or their sub-national territorial units having such a capacity. Other States just as firmly deny any authority to one or both types of their own institutions. As such, there is a risk of unaligned expectations in inter-institutional agreements, where one side assumes both institutions have a treaty-making capacity and the other assumes that one or both institutions do not. Such an event can not only cause confusion but can also lead to diplomatic tensions and disputes if the two institutions conclude an agreement.

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

Such verifications could be formal or informal. In 2001, for example, the United States asked the United Kingdom to confirm that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States. The United Kingdom provided an instrument of "entrustment" verifying the sub-national territorial units of the United Kingdom had the requisite competence and authority to conclude such treaties.<sup>728</sup>

What happens if the potential partner cannot confirm the foreign institution's treaty-making capacity? A State (or its institution) has several options. It could opt not to conclude the treaty at all. Or, it could revise the treaty to make it with the foreign State responsible for the institution in question. For example, when the United States determined that the Cayman Islands lacked the necessary entrustment to sign a tax information exchange agreement in its own name, the United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman Islands.<sup>729</sup> And when the United States and Canada discovered that the city of Seattle and the Province of British Columbia had

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<sup>727</sup> See *supra* notes 249-254, and accompanying text. This confusion likely extends beyond wholly inter-institutional agreements to those between a State and a foreign State's institution. See *supra* notes 87-89 and accompanying text.

<sup>728</sup> See, e.g., Press Release, U.S. Treasury Department, *Treasury Secretary O'Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information* (4 Nov. 2002).

<sup>729</sup> See, e.g., Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, 21 Nov. 2001, U.S.-U.K., T.I.A.S., CTIA No. 15989.000.

concluded a significant agreement concerning the Skagit River, they stepped in to “consent” to and indemnify that agreement via a treaty of their own.<sup>730</sup>

Can a State institution authorized to conclude a treaty with a foreign institution enter into that treaty if it cannot confirm the foreign institution’s capacity to do so? Unfortunately, there is substantial evidence of inter-institutional agreements arising without clear authorization from one or more responsible State(s).<sup>731</sup> Many of these agreements may be best regarded as political commitments or contracts. At least some of them, however, bear the markers of a treaty. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba where they agreed to jointly cooperate in opposing certain inter-basin water transfer projects contemplated by U.S. federal law.<sup>732</sup> Other States have experienced similar problems. By the end of the twentieth century, for example, the Canadian province of Quebec had reportedly concluded some 230 unauthorized “ententes” with foreign governments, nearly 60% of which were with foreign states.<sup>733</sup> At present, it does not seem a good practice to regard such agreements as treaties, especially if it later becomes clear one or more of the institution’s involved had no capacity to conclude treaties in its own name. Nonetheless, it is an area worthy of further State attention and discussion.

**2.10 The Capacity to Make Political Commitments:** *States or State institutions should be able to make political commitments to the extent political circumstances allow.*

**Commentary:** Political commitments are, by definition, free of any legal force under international or domestic law. As such, international law imposes no capacity conditions for which actors can conclude them. Similarly, domestic legal systems usually do not regulate which actors may conclude such commitments.<sup>734</sup> Unlike treaties, therefore, there are no concrete distinctions between the capacity of States and State institutions to conclude these non-binding agreements.

Politics, rather than law, serves as the guiding criterion for who within a State may enter into political commitments and on which subjects. Most States have little experience with regulating the capacity to make non-binding commitments on behalf of the State or State institutions. On some occasions, however, States have adopted policies organizing the capacity of the State or State institutions to enter into political commitments. In Colombia, for example, only those with the legal capacity to represent the State institution can sign memoranda of understanding or letters of intent even where these instruments are regarded

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<sup>730</sup> See Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D’Oreille River, 2 Apr. 1984, U.S.-Can., T.I.A.S. No. 11,088.

<sup>731</sup> See Hollis, *Unpacking the Compact Clause*, *supra* note 240 (identifying 340 binding and non-binding agreements concluded by U.S. states with foreign powers).

<sup>732</sup> See *Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba*, 2001 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, § A, at 179-98.

<sup>733</sup> Nikravesh, *supra* note 268, at 239. France, moreover, reportedly regards its ententes with Quebec as instruments governed by international law. See *id.* at 242.

<sup>734</sup> This is the case so long as the commitment does not infringe on the constitution or domestic law. Of course, should an agreement do so, its status as a political commitment would likely be called into question since the category, by definition, only covers agreements lacking legal force.

as non-binding (and even then, only after the instrument has undergone a legal review).<sup>735</sup> And, of course, international politics can have a significant influence on which States or State institutions can conclude political commitments and on what subjects.

In a few high-profile cases, a State may impose domestic legal constraints that limit the capacity to enter into a non-binding political commitment. As part of the controversy over the Joint Comprehensive Plan of Action (JCPOA), for example, the U.S. Congress passed a statute, the Iran Nuclear Review Act, requiring the U.S. President to submit “any agreement with Iran” (*i.e.*, not just a legally binding one) to Congress for review and an opportunity for disapproval.<sup>736</sup> President Obama submitted the JCPOA as required under the Act, although Congress eventually declined to approve or disapprove of that instrument.<sup>737</sup> Canada, Ecuador, and Peru have reported similar practices of coordinating and reviewing their political commitments, with Peru reporting different policies for the review of inter-State and inter-institutional political commitments.<sup>738</sup>

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

**Commentary:** Consistent with the earlier views of the ILC, some States in the region assert a capacity to enter into contracts with other States.<sup>739</sup> At the same time, other States indicate that they do not engage in inter-State contracting.<sup>740</sup> Thus, it appears that nothing in international law precludes a State from having a practice of concluding contracts with a foreign State likewise willing to conclude such contracts. A State’s own legal system could, in theory, limit its capacity to conclude inter-State contracts, but there are no examples of such limitations to date.

Any capacity constraints to inter-State contracting are more likely to come from either the choice—or content—of the contract’s governing law. The choice of a single governing domestic law may, as a practical matter, limit the frequency of such contracts since it requires at least one (if not both) contracting States to agree to a governing domestic law other than their own.<sup>741</sup> Contracting capacity is, moreover, a function of the

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<sup>735</sup> Colombia Response, *supra* note 267. Thus, among Colombia’s government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole. *Id.*

<sup>736</sup> See Pub. L. No. 114-17, 129 Stat. 201 (2015). The JCPOA was a political commitment relating to Iran’s nuclear program between Iran, the 5 Permanent Members of the U.N. Security Council, Germany and the European Union. U.S. President Trump gave notice of U.S. withdrawal from the JCPOA on May 8, 2018.

<sup>737</sup> Kristina Daugirdas & Julian Davis Mortensen, *Contemporary Practice of the United States relating to International Law*, 109 AM. J. INT’L L. 873, 874-78 (2015) (due to a minority filibuster, Congress failed to take any action on the JCPOA to approve or disapprove it).

<sup>738</sup> Peru Response, *supra* note 248 (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording . . .”); see also Canada Response, *supra* note 40, at 4; Ecuador Response, *supra* note 46.

<sup>739</sup> See [1966] YBILC, vol. II, 189, ¶6. In responding to the OAS Questionnaire, Canada, Ecuador, Jamaica, Mexico and the United States all acknowledged the possibility of inter-State contracting. See Hollis, Second Report, *supra* note 204, ¶15; Canada Response, *supra* note 40, at 4.

<sup>740</sup> Hollis, Second Report, *supra* note 204, ¶15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay report no practice of concluding contracts governed by domestic law for binding agreements among States.).

<sup>741</sup> Selecting non-State law to govern such contracts, however, could (at least in theory) sidestep such difficulties. See note 58 and accompanying text. Canada recounts a practice where inter-State contracts include a waiver of privileges and immunities; indeed, where there is “no such waiver, and no subordination to a chosen

law of the contract. Domestic legal systems (and certain non-State laws) each have their own rules for who can form a contract and on which subjects. As such, whether a foreign State can conclude a contract governed by a State's domestic law depends on a legal analysis of the applicable law (whether the one selected by the parties, or, in appropriate circumstances, the governing law determined according to the application of conflict of law rules).

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

**Commentary:** The capacity of State institutions to conclude contracts with foreign State institutions appears less controversial than inter-State contracting. Many of the States that disclaim any role in inter-State contracting admit the capacity of their institutions to do so.<sup>742</sup> Unlike inter-State contracting, however, the capacity of State institutions to conclude inter-institutional contractual agreements is not solely a function of the choice and contents of the contract's governing law. As creatures of a State's legal system, the contracting capacity of a State institution will be governed by that State's domestic law, whether or not it is the same as the contract's governing law. Colombia, for example, authorizes its "public legal entities or public bodies with the capacity to enter into contracts" but does so "subject to the authorities those entities are accorded under the Constitution and by law."<sup>743</sup>

Indeed, in some cases, States from the region appear to have constitutional or legislative mandates requiring the use of their own law as the governing law for certain public contracts, which would appear to include inter-institutional ones. Mexico's Constitution, for example, requires public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) via "contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal)."<sup>744</sup> States like Peru and Ecuador have procurement laws that provide similar authorizations and conditions for contracts by State institutions.<sup>745</sup>

Thus, the domestic law of the State institution may direct its capacity to conclude contracts with foreign State institutions directly through authorizations or indirectly through governing law mandates. That said, an inter-institutional agreement may be concluded that selects one State's governing law over the others. Article 9 of the 1998 Agreement between the National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist, provides, for example, that "[t]he Parties hereby designate the United States Federal Law to govern this Agreement for

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law and chosen forum, the instrument may be seen as something other than an enforceable contract." Canada Response, *supra* note 40, at 4.

<sup>742</sup> See Hollis, Second Report, *supra* note 204, ¶30 (Argentina, Colombia and Peru, each of which declined any practice of inter-state contracting, reported significant experience with inter-institutional contracting).

<sup>743</sup> *Id.* at ¶30.

<sup>744</sup> See Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response") (discussing Mexico Constitution 1917 (rev. 2015) Art. 134).

<sup>745</sup> Hollis, Second Report, *supra* note 204, ¶¶15, 30.

all purposes, including but not limited to determining the validity of this Agreement ...”<sup>746</sup> It is possible, moreover, that two State institutions could select a third State’s domestic law to govern their contract (subject to the caveat that the third State’s law permits such a selection). Similarly, inter-institutional agreements might select non-State law to govern the contract in addition to—or in lieu of—a national legal system.

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

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

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

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

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

**Commentary:** How can States and others determine whether any particular text will (or already) comprises a treaty, a political commitment, or a contract? There are two steps involved. First, there must be a discernable agreement. Second, there needs to be some method(s) for differentiating within the category of agreements: which ones are treaties? which ones are political commitments? and which ones are contracts?

*Guideline 3.1* offers best practices for the first step – identifying agreements generally. In some cases, the participants make it easy and jointly concede an agreement’s existence. In the *Pulp Mills* case, for example, neither Argentina nor Uruguay disputed that their Presidents had reached an agreement expressed via a 31 May 2005 press release; their dispute revolved around whether the agreement was binding (*i.e.*, governed by international law) or not.<sup>747</sup> Similarly, in the *Iron Rhine (“Ijzeren Rijn”) Railway* arbitration, both Belgium and the Netherlands acknowledged that they had reached an agreement in a Memorandum of Understanding (MOU) *and* that the MOU was not a “binding instrument.”<sup>748</sup>

In many cases, however, there will not be any “agreement to agree.” In these circumstances States should follow the ICJ’s lead from the *Aegean Sea* case and examine any proposed or existing statement with “regard above all to *its actual terms and to the particular circumstances* in which it was drawn up.”<sup>749</sup> That test provides a useful framework for identifying the conditions of any agreement – *i.e.*, mutuality and commitment.

<sup>746</sup> An excerpt of the contract, including Article 9, is reprinted in BARRY CARTER ET AL, INTERNATIONAL LAW 86-87 (7<sup>th</sup> ed., 2018).

<sup>747</sup> See *Pulp Mills*, *supra* note 218, at ¶¶132-33.

<sup>748</sup> *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) 27 RIAA 35, ¶156.

<sup>749</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] I.C.J. Rep. 3, ¶95 (emphasis added).



In the *Aegean Sea* case, for example, Greece and Turkey disputed both the existence of an agreement and its particular type. To resolve the issue, the Court reviewed both prior communications and the language used in a Joint Communiqué between Greece and Turkey’s Prime Ministers, concluding that the Communiqué did not constitute a “commitment” to submit the States’ dispute to the Court.<sup>750</sup> The ICJ affirmed this approach in *Qatar v. Bahrain*, examining a set of “Agreed Minutes” signed by Qatar and Bahrain’s Foreign Ministers and finding that they did constitute an agreement; they were “not a simple record of a meeting ... they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented.”<sup>751</sup> The ICJ continued this approach in the *Case Concerning Kasikili/Sedudu Island*, reading the varying views contained in exchanges of notes and letters between South Africa and Bechuanaland with regard to a boundary location and finding that they “demonstrate the absence of agreement.”<sup>752</sup>

For its part, the International Tribunal for the Law of the Sea (ITLOS) has suggested that otherwise “conditional” language in a shared text can preclude assigning it the status of an agreement.<sup>753</sup> International tribunals have also declined to identify an agreement where one side is non-responsive to an offer made by the other side. Thus, ITLOS refused to find Japan had, by its silence, agreed to a methodology for setting bonds that Russia presented in certain joint meetings and recorded subsequently in written Protocols between the two States.<sup>754</sup> Similarly, a PCA Tribunal declined to find that Jordan had reached an agreement to arbitrate when it failed to respond to two letters from an Italian Ambassador asserting that the two States had concluded an oral agreement to that effect.<sup>755</sup>

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

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<sup>750</sup> *Id.* at ¶107.

<sup>751</sup> *Qatar v. Bahrain*, *supra* note 228, at ¶24.

<sup>752</sup> *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999] I.C.J. Rep. 1045, ¶63.

<sup>753</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of Mar. 14, 2012) 2012 ITLOS Rep. 4, ¶92 (“The Tribunal considers that the terms of the 1974 Agreed Minutes confirm that these Minutes are a record of a conditional understanding reached during the course of negotiations, and not an agreement within the meaning of article 15 of the Convention. This is supported by the language of these Minutes, in particular, in light of the condition expressly contained therein that the delimitation of the territorial sea boundary was to be part of a comprehensive maritime boundary treaty.”).

<sup>754</sup> See “*Hoshinmaru*” (*Japan v. Russian Federation*) (Prompt Release, Judgment) 2007 ITLOS Rep. 18 (Aug. 6), ¶¶85-87.

<sup>755</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 Jan. 2006), ¶98.

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

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

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

*The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (e.g., a treaty) but external evidence suggests another (e.g., contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:*

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

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

**3.2.3** *A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.*

**Commentary:** Where there is an existing agreement, one way to determine if it is binding (or not) involves asking what its authors intended. The ILC ended up endorsing this methodology to determine which agreements would meet the treaty requirement of

being “governed by international law.”<sup>756</sup> The Vienna Conference delegates agreed.<sup>757</sup> Today, a large number of States, scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties.<sup>758</sup> In the *South China Seas* arbitration, for example, the Tribunal emphasized that “[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties.”<sup>759</sup> Several OAS Member States have affiliated themselves with this approach as well.<sup>760</sup> Under this view, if the parties intend an agreement to be a treaty, it is a treaty. Similarly, if they do not intend their agreement to be binding, it will be a non-binding political commitment.

The ICJ has, however, signaled a more objective approach to identifying when an agreement is a treaty (*i.e.*, governed by international law). In *Qatar v. Bahrain*, the ICJ found that the parties *had* concluded a legally binding agreement accepting ICJ jurisdiction in the

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<sup>756</sup> [1966] YBILC, vol. II, 189, ¶6 (“The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase ‘governed by international law’, and it decided not to make any mention of the element of intention in the definition”). Before reaching this conclusion, the ILC oscillated between subjective and objective approaches. Brierly proposed an objective look for agreements establishing “a relationship under international law” while his successor, Hersch Lauterpacht defined treaties as agreements “intended to create legal rights and obligations.” Compare Brierly, *First Report*, *supra* note 195, at 223 with Lauterpacht, *First Report*, *supra* note 195, at 93. The ILC’s Third Rapporteur, Gerald Fitzmaurice tried to combine the two approaches, defining a treaty as an agreement “intended to create legal rights and obligations, to establish relationships, governed by international law.” [1959] YBILC, vol. II, 96. He later fell back on just using the governed by international law formula as a stand in for a subjective test. See Fitzmaurice, *First Report*, *supra* note 195, at 117.

<sup>757</sup> U.N. Conference on the Law of Treaties, Summary Records of Second Session, U.N. Doc. A/CONF.39/11, Add.1, 225, ¶13 (“Vienna Conference, Second Session”) (Drafting Committee “considered the expression ‘agreement . . . governed by international law’ . . . covered the element of intention to create obligations and rights in international law”).

<sup>758</sup> *South China Sea Arbitration*, *supra* note 227, at ¶213; *France v. Commission*, C-233/02 (E.C.J., 23 Mar. 2004) (“the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding”); Switzerland, Federal Department of Foreign Affairs, *Practical Guide to International Treaties* 4 (2015) at [https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege\\_en.pdf](https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf) (“Switzerland Guide to Treaties”) (“establishing whether the parties wish to make their agreement legally binding is essential. If this is not the intention, it is not a treaty”); see also AUST, *supra* note 205, at 20-21 (“It is the negotiating states which decide whether they will conclude a treaty, or something else”); KLABBERS, *supra* note 197, at 68 (“Notwithstanding its awkwardness, there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations”); Widdows, *supra* note 199, at 120-39.

<sup>759</sup> *South China Seas Arbitration*, *supra* note 227, at ¶213.

<sup>760</sup> See Hollis, Second Report, *supra* note 204, ¶16 (Five Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked “intent” as the deciding criterion for identifying a treaty); see Brazil Response, *supra* note 267 (relies “on the intention of the parties”); Colombia Response, *supra* note 267 (looks for “an expression of or an agreement/arrangement on the intent of the States to enter into legally binding obligations”); Mexico Response, *supra* note 289 (“‘Non-binding’ instruments, use words emphasizing the intent of the participants involved”); Peru Response, *supra* note 248 (describing efforts to ensure the agreement records “the common intent of the parties”); U.S. Response, *supra* note 254 (United States works to “ensure that the text of written instruments it concludes with other states accurately reflects the intentions of the states involved with respect to the legal character of the instrument and the law, if any, that governs it”). Canada’s response was more equivocal although it did indicate that “[a]n exchange of notes that is *intended* by the parties to be binding can also constitute a treaty” while political commitments involve “instruments that the participants *intend* to be non-legally binding.” Canada Response, *supra* note 40, at 4 (emphasis added).

form of Agreed Minutes, notwithstanding protestations by Bahrain’s Foreign Minister that he had not intended to do so.<sup>761</sup> The Court viewed the Agreed Minutes as a treaty based on the “terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention.”<sup>762</sup> Some suggest the Court might simply have been emphasizing the intention expressed in the Agreed Minutes over later, self-serving claims of intention issued in anticipation of litigation.<sup>763</sup> For others, however, the Court’s approach suggests that objective criteria – e.g., the language and types of clauses included in the instrument, and perhaps even its very subject-matter – may dictate whether it is a treaty or not.<sup>764</sup> The Court’s more recent cases – e.g., *Pulp Mills* and *Maritime Delimitation in the Indian Ocean* – have reinforced this objective approach.<sup>765</sup> The Court’s opinion in *Maritime Delimitation in the Indian Ocean*, for example, reasoned that the “inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character” without any mention of the parties’ intentions.<sup>766</sup>

The objective test is not, however, merely an ICJ formulation. The *Chagos Arbitration Tribunal* emphasize the need for an “objective determination” in sorting binding and non-binding agreements.<sup>767</sup> Meanwhile, a number of OAS Member States have likewise emphasized the structure and language used in a text as determinative of its legal (or non-legal) status.<sup>768</sup>

The purpose of these *Guidelines* is not to pronounce one of these methods superior to the other, let alone resolve which one more accurately reflects international law. Rather, these guidelines aim to advise States and others on how to create and differentiate among binding and non-binding international agreements in a world where different methods may be employed to do so. To that end, this guideline highlights how, in many respects, the intent and objective tests overlap in the evidence they use:

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<sup>761</sup> *Qatar v. Bahrain*, *supra* note 228, at ¶27.

<sup>762</sup> *Id.* (“The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister is not in a position to say that he intended to subscribe only to a ‘statement recording a political understanding’, and not to an international agreement”); see also *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Judgment, 15 Feb. 1995) [1995] I.C.J. Rep. 6.

<sup>763</sup> AUST, *supra* note 205, at 51-52; *Accord Widdows*, *supra* note 199, at 94 (in determining an agreement’s status, “the views of one party at the time of conclusion of the instrument will be of some assistance, subject to all other considerations being equal, but one party’s statements made at a later stage should be disregarded . . . as self-serving”).

<sup>764</sup> See Chinkin, *supra* note 238, at 236-37; KLABBERS, *supra* note 197, at 212-216.

<sup>765</sup> See, e.g., *Pulp Mills*, *supra* note 218, at ¶128, *Somalia v. Kenya*, *supra* note 9, at ¶42.

<sup>766</sup> *Somalia v. Kenya*, *supra* note 9, ¶42.

<sup>767</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case 2011-03 (18 March 2015) at 168, ¶426 (“Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law *must be clearly expressed or is otherwise a matter for objective determination*” (emphasis added)).

<sup>768</sup> See, e.g., Jamaica Response, *supra* note 253 (“The language used in an agreement characterizes the type of agreement”). The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty’s status as such. Dominican Republic Response, *supra* note 46.

- (a) the text;
- (b) the surrounding circumstances; and
- (c) subsequent conduct.

For example, those adhering to the intent test regularly regard the structure and language of the agreed text as the best manifestation of the authors' intentions.<sup>769</sup> That same structure and language forms the crux of the objective test.

Nonetheless, there are cases where the two approaches may produce divergent results; *i.e.*, where external manifestations of consent differ from those manifested in the language of the document. In the *South China Sea Arbitration*, for example, the agreement contained language – such as “undertake” and “agree” – that in other contexts is taken as objective evidence of a treaty.<sup>770</sup> Nonetheless, the Tribunal discounted such language given the context in which it was used and the parties' characterization of the instrument as a “political document.”<sup>771</sup> That Tribunal was, however, clearly engaged in a search for the parties' intentions. Tracking the objective approach of *Qatar v. Bahrain* or *Pulp Mills* might have produced a different result; *i.e.*, holding the language used in the agreement itself is sufficiently determinative to forgo any need to consult the *travaux préparatoires* or other statements by States of their intentions.<sup>772</sup>

Thus, for some Member States, structure and terminology are determinative of treaty status, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for party intentions. This creates a risk that different participants will categorize their agreement differently (or that third parties such as international courts or tribunals might do so). Such disagreements can have important international and domestic law consequences. Whether an agreement is binding under international law or not, for example, determines whether counter-measures are an available option in cases of breach.<sup>773</sup> Domestic laws can also require certain agreements to take a treaty form, creating difficulties when other participants do not regard them as such.<sup>774</sup> Conversely, some States need an agreement to be non-binding because they do not (or cannot) get the requisite domestic approvals that would be required if the agreement were a treaty.

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<sup>769</sup> See, *e.g.*, Brazil Response, *supra* note 267 (“language used in an instrument is key”); Colombia Response, *supra* note 267 (“treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties”); Mexico Response, *supra* note 289 (noting verbs and words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 248 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); U.S. Response, *supra* note 254.

<sup>770</sup> *South China Sea Arbitration*, *supra* note 227, at ¶216.

<sup>771</sup> *Id.* at ¶¶217-218. The Tribunal undertook a similar analysis of several bilateral joint statements, finding that they were non-binding despite containing language like “agree.” *Id.* at ¶¶231, 242.

<sup>772</sup> See *Qatar v. Bahrain*, *supra* note 228, at ¶27 (“The Court does not consider it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar.”).

<sup>773</sup> See ILC, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts” in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), U.N. Doc A/56/10 55 [3], Art. 22 [‘ASR’].

<sup>774</sup> See *supra* note 230 (discussing disagreement between the United States and its allies on the binding status of certain MOUs).

States may take several steps to alleviate such difficulties. For starters, this guideline proposes that Member States consciously adopt one test or the other and be transparent and consistent in doing so. Consistent application of a test will help settle other actors' expectations and allow more predictable interactions among them. Where a State knows that another State uses the same test for identifying binding and non-binding agreements, it will have greater certainty that its expectations as to the agreements status as a treaty (or a political commitment, or a contract) will hold.<sup>775</sup> And where a State knows in advance that another State identifies its binding and non-binding agreements using a different test, a State will know that it may need to take specific steps or use particular text to ensure it can produce the type of agreement it desires.

Whatever their view on the appropriate method for identifying international agreements, States should thus be sensitive to the possibility that others (including international courts and tribunals) may not share their view. Whenever possible, States (and their institutions) should take measures to reduce the risk of inconsistent views on the type of agreement reached. This may best be done expressly whether in the agreement text or communications related to its conclusion.

**5.2 Specifying the Type of Agreement Concluded:** *To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement's status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.*

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

**Commentary:** One way to mitigate the risk of disputes over the type of agreement reached lies in the participants' control – they can specify a shared understanding of its

<sup>775</sup> That certainty may not be complete if third party dispute settlement is possible; a tribunal could, in theory, override both States' approach to identification in favor of its own.

status. States can—and probably should—in the course of negotiations confirm if there is any doubt among the participants on the type of agreement envisioned. A record that the parties understood themselves to be forming a treaty, for example, can reduce the risk that its status as such will come into later dispute.

States and State institutions can, moreover, employ text in the agreement itself to specify its status. Treaty texts have rarely done so to date, but *Guideline 3.2* offers a sample formulation that might be used in future cases. It is a variation on Gerald Fitzmaurice’s earlier treaty definition, which attempted to fuse intentional and objective approaches.<sup>776</sup> Thus, it could be employed by adherents of both the intent and objective tests. I included a “shall” to provide further objective evidence of the agreement’s binding status as well as a qualifier “according to its terms” to have the text be the reference point for interpreting what rights and obligations the treaty conveys.

States and State institutions more regularly use language to specify their shared view that an agreement is non-binding. In some cases, the title alone may be sufficient specification as in the appropriately titled, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*.<sup>777</sup> Or, the specification may come via a clause that rejects the treaty label. In 2010, for example, the Republic of Moldova and the U.S. State of North Carolina concluded a “Memorandum of Principles and Procedures” on their mutual relations, which clarified in paragraph A that **“This Memorandum does not create any obligations that constitute a legally binding agreement under international law.”**<sup>778</sup> In other cases, participants specify the political character of their commitments, affirmatively describing it as “politically binding” or a “political commitment.”<sup>779</sup> Most famously, the Helsinki Accords specified the agreement as a political commitment by describing it as not “eligible for registration” under Article 102 of the U.N. Charter.<sup>780</sup> States in the region may wish to adopt such practices to make clear when they understand their agreements to be non-binding. Thus, this guideline provides two sample clauses for signaling a non-binding agreement, the first negatively and the second affirmatively. Neither sample clause specifies the title of the instrument, recognizing that these clauses could be employed for documents titled anything from “Memorandum of Understanding” to “Declaration” to “Code of Conduct.”

Finally, this guideline offers a choice of law clause to specify when a binding agreement constitutes a contract. It includes a possibility of referencing either a specific

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<sup>776</sup> See *supra* note 119.

<sup>777</sup> 31 ILM 882 (1992) (emphasis added).

<sup>778</sup> **Memorandum of Principles and Procedures between the Republic of Moldova and the State of North Carolina (USA) concerning their Desire to Strengthen their Good Relations (2010)**, excerpted in **THE OXFORD GUIDE TO TREATIES 656 (D. Hollis, ed., 2012)**.

<sup>779</sup> See, e.g., Founding Act on Mutual Relations, Cooperation and Security (NATO-Russia) 36 ILM 1006, ¶1 (1996) (describing the declaration as an “enduring political commitment undertaken at the highest political level”); CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe, 26 ILM 190, ¶101 (1986) (“The measures adopted in this document are politically binding ...”).

<sup>780</sup> Final Act of the Conference on Security & Co-operation in Europe, 14 ILM 1293 (1975).

State's national laws or some non-State law sources, such as UNIDROIT principles or *lex mercatoria* (however defined).

Explicit, shared, and transparent indications of the participants' understanding of the type of agreement being concluded may go far to alleviating the confusion and conflicts that have occupied State practice recently. Nonetheless, it is important to recognize that an agreement's authors may not always have complete control over what type of agreement they conclude. If the participants lack a treaty-making capacity, for example, they cannot create a treaty even if they use the sample clause included here or otherwise claim their agreement qualifies as such. And whatever specifications are employed, international law may disavow the treaty status of an agreement that results from coercion or violates *jus cogens*.<sup>781</sup> Similarly, even if States or State institutions adopt the contract label for their agreement, the governing law of that contract will have the last say on whether they may do so. Finally, although never litigated, there remain open questions about whether certain subjects require the treaty form, the parties' views notwithstanding.<sup>782</sup>

### **3.4 Evidence Indicative of an Agreement's Status as Binding or Non-Binding:**

*Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:*

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

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

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<sup>781</sup> See, e.g., VCLT, Art. 52 (coercion) and Art. 53 (*jus cogens*).

<sup>782</sup> Roberto Ago, for example, famously suggested that commitments on certain subjects (e.g., territorial boundaries) must be treaties whatever the parties' intentions. [1962] YBILC, vol. I, 52, ¶19.



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

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

**Commentary:** Differentiating among treaties, political commitments, and contracts involves a holistic examination of the language used, the presence or absence of specific clauses, the circumstances surrounding the agreement’s conclusion, and the subsequent practice of participants. Regardless of the method used, all such evidence is relevant to the identification of treaties.

*Language.* In practice, States and scholars have identified certain formulas to identify an agreement as a treaty. In the English language, for example, the use of the verb “shall” strongly suggests the commitment is a binding one. Several Member States have confirmed such usage along with verbs like “must” and “agree” and terms like “party” to describe agreement participants.<sup>783</sup>

At the same time, State practice has developed a set of linguistic markers that are associated with non-binding agreements. In contrast to language of commitment like “shall,” political commitments often contain the more precatory “should.”<sup>784</sup> Other words and clauses are often employed to signal non-binding intent. For example, instead of treaty “parties,” political commitments often refer to “participants”; instead of “articles,” a political commitment is more likely to reference paragraphs; instead of describing “obligations” that are “binding,” political commitments may reference “principles” that are “voluntary.” *Guideline 3.4* thus offer a non-exhaustive list of the sort of language often used in treaties and political commitments in Table 2.

It is important to emphasize, however, that there are no “magic words” that guarantee an agreement the status of either a treaty or a political commitment. For starters, there is the divide between the intentional and objective methods discussed in *Guideline 3.3* above. Those who favor the intentional test emphasize a holistic approach, where all manifestations of party intention must be considered rather than allowing one word or phrase alone to dictate the result. But even those who ascribe to an objective analysis should be reluctant to treat any single verb or noun as outcome-determinative. Clever drafters can turn otherwise imperative language into precatory form. It matters for example, whether a verb like “agree”

<sup>783</sup> Hollis, Second Report, *supra* note 204, at ¶18. Outside the region, several States have tables that lay out a glossary of language typical for treaties versus political commitments. *See, e.g.*, Switzerland, Guide to Treaties, *supra* note 758, at Annex B; Germany, Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV) (1 July 2019) (in German, but Annex H includes examples in English of clauses and language differentiating treaties from political commitments), at [http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund\\_05032014\\_50150555.htm](http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm).

<sup>784</sup> It is possible for a treaty to contain a clause with precatory language; doing so limits the legal rights or obligations that a particular clause imposes on parties. But, assuming the agreement otherwise was intended to constitute a treaty (or has sufficient markers to so qualify) it will remain a treaty.

stands alone or is prefaced by language such as “intend to agree” or “hope to agree.” Thus, the language used is an important indicator of the agreement’s status, but decision-makers should be careful not to rely on any one single piece of evidence to reach their conclusion.

*Clauses.* Certain clauses are often standard in treaty texts and thus their presence may be indicative that an agreement qualifies as a treaty. Treaties often contain elaborate provisions on consenting to be bound via options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval. When treaties are concluded as an exchange of notes, State practice has devised a common formula both sides use to signal their consent to be legally bound. A paradigmatic example is found in an Exchange of Notes between the United Kingdom and Uruguay. The United Kingdom concluded its proposal by saying:

If the Government of Uruguay accepts this proposal, I have the honour to propose that this Note and your reply in the affirmative shall constitute an Agreement between our two governments.

And Uruguay’s reply note indicated:

With regard to the above, I wish to inform Your Excellency of the consent of the government of the Oriental Republic of Uruguay to the arrangements as set out, and therefore this Note and Your Excellency’s Note shall constitute an Agreement between our two Governments which will come into force today.<sup>785</sup>

Other “final” clauses are regularly used in treaties and this guideline offers an illustrative list of those whose existence may be indicative of a treaty. Treaties often precede the parties’ signatures with standard phrasing (*i.e.*, “Done at [place], this [date]...”). The use of a clause on “entry into force” is another well-recognized marker of a treaty. In the *Somalia v. Kenya* case, the ICJ found that “the inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character.”<sup>786</sup> Treaties, moreover, regularly incorporate notice requirements for termination or withdrawal (for example, requiring six or twelve months advance written notice).

In contrast, political commitments may not be signed (the text may simply be released to the press or otherwise published), and when they are, they usually forgo the more formal signature language employed in the treaty context. Instead of clauses on amendments or termination, a political commitment will (if it addresses the issue at all) sometimes use the term “modifications.”

Not all States employ the same linguistic markers, titles, or clauses to differentiate a treaty from a political commitment. As such, no single clause should guarantee an agreement treaty status (or the status of a political commitment). The VCLT, for example, acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.<sup>787</sup> As such, all of these clauses are better viewed as indicative, rather than determinative. Countervailing evidence, whether in the agreement or outside of it, may

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<sup>785</sup> AUST, *supra* note 205, at 425, 427; *see also* HOLLIS, THE OXFORD GUIDE TO TREATIES, *supra* note 201, at 678-79; HANS BLIX AND JIRINIA H. EMERSON, THE TREATY-MAKER’S HANDBOOK 80 (1973).

<sup>786</sup> *Somalia v. Kenya*, *supra* note 9, at ¶42.

<sup>787</sup> *See* VCLT, Art. 56.

point to the existence of a political commitment rather than to a treaty (or vice versa). For example, the Conference on Security and Cooperation in Europe (now the OSCE) produced a “Document on Confidence and Security Building Measures in Europe” in 1986 that provided that it would “come into force on 1 January 1987” – the sort of entry into force clause usually associated with a treaty. Yet, the same sentence also clarified that the “measures adopted in this document are politically binding.”<sup>788</sup>

*Surrounding Circumstances.* The effort to identify and differentiate binding and non-binding agreements is not limited to their text. Both the intentional and objective tests view similar external evidence – namely the surrounding circumstances and the participants’ subsequent conduct – in identifying agreements as treaties and political commitments. As noted, under the intentional test, the search for intention is a holistic one and thus includes the *travaux préparatoires* that precedes the agreement as well as any of the participants’ subsequent conduct relevant to identifying the nature of the agreement. In the *Bay of Bengal* case, for example, the ITLOS Tribunal emphasized that “the circumstances” in which the Agreed Minutes were adopted “do not suggest that they were intended to create legal obligations” where one of the participants, Myanmar, had made clear early on of its intention to only agree to a comprehensive agreement rather than a separate agreement like that alleged to be found in the Agreed Minutes.<sup>789</sup>

At the same time, even as the objective test prioritizes text, it does not exclude analysis of external evidence, especially where the actual text is ambiguous or contradictory. Thus, the ICJ’s more objective analysis in *Qatar vs. Bahrain* was expressly contingent on considering the circumstances surrounding an agreement’s conclusion.<sup>790</sup>

*Subsequent Conduct.* In addition to the surrounding circumstances, both intentional and objective methods may also invoke the parties’ subsequent conduct. For example, in searching for the parties’ intentions, the *South China Seas* Tribunal concluded that an agreement was not intended to be a treaty given China’s repeated use of the term “political document” to describe it after its conclusion.<sup>791</sup> The failure to submit an agreement to the domestic procedures required for treaties may also signal the parties’ intentions to conclude a political commitment.<sup>792</sup> That kind of behavior may, however, also be cast in a more

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<sup>788</sup> CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe (1986) 26 ILM 190, ¶101 (1987).

<sup>789</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 298, at ¶93; *Accord Aegean Sea* case, *supra* note 294, at ¶107. Similarly, in the *South China Seas Arbitration*, the Tribunal emphasized how China had repeatedly labeled the agreement at issue as a “political document” in the run-up to its conclusion. *South China Sea Arbitration*, *supra* note 227, at ¶216.

<sup>790</sup> *Qatar v. Bahrain*, *supra* note 228, at ¶23 (In order to ascertain whether an agreement of that kind has been concluded, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”).

<sup>791</sup> *South China Sea Arbitration*, *supra* note 227, at ¶218.

<sup>792</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 298, at ¶97 (“[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding.”). On the other hand, the ICJ has suggested that a failure to follow domestic treaty-making procedures will not deny an agreement that otherwise looks like a treaty that status. *Somalia v. Kenya*, *supra* note 9, at 23-24, ¶¶48-50.

objective light. Thus, the ICJ has found the parties' subsequent behavior – e.g., making technical corrections to an agreement – indicative of a binding commitment.<sup>793</sup>

What about the fact that a participant registered an agreement with the United Nations pursuant to Article 102 of the U.N. Charter? As noted above, registration is not a requirement for treaties. In *Qatar v. Bahrain*, the ICJ emphasized that the failure to register the Agreed Minutes could not deprive what it otherwise viewed as a legally binding agreement of that status.<sup>794</sup> On the other hand, in the *Maritime Delimitation in the Indian Ocean* case, the ICJ emphasized that Kenya had intended the MOU in question to be a treaty, having requested its registration at the United Nations, and that Somalia did not object to that request for almost five years.<sup>795</sup> In other words, even if not determinative, registration (or non-registration) may still be somewhat indicative of an agreement's binding or non-binding character.

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

**Commentary:** In differentiating among agreements, the possibility of a contract only emerges after two previous questions are answered affirmatively. First, is there an agreement? Second, is the agreement binding? Where there is a binding agreement, the question then arises whether it constitutes a treaty or a contract? The capacity of the participants may assist in this inquiry as certain participants may not be authorized to make treaties. See *Guideline 2.1-2.2* and the accompanying *Commentary* for how to identify which entities may have a treaty-making capacity.

As with the identification of treaties and political commitments, moreover, the language used in the agreement may be indicative of its contractual status. Contracts, for example, may be titled as such. Or, as indicated above, they may specify a governing law other than international law (thereby excluding the treaty option).<sup>796</sup> Care should be taken, however, not to conclude that any agreement that references a State's laws or legal system is a contract. States may condition their treaty obligations, for example, to only extend so far as domestic law allows (or to disavow as obligatory behavior that would violate such law). In such cases, the domestic law reference serves to limit the scope of the obligation governed by international law rather than to re-define what law governs the agreement.

What happens when a text is clearly binding but silent as to its status as a treaty or a contract? Where the participants are subjects of international law, binding agreements are

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<sup>793</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra* note 259, at ¶253 (concluding that the Maroua Declaration was legally binding where it was published (without any condition suggesting a need for further ratification); subsequent letters were exchanged making technical corrections to its contents; and the boundary line it contained was notified to the relevant U.N. Secretariat).

<sup>794</sup> *Qatar v. Bahrain*, *supra* note 228, at ¶¶28-29.

<sup>795</sup> *Somalia v Kenya*, *supra* note 9, at ¶19.

<sup>796</sup> See, e.g., *supra* note 291 (governing law clause of 1998 NASA-AEB Agreement designated "United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement . . .").

most often presumed to constitute treaties.<sup>797</sup> Thus, States should assume binding inter-State agreements will qualify as treaties absent evidence indicative of a contract (*e.g.*, a governing law clause). Where the participant is a State institution, however, this presumption may not hold, requiring careful analysis of not just the agreed text, but also the surrounding context and the parties' subsequent conduct. There are, moreover, some academic suggestions that the two categories of binding agreement need not be mutually exclusive, *i.e.*, that some agreements could take a "hybrid" form where certain terms are governed by international law, while others are governed by national law.<sup>798</sup> As yet, however, there is insufficient State practice to support this as a new agreement form.

**3.8 Ambiguous or inconsistent evidence of an agreement's status:** *Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).*

**Commentary:** In some cases, the evidence relating to the type of agreement concluded can be ambiguous. Consider, for example, the title "Memorandum of Understanding." For certain States, this title is indicative of a political commitment, rather than a treaty. But other States have not found this title preclusive of treaty status. Similar ambiguity surrounds the verb "will" in English. Among some States, particularly those associated with the British Commonwealth, the verb "will" is regarded as aspirational rather than mandatory. Hence, those States regularly use "will" in and associate it with non-binding agreement texts. For other States, however, "will" is synonymous with "shall" and can be read as conveying a binding commitment. Thus, States and State institutions should exercise caution in their assumptions that such language will be indicative of an agreement's status.

Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding because a political commitment cannot, by definition, be binding in any part.<sup>799</sup> State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—that (famously) uses the verb "should" to define the parties' central obligation on emission reduction targets, while using the verb "shall" in other provisions on future meetings and reporting.<sup>800</sup> In other

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<sup>797</sup> Professor Jan Klabbbers devoted an entire book to establishing this presumption. See KLABBERS, *supra* note 197. For others favoring it, see Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L & COMP. L. Q 787, 798 (1986); Widdows, *supra* note 199, at 142; Hersch Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, vol. II, 125. These views have come to supplant earlier suggestions that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). See Schachter, *supra* note 235, at 297; JES Fawcett, *The Legal Character of International Agreements*, 30 BRIT. YBK INT'L L. 381, 400 (1953).

<sup>798</sup> See Paul Reuter, *Third report on the question of treaties concluded between States and international organizations or between two or more international organizations*, [1974] YBILC, vol. II(1), 139.

<sup>799</sup> See, *e.g.*, Switzerland Guide to Treaties, *supra* note 758, at 6 (a non-binding "text in its entirety has to be drafted using terms which do not express legal commitment").

<sup>800</sup> Compare U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, FCCC/CP/2015/L.9, Dec. 12, 2015 art. 4.4 with arts. 4.9 & 4.12. The Paris Agreement's intended treaty status is also evident in the presence of clauses on consent, entry into force, and withdrawal/termination.

words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any application of the intent test, since it requires evaluating the parties' intentions on a provision-by-provision basis.

In other cases, evidence may not be ambiguous but contradictory. States should, where possible, avoid such conflicting constructs. Where such cases nonetheless arise, the participants (or a third party) will need to carefully weigh all the evidence, whether in the text, the surrounding circumstances or subsequent conduct. If possible, in such cases, it would be good to determine whether the results of an intentional and objective approach reach the same conclusion. Where they do not, the participants may wish to pursue dispute settlement mechanisms, including possibilities of (a) clarifying or otherwise reaching an understanding on the agreement's status, (b) terminating the agreement, or (c) replacing it with a more clearly delineated agreement.

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

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

**Commentary:** States have extensive—and often different—domestic procedures for authorizing treaty-making derived from each State's legal, historical, political, and cultural traditions. Despite their differences, these procedures serve similar functions. First, and foremost, they can confirm that the proposed agreement will constitute a treaty for the State (in the international law sense of that term employed in the *Guideline 1.2* definition above). Second, they confirm that the treaty is consistent with the State's domestic legal order, ensuring, for example, that the treaty's terms do not run afoul of any constitutional or statutory prohibitions or requirements. Third, they ensure appropriate coordination regarding the treaty's contents and/or its performance both within a State's executive branch and across the other branches of government.<sup>801</sup>

The domestic procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State's constitution.<sup>802</sup> Others may be a product of national

<sup>801</sup> See, e.g., Colombia Response, *supra* note 267 (“depending on the subject matter of the legal instrument to be negotiated . . . the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself” are involved in authorizing it).

<sup>802</sup> See, e.g., Argentina Response, *supra* note 254 (citing Article 99(11) of the Constitution for the President's authority to conclude treaties and Article 75(22) for the legislature's authority “[t]o approve or reject treaties concluded with other nations and with international organizations . . .”); Colombia Response, *supra* note 267 (“treaties require adoption by the Congress of the Republic and a declaration of enforceability by the Constitutional Court, in fulfillment of the provisions of Articles 156 and 241 of the 1991 Political Constitution, respectively.”); Dominican Republic Response, *supra* note 46 (citing Art. 184 of the Constitution requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Ecuador Response, *supra* note 46 (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Mexico Response, *supra* note 289 (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); U.S. Response, *supra* note 254 (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

law.<sup>803</sup> In some cases, the procedures have no formal legal basis, but depend on a national practice or policy. In Canada, for example, although the Prime Minister has unilateral authority to make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted (whether at federal or provincial levels).<sup>804</sup> As a result, States may have different levels of legal commitment to their treaty-making procedures; some States' procedure will be non-derogable; others may have more flexibility, capable of accommodating variations if the circumstances warrant.

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

But there is extensive variation in both the breadth and depth of the required legislative role.<sup>805</sup> For some States, like the Dominican Republic, all treaties require legislative approval.<sup>806</sup> Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.<sup>807</sup> Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive legislative approval, Colombian law and practice also recognizes "executive agreements" and "simplified procedure agreements." The former fall within the exclusive authorities of the Colombian President as director of international affairs under Article 189.2 of the Colombian Constitution while the latter are concluded pursuant to a

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<sup>803</sup> Brazil Response, *supra* note 267 (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017).

<sup>804</sup> See Canada Response, *supra* note 40, at 6; Maurice Copithorne, *National Treaty Law & Practice: Canada*, in NATIONAL TREATY LAW & PRACTICE 95-96 (D.B. Hollis et al, eds., 2005).

<sup>805</sup> The level of legislative approval may vary. Some states require the entire legislature to approve a treaty. Others have both chambers of a legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of two legislative chambers give its approval. Finally, some States affiliated with the Commonwealth do not grant their legislatures any role in approving a treaty, but they also disavow any domestic implementation without legislative authorization, which occurs via normal parliamentary procedures. See Hollis, *A Comparative Approach*, *supra* note 204, at 32-35 (surveying the treaty law and practice of nineteen representative States).

<sup>806</sup> Dominican Republic Response, *supra* note 46 (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive").

<sup>807</sup> Ecuador Response, *supra* note 46 (National Assembly required to give prior approval to ratification of treaties involving territorial or border delimitation matters, political or military alliances, commitments to enact, amend or repeal a law, rights and guarantees provided for in the Constitution, the state's economic policies, integration and trade agreements, delegation of powers to an international or supranational organization, a compromise of the country's natural heritage and especially its water, biodiversity, and genetic assets).



prior treaty (which did receive the assent of the national legislature).<sup>808</sup> Executive or simplified procedure agreements that exceed these parameters would be unconstitutional.

For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those “sole” powers possessed exclusively by the Executive; and (4) where it is authorized by an earlier treaty that received Senate advice and consent.<sup>809</sup> In addition to legislative involvement, several Member States have a judicial review requirement, where the Constitutional Court reviews the constitutionality of a proposed treaty. Thus, in the Dominican Republic and Ecuador, the Constitutional Court must review all treaties before they can proceed through other domestic procedures.<sup>810</sup>

States may also impose notification requirements for treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the executive branch, including by government agencies. The “Circular 175” (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding treaties (in the international law sense of that term employed in these guidelines) unless they have first consulted with the U.S. Secretary of State.<sup>811</sup> In 2013, Peru’s Ministry of Foreign Affairs issued two Directives that “establish guidelines for the administration of treaties, including their negotiation, signature, adoption (domestic

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<sup>808</sup> Colombia Response, *supra* note 267 (noting that for agreements developing a prior agreement, that prior agreement must be consistent with all constitutional requirements and that the implementing agreement itself must be consistent with—and cannot exceed—those in the framework treaty that serves as its basis).

<sup>809</sup> As a result, the United States domestically uses different terminology to refer to treaties (in the international law sense of that term) that proceed along these different paths. In U.S. law, the term “treaties” only refers to those agreements receiving Senate advice and consent; “congressional-executive agreements” are agreements approved by a federal statute; and “sole executive agreements” are agreements done under the President’s executive authorities. Other States employ their own domestic lexicons to differentiate their treaties according to the different domestic procedures employed. See note 47 and accompanying text.

<sup>810</sup> See, e.g., Dominican Republic Response, *supra* note 46 (pursuant to Article 55 of Organic Law No. 137-11, the President must submit signed international treaties to the Constitutional Court for it to rule on their constitutionality); Ecuador Response, *supra* note 46 (citing Art. 110.1 of Ecuador’s Organic Law on Judicial Guarantees and Constitutional Oversight – “International treaties requiring legislative approval will be automatically put to constitutional review before ratification, prior to the start of any legislative approval process.”).

<sup>811</sup> The Case-Zablocki Act, 1 U.S.C. §112b(c) (“Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.”). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

adoption and/or ratification), and procedures for the formulation of possible declarations, reservations, and objections to reservations, and registration ...”<sup>812</sup>

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

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

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

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

**Commentary:** Political commitments, including many titled as MOUs, have become an increasing vehicle for inter-State and inter-institutional agreements. At least part of their appeal derives from the general absence of domestic procedures for their conclusion.<sup>813</sup> That has allowed these instruments to develop a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or modifications), and *exit* (in terms of bringing the commitment to an end) than treaties.<sup>814</sup> Such benefits suggest that it would be a mistake to extend the same approval procedures for treaties to political commitments.

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

<sup>812</sup> Peru, Ministry of Foreign Affairs, *General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 001-DGT/RE-2013 (covering the Ministry of Foreign Affairs itself); Peru, Ministry of Foreign Affairs, *General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 002-DGT/RE-2013 (covering all Peruvian governmental entities).

<sup>813</sup> See Charles Lipson, *Why are Some International Agreements Informal?* 45 INT’L ORG. 495, 508 (1991); Raustiala, *supra* note 6, at 592.

<sup>814</sup> Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17, ¶15 (24 July 2017) (“Preliminary Report”).

commitments might be concluded that do not comport with the State’s laws or policies. In the inter-institutional context, it is even possible that one institution within a State might conclude a political commitment that runs counter to—or conflicts outright—with institutional interests or agreements elsewhere in the same State.

Such concerns help explain why some States have devised review mechanisms for their political commitments. Canada’s published treaty policy, for example, includes a section mandating policy approvals of “non-legally binding instruments” by the national government or its institutions.<sup>815</sup> Colombia limits the capacity to sign non-binding agreements to those with legal capacity to represent the entity and subject to verification by the relevant legal office that the commitments assumed would not exceed the functions and authorities granted to that entity by the Constitution or laws.<sup>816</sup> In Peru, non-binding political commitments by the State are coordinated with all the governmental entities within whose purview its contents fall. The legal office of the Ministry of Foreign Affairs is charged with deciding whether to issue approval for their signature. But where the nonbinding agreement is at the inter-institutional level, the negotiations are conducted by the institution concerned, and “[a]lthough under Peruvian legislation, there is no mandate to submit the draft instrument to the Ministry of Foreign Affairs for its consideration, many governmental entities do so.”<sup>817</sup>

Mexico and the United States recount similar efforts to review proposed non-binding agreements to confirm that they have such a status and otherwise comport with their own treaty practice.<sup>818</sup> What is less clear, however, is how regularly this review occurs. Mexico’s response indicates that it occurs “at the request of the signing Mexican entity” (although the relevant Mexican authority sends copies of the instrument once it “has been formalized”). In the United States, although it reports no “formal procedures governing the conclusion of non-legally binding instruments, ... such instruments are reviewed both [with] respect to their content and drafting, including to ensure that they appropriately reflect the intention that the instrument not be governed by, or give rise to rights or obligations under, domestic or international law.”

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<sup>815</sup> Canada Treaty Policy, *supra* note 48, Pt. 8 and Annex C (“each Department is responsible for ensuring that the proper distinction is made between treaties and non-binding instruments, in consultation with the Treaty Section” and requiring policy approval, including from Cabinet for a “non-legally binding instrument that would result in a major shift in Canadian policy” and archiving of all non-legally binding instruments with the Canadian Treaty Section); *see also* Canada Response, *supra* note 40 (“Although considered non-binding by Canada, such instruments do have a distinct form and must respect Canadian policies and practices, including the foreign policy of the Canadian government, Canadian and international law”).

<sup>816</sup> Colombia Response, *supra* note 267. Thus, among Colombia’s government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

<sup>817</sup> Peru Response, *supra* note 248 (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording . . .”). Outside the region, States like Germany and Switzerland have also instituted formal procedures for approving the conclusion of political commitments, while States like Israel and Spain report more informal mechanisms for review. *See, e.g.*, Switzerland Guide to Treaties, *supra* note 758, at 25, 50 (noting different approvals required for different types of non-binding instruments); Working Group on Treaty Practice, *supra* note 40, at 10, 28.

<sup>818</sup> Mexico Response, *supra* note 289; U.S. Response, *supra* note 254.

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

The *Guidelines* do not, however, attempt to elaborate any best practice with respect to the contents of the approval procedures themselves. States will most likely want to avoid imposing overly restrictive or onerous processes as that would deprive the political commitment of the speed and flexibility benefits on which their current popularity rests.

At the same time, however, by formalizing at least some procedural review of a State’s political commitments, the government can ensure that the executive branch is not concluding treaties under the guise of their being political commitments or otherwise attempting to circumvent domestic procedures required for treaty-making. States should all have an interest in making sure that political commitments are used only in appropriate circumstances and not as a way to bypass the legislative or judicial role required for the State’s conclusion of binding agreements. Having at least *some* procedures for approving inter-State and inter-institutional political commitments would help mitigate that risk.

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

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

**Commentary:** Some—but not all—States have a practice of entering into contracts with other States. *See Guideline 2.5* and accompanying *Commentary*. Of these, several States have developed procedures for reviewing or approving the conclusion of such contracts. Ecuador has a government procurement law that, while prioritizing the terms of any inter-state contract, regulates such agreements where they involve “international public enterprises” including other states’ public enterprises.<sup>819</sup> The United States has a foreign military sales program that includes a program with instructions on the requirements and

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<sup>819</sup> *See, e.g.,* Ecuador Response, *supra* note 46 (citing Article 100 of the General Regulations of the Organic Law on the National Government Procurement System which authorizes contracts with “international public enterprises” and provides for the application of domestic articles “in the event no specific contracting regime is provided for” in the terms and conditions of any relevant agreements); *id* (citing Organic Law on the National Government Procurement System, Art. 3, which requires compliance with the terms of the agreements and “[a]nything not provided for in those agreements shall be governed by the provisions of this Law”).

steps to be followed.<sup>820</sup> Mexico’s Constitution (Art. 134) requires certain public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) which, in turn, require “contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal).”<sup>821</sup>

*Guideline 4.3* proposes as a best practice that *all* States with a practice of inter-State contracting should have procedures for authorizing the conclusion of such binding agreements. Having procedures for inter-State contracting would allow States to confirm the contractual status of the agreements proposed, and thus avoid inadvertent characterization of a treaty or political commitment as a contract.

Moreover, these procedures could help alleviate questions that may arise with respect to the contract’s governing law. States should have procedures indicating whether and when they would (i) insist on their own national law as the governing law, (ii) permit the other contracting State’s law to do so, or (iii) authorize the employment of a third State’s contract law or non-State law instead. Furthermore, States could have procedures that require communication on these governing law questions with the other contracting party. Doing so would help avoid problems where the contracting parties disagree on what domestic or non-State law governs the contract concluded.

#### **4.7 Domestic Approval Procedures for Binding Inter-Institutional Agreements.**

*States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law, the domestic law of another State, or non-State law.*

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

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

**Commentary:** Consistent with *Guideline 4.1*, States should decide for themselves whether and which sorts of binding agreements to authorize their institutions to conclude.<sup>822</sup> States may, moreover, authorize certain institutions to conclude treaties or contracts, but not others. A State, for example, may allow a government agency to conclude a treaty in its own name but not a sub-national entity, or vice versa. Article 125 of the Argentina Constitution, for example, authorizes subnational units to conclude “partial treaties”—which the government calls “international agreements”—with the “knowledge of Congress” and “provided that they are not incompatible with the foreign policy of the Nation and do not

<sup>820</sup> See U.S. Foreign Military Sales program, available at <http://www.dsca.mil/programs/foreign-military-sales-fms>.

<sup>821</sup> Mexico Response, *supra* note 289.

<sup>822</sup> Thus, States like Brazil, Colombia, the Dominican Republic, and Peru do not authorize *any* binding agreements by their government agencies, ministries or institutions. *See, e.g.*, Peru Response, *supra* note 248 (“Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)”).

affect the powers delegated to the Federal Government or the public credit of the Nation.” At the same time, Argentina denies its national ministries a capacity to make treaties in their own name.<sup>823</sup>

Several states already have regulations or approval procedures in place for their institutions’ agreements. Some States simply extend their existing procedures for the State’s agreements to their institutions. The United States, for example, requires the same consultation and approval by the U.S. Department of State for inter-agency agreements as it does for treaties concluded in the U.S. name.<sup>824</sup> Other States have devised procedures focused on one type of institution. Jamaica reports a practice of the relevant Ministry, Department, or Agency seeking Cabinet approval to negotiate a binding agreement and subsequently seeking further approval to sign it. Copies of signed inter-institutional agreements are then kept on file by the Foreign Ministry Legal Office. Mexico’s 1992 Law on the Conclusion of Treaties regulates both the subject-matter and functional limits on inter-institutional agreements involving Mexican federal government ministries or its state or regional governments.<sup>825</sup> Mexican institutions can only conclude binding agreements (i) on subjects within the exclusive purview of the area or entity making the agreement; (ii) the agreement can only affect the concluding entity; (iii) the entity’s regular budget must be sufficient to cover the agreement’s financial obligations; (iv) the legal rights of individuals cannot be affected; and (v) existing legislation cannot be modified. In addition, Article 7 of the Law on the Conclusion of Treaties requires Mexican institutions to inform the Secretariat of Foreign Affairs of any binding inter-institutional agreement they are seeking to conclude, with a requirement that the Legal Department of the Secretariat of Foreign Affairs report on the lawfulness of signing such an agreement.<sup>826</sup>

States have sought further guidance regarding their inter-institutional agreements for three reasons.

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

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

Moreover, *Guideline 4.4* suggests that States may include in their procedures one or more mechanisms for differentiating among the institutions’ binding agreements. Some

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<sup>823</sup> See *supra* note 82.

<sup>824</sup> U.S. Response, *supra* note 254.

<sup>825</sup> 1992 Mexican Law Regarding the Making of Treaties, *supra* note 65.

<sup>826</sup> Mexico Response, *supra* note 289.

possible mechanisms to mitigate existing confusion and the risk of future misunderstandings or disagreements would include:

- d) a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status.
- e) a default presumption when two or more State institutions conclude a binding agreement, *i.e.*, establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties.
- f) procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (a) the agreement is binding (or not); and (b) what type of binding agreement will be concluded, be it a treaty or a contract.

#### **4.8 Publicizing Institutional Capacities to Conclude Binding Agreements.**

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

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

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

**Commentary:** *Guideline 4.4* focuses on encouraging States to devise procedures to ensure that the State has sufficient self-awareness of whether and what types of binding agreements its institutions may conclude. *Guideline 4.5* promotes inter-State communication of the conclusions reached and procedures used by a State to approve or monitor inter-institutional agreement-making. Other States may benefit from learning:

- (i) which State institutions may conclude binding (or non-binding agreements) with foreign institutions;
- (ii) what types of binding and non-binding agreements may be authorized; and
- (iii) what the processes are for doing so.

This information may assist another State or its institutions in deciding whether to conclude an agreement with a State's institutions and what form that agreement should take.

Sharing information among States concerning their inter-institutional agreement authorities and practices should also pay off in existing cases to reduce confusion (or even conflicting views) as to what type of inter-institutional agreement has been concluded. Finally, publicizing procedures may offer useful models or examples of processes on which States with less experience with inter-institutional agreements may rely.

#### **4.9 Publicizing Registries of Binding and Non-Binding Agreements**

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

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

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

*Guideline 4.6.1* suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement’s existence, but its contents as well. Doing so would have several benefits:

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

When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State’s political commitments, whether labeled as MOUs or otherwise, are often unclear. And there is even greater ambiguity surrounding inter-institutional political commitments. Whatever informal procedures might exist to review or even approve political commitments, most States do not count or collect them.<sup>827</sup>

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<sup>827</sup> Canada and Ecuador are notable exceptions. See Canada Treaty Policy, *supra* note 48; Ecuador Response, *supra* note 46 (noting practice of recording “non-binding political agreements (joint declarations and communiqués)” with the Directorate for Legal Advice on Public International Law, some of which are



Thus, there is a real dearth of information available on the number and types of non-binding agreements reached by States and their institutions.

*Guideline 4.6.2* aims to rectify this information gap by calling on States to accept a best practice by which they establish a centralized point of contact within the government where political commitments may be collected and retained. As with existing treaty registries, a political commitment registry would have valuable internal and external benefits.

- d) It would alert other actors within a State, such as the legislature or non-participating institutions, as to the existence of a political commitment. It might thus check incentives to use political commitments merely as a means to avoid the domestic approval procedures assigned to binding agreements.
- e) Externally, it would inform other States about the content and assumed non-binding legal status of the commitments listed, creating space for further inquiries or communications about such political commitments as these other States deem appropriate.
- f) It would, moreover, alert a State's public of *all* agreements a State has concluded, not just those that may generate legal effects. The public has a clear interest in learning more about agreements that may generate significant consequences for their State, even if those consequences will take a political (rather than legal) form.

## 7. Legal Effects of Binding and Non-Binding Agreements

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

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

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

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

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accompanied by a "legal opinion from the Foreign Ministry's General Legal Coordination Office."). Outside the region, several States report having a database or archive for political commitments. Working Group on Treaty Practice, *supra* note 40, at 9, 27 (Canada, Germany (since 2014), Israel, Korea, Mexico, and Spain report archives or mandatory reporting of political commitments to their Foreign Ministries; Finland and Japan do not); *but see id.* at 14, 32 (the 8 States surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – all cite a need for further internal coordination on the quality and effectiveness of political commitments).

**Commentary:** One of a treaty’s defining features is that it is *binding* under international law. Treaties trigger the foundational international legal principle of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>828</sup> Thus, a treaty’s primary legal effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own enforcement—e.g., the American Convention on Human Rights—States are obligated to accept these as well.<sup>829</sup> Thus, Canada, Jamaica and Peru acknowledge that each State must comply with obligations assumed in their binding agreements while Colombia sources its compliance obligation to VCLT Article 26 and *pacta sunt servanda*.<sup>830</sup>

Beyond a treaty’s primary international legal effects, the existence of a treaty may also trigger a series of secondary international legal rules and regimes. Chief among these is the law of treaties itself. The VCLT (or customary international law more generally) will regulate the validity, interpretation, application, breach, and termination of all a State’s treaties. For example, VCLT Article 29 provides that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” This provision creates room, *if* all the parties agree, for treaties to contain “federal” or “territorial” clauses that allow a State to designate to which sub-national territorial units a treaty does (or does not) apply.<sup>831</sup> On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire territory.<sup>832</sup> The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party’s “material breach.”<sup>833</sup>

The secondary legal effects of a treaty are not, however, limited to the law of treaties. State responsibility, for example, may also attach to “internationally wrongful acts,” which include treaty violations. As detailed in the 2001 Articles on State Responsibility (“ASR”), the law of state responsibility affords States the right to engage in “countermeasures”—unlawful acts that are justified (*i.e.*, lawful) because that State was negatively impacted by a

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<sup>828</sup> VCLT, Art. 26. Some of a treaty’s clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

<sup>829</sup> American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Chs. VI-IX (constituting the Inter-American Commission and Court of Human Rights).

<sup>830</sup> *See, e.g.*, Canada Response, *supra* note 40 (“The parties to treaties have a legal obligation to fulfill their duties”); Dominican Republic Response, *supra* note 46; Jamaica Response, *supra* note 253; Colombia Response, *supra* note 267 (“Article 26 of the 1969 Vienna Convention, imposes an obligation on the parties to comply with the treaties they ratify, and to do so in good faith.”).

<sup>831</sup> *See, e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, 1489 U.N.T.S. 3, Art. 93(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 56(1); Constitution of the International Labour Organization, 9 October 1946, 15 U.N.T.S. 35, Art. 19(7).

<sup>832</sup> *See, e.g.*, International Covenant on Civil and Political Rights (‘ICCPR’), 16 December 1966, 999 U.N.T.S. 171, Art. 50; American Convention on Human Rights, *supra* note 191, Art. 28(2).

<sup>833</sup> VCLT Art. 60. In addition, States always remain free to engage in acts of *retorsion* – unfriendly, but intrinsically lawful behavior that a State might perform to incentivized a breaching State back into treaty compliance (say, for example, by halting the provision of financial assistance that a State otherwise has no obligation to provide). Since acts of retorsion may occur without any prior treaty breach, however, they do not technically fall under the banner of a treaty’s legal effects. *See* ASR, *supra* note 136, at 128, ¶5.

prior internationally wrongful act.<sup>834</sup> By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for other forms of binding agreement (contracts) let alone non-binding ones (political commitments).

The existence of treaties on specific topics (*e.g.*, human rights, the environment) may also trigger a range of specialized rules and principles that have emerged to regulate that particular sub-field of international law.<sup>835</sup> Finally, the availability of certain dispute resolution procedures may depend on the existence of a treaty (either to establish the court or tribunal's jurisdiction or to give the court material on which to resolve disputes). For example, under the heading of "international conventions", treaties are specifically listed among the sources of law on which the ICJ can reach an opinion.<sup>836</sup>

States should, moreover, recognize that the legal effects of a treaty may not be limited to the international sphere. A State's domestic legal order can (but is not required to) accord domestic legal effects to the State's treaties. Thus, some States' domestic laws may supplement *pacta sunt servanda* by imposing their own obligation of treaty compliance. Under the Dominican Republic's Constitution, for example, there is "an obligation, once the constitutional ratification procedure is concluded, to comply with a valid treaty or agreement."<sup>837</sup> In Peru, this obligation is specifically imposed on those governmental departments under whose purview the treaty falls.<sup>838</sup>

Some States (*e.g.*, Canada) do not accord their treaties any domestic legal status, and thus, the treaty's existence will have little direct domestic impact.<sup>839</sup> Other States' domestic legal orders may accord treaty texts the same legal effects as a statute, or even in some cases, a constitutional provision (assuming the treaty otherwise comports with any domestic conditions regarding its formation or validity).<sup>840</sup> In some States, different treaty categories generate different domestic legal effects, whether based on the treaty's subject matter or the procedures used to authorize it. In Ecuador, for example, its human rights treaties that provide "rights that are more favorable than those enshrined in the Constitution" prevail over "any other legal regulatory system or act of public authorities."<sup>841</sup> Other treaties have significant weight within Ecuador's domestic legal order, with the Constitution listing

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<sup>834</sup> ASR, *supra* note 136, Ch. II. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

<sup>835</sup> Human Rights treaties, for example, are subject to specialized interpretative rules. *See, e.g., Başak Çalı, Specialized Rules of Treaty Interpretation: Human Rights* in THE OXFORD GUIDE TO TREATIES 525 (D Hollis, ed., 2012).

<sup>836</sup> ICJ Statute, Article 38(1)(a).

<sup>837</sup> Dominican Republic Response, *supra* note 46.

<sup>838</sup> Peru Response, *supra* note 248.

<sup>839</sup> *See supra* note 46.

<sup>840</sup> *See, e.g.,* Argentina Constitution, *supra* note 82, Art. 31 ("[T]reaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain . . ."); *id.*, Art. 75(22) (giving treaties on human rights "standing on the same level as the Constitution"); Constitution of Peru, Art. 55, *English translation available at* [https://www.constituteproject.org/constitution/Peru\\_2009#s202](https://www.constituteproject.org/constitution/Peru_2009#s202) ("Treaties formalized by the State and in force are part of national law.")

<sup>841</sup> Ecuador Response, *supra* note 46 (citing the Ecuador Constitution, Art. 424).

treaties in the “order of precedence for the application of the regulations” above other organic laws and other forms of domestic regulation.<sup>842</sup>

In addition, just as a treaty may trigger the law of treaties internationally, a treaty’s existence in domestic law may trigger various other domestic legal doctrines or regimes. Looking at Ecuador again, its Constitution assigns various domestic legal doctrines (*e.g.*, direct applicability) to “treaties and other instruments for human rights.”<sup>843</sup> States can also use their domestic legal system to afford treaties judicial enforcement.<sup>844</sup>

The *Guidelines* take existing legal effects as it finds them; there are, for example, no proposals of best practices on what domestic legal effects States should accord some—or all—treaties. There is too much diversity in existing practice, and the reasons States have chosen their own path are often so unique as to counsel against harmonization.

Nonetheless, there is value in having States pay closer attention to the legal effects that follow from treaty-making under both international and domestic law. For example, a State contemplating a new treaty-relationship may have different positions on the treaty’s contents depending on what—if any—domestic legal effects follow the treaty’s conclusion not just in its own legal system, but that of its potential treaty partner(s) as well. A State might be content with a straightforward treaty provision where it and its potential partner give treaties direct domestic legal effect—*e.g.*, “the Parties shall not allow X to occur.” That same State might, however, prefer a different formulation with States that do not give treaties direct effect—*e.g.*, “the Parties agree to legislate to not allow X to occur.”

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

**Commentary:** As with questions of validity and capacity, the primary effects of a contract will depend on the relevant governing law, which may be a State’s national law or, if the parties select it, non-State law.<sup>845</sup> The governing law will establish whether and how

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<sup>842</sup> *Id.* (citing the Ecuador Constitution, Art. 425: “The order of precedence for the application of the regulations shall be as follows: The Constitution; international treaties and conventions; organic laws; regular laws; regional rules and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.”).

<sup>843</sup> *Id.* (Article 417 of the Constitution: “The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied.”).

<sup>844</sup> See David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 367 (D. Hollis, ed., 2012); Joost Pauwelyn, *Is it International Law or Not and Does it Even Matter?* in *INFORMAL INTERNATIONAL LAWMAKING* 145-46 (J. Pauwelyn, J. Wessel and J. Wouters, eds., 2012).

<sup>845</sup> U.S. Response, *supra* note 254 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”).

contracts will operate as well as the available remedies for breach, including judicial means. In the case of non-State law, enforcement may occur through some international forum (*e.g.*, UNIDROIT, ICSID).

Among their legal effects, contracts may also have the legal effect of displacing other, default rules of domestic law that exist in the absence of agreement. Ultimately, therefore, the nature and extent of a contract's legal effects depends on the governing law, including any relevant conflicts of law rules.

Although a contract's legal effects will flow from the governing law, contracts could generate legal effects in the international arena. One contracting State could undertake behavior in reliance on the other contracting State continuing to perform its obligations. Given the binding nature of the contract, that reliance might be sufficiently reasonable to estop the other State from ceasing performance.<sup>846</sup>

Alternatively, it might be possible for a contract governed by, say, national law to become elevated into a binding agreement governed by international law. In the *Chagos Arbitration*, for example, the Tribunal reasoned that a 1965 Agreement between the British Government and Mauritius (a non-self-governing territory) was at "most ... a contract binding upon the Parties under domestic law."<sup>847</sup> It found, however, that Mauritius' independence, had "the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement" governed by international law.<sup>848</sup> Although the Tribunal did not say so explicitly, one way to explain this result would be on the idea that Mauritius independence implicitly shifted the governing law of the "contract" from UK law to international law, which by definition, converted the agreement into a treaty.

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

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

**5.3.4** *States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:*

(vi) *incorporated into other international legal acts such as treaties or*

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<sup>846</sup> On estoppel in international law, see Thomas Cottier and Jörg Paul Müller, *Estoppel* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2007); *Chagos Arbitration*, *supra* note 130, at 174, ¶438 ("estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.").

<sup>847</sup> *Chagos Arbitration*, *supra* note 130, at 167, ¶424 (quoting Hendry and Dickson).

<sup>848</sup> *Id.* at 167-68, ¶¶425, 428.

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

**Commentary:** By definition, political commitments are not binding; they are incapable of producing any legal effects on their own. States and their institutions should adjust their expectations accordingly. As a matter of international law, political commitments will not trigger *pacta sunt servanda* nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, state responsibility, specialized regimes).<sup>849</sup>

But it would be a mistake for States to assume this means that political commitments have no effects. Even if they are not themselves binding, political commitments still contain commitments and those commitments are often made in a State's name (or those of its institutions). Other States can—and often will—expect continued performance of their terms (even as they are aware that they will be incapable of invoking international legal tools in cases of non-performance).<sup>850</sup> Political commitments thus trigger the honor and reputation of the States and the State institutions that make them. State practice shows, moreover, that political commitments can have significant effects on State behavior, as for example, in implementing the commitments of the Financial Action Task Force to combat terrorist financing.<sup>851</sup>

As a best practice, therefore, these *Guidelines* recommend that States should honor their political commitments. They are, of course, not legally bound to do so. Still, by performing its political commitments, a State fulfils the behavioral expectations of other political commitment participants. Where a State encounters difficulties in performance, dialogue and communication with other participants are likely to be more productive than ignoring agreed terms. And just because a State that ceases to perform its political commitments will not be subject to international legal remedies (e.g., treaty termination or counter-measures) does not mean that non-performance will be costless. Other States may respond with unfriendly—albeit still lawful—acts, including those that are labeled as retorsion by international law.<sup>852</sup> Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium

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<sup>849</sup> See, e.g., Canada Response, *supra* note 40, at 8 (“Non-binding instruments concluded at the agency or sub-national level are regarded to hold only political or moral commitments.”); Peru Response, *supra* note 248 (“Since “nonbinding” agreements concluded by Peruvian governmental entities with foreign counterparts do not seek to create a legal relationship, the *pacta sunt servanda* principle does not apply; only the good faith principle.”).

<sup>850</sup> See *supra* note 51 and accompanying text.

<sup>851</sup> See, e.g., The Financial Action Task Force (FATF), at [http://www.fatf-gafi.org/pages/0,3417,en\\_32250379\\_32235720\\_1\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html) (FATF issues “recommendations” that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

<sup>852</sup> See *supra* note 195.

enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.<sup>853</sup>

Several Member States appear to view political commitments as incapable of generating *any* legal effects.<sup>854</sup> That view may, however, depend on how one defines “legal effects”. Practice suggests that political commitments may have *legal* relevance and, in certain cases, may even generate *indirect* legal effects in certain discrete ways:

- In terms of indirect international legal effects, States may eventually convert a political commitment into a treaty by additional, discretionary acts. The prior informed consent procedure at the heart of the Rotterdam Convention existed prior to that treaty’s conclusion via political commitments done under UNEP and FAO auspices.<sup>855</sup> Alternatively, an international organization may incorporate a political commitment into an internationally legally binding form. In Resolution 2231, for example, the United Nations Security Council endorsed the so-called “Iran Deal” on nuclear non-proliferation, making certain of its terms obligatory via its Chapter VII authorities.<sup>856</sup>
- In terms of indirect domestic legal effects, some political commitments—e.g., the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law by additional discretionary acts on the part of a State’s legislature.<sup>857</sup>
- Political commitments may also be employed as vehicles for interpreting other legally binding agreements. The ILC, for example, has concluded that subsequent agreements or subsequent practice used for purposes of treaty interpretation under VCLT Article 31(3) “require[] a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account...”<sup>858</sup> Interpreters may, moreover, employ political commitments without any of the additional discretionary acts that are necessary in converting political commitments into international or domestic legal commitments.
- Similarly, international courts and tribunals have shown a willingness to have political commitments set relevant standards of behavior that can be used to

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<sup>853</sup> Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFFAIRS (Mar./Apr. 2001).

<sup>854</sup> *See, e.g.*, Colombia Response, *supra* note 267 (Non-binding agreements have “no legal implication for the Republic of Colombia as a subject of international law.”); Mexico Response, *supra* note 289 (“[N]on-binding’ instruments are eminently political in nature since they set forth the will and intent of the signing authorities, and therefore they DO NOT have legal implications.”); U.S. Response, *supra* note 254 (“As non-legally binding instruments are neither governed by, nor give rise to rights or obligations under, domestic or international law, there are no legal effects associated with them.”).

<sup>855</sup> Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 11 September 1998, 2244 U.N.T.S. 337 (“Rotterdam Convention”); see also Rotterdam Convention, “History of the Negotiation of the Rotterdam Convention,” at <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>.

<sup>856</sup> *See* UNSC Res. 2231 (July 2015).

<sup>857</sup> *See, e.g.*, Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the “Kimberley Process,” which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arrangement, at <http://www.wassenaar.org>.

<sup>858</sup> ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Text of the draft conclusions adopted by the Drafting Committee on second reading*, Seventieth session, A/CN.4/L.907 (11 May 2018).

evaluate a State's treaty compliance. In a 2011 WTO ruling, for example, a Dispute Settlement Panel found that several non-binding political commitments generated under the auspices of the International Dolphin Conservation Program constituted the "relevant international standard" for purposes of measuring U.S. compliance with its WTO Technical Barriers to Trade Agreement.<sup>859</sup>

What about using the international legal doctrine of estoppel to require continued State performance of its political commitments? Scholarship has long debated whether under the right circumstances a political commitment might cause others, to rely on its continuing the agreed behavior as a matter of good faith, even if not required by the (non-binding) agreement itself.<sup>860</sup> This is the same logic, for example, that explains the legal force of certain unilateral declarations.<sup>861</sup> Member States do not appear enthusiastic about this possibility.<sup>862</sup> Moreover, where an agreement is clearly "non-binding" it will be difficult to establish that other States' reliance on continued performance is reasonable (in a legal sense). As the *Chagos Arbitration* Tribunal emphasized: "Not all reliance, even to the clear detriment of a State, suffices to create grounds for estoppel. A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate."<sup>863</sup> Still, the matter may remain open to debate, and States should at least be aware of the possibility that some might invoke estoppel in the context of certain political commitments.

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

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

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

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

**5.4.4** *States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions*

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<sup>859</sup> See WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Panel Report* (15 Sept 2011) WT/DS381/R, ¶¶7.707 and 7.716; see also Pauwelyn, *supra* note 206, at 155-56.

<sup>860</sup> See, e.g., Schachter, *supra* note 235, at 301 (suggesting estoppel might apply where there is a gentleman's agreement and reasonable reliance on it); Aust, *supra* note 160, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will); but see KLABBERS, *supra* note 197, at 138-40 (insisting an agreement cannot be non-binding if it has legal effects); see also *supra* note 208.

<sup>861</sup> See *supra* note 2.

<sup>862</sup> See, e.g., *supra* note 216. Peru, however, notes that political commitments may trigger a State's good faith (rather than *pacta sunt servanda*) which might suggest some solicitude for an estoppel claim in the right circumstances. *Supra* note 211.

<sup>863</sup> *Chagos Arbitration*, *supra* note 130, at 177, ¶445.



*involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.*

**Commentary:** Inter-institutional agreements are not, by definition, associated with any particular type of international agreement. They may be binding (whether as treaties or contracts) or non-binding, political commitments. Which type of agreement exists will be a function of the capacities of the institutions involved and the methods of identification employed.<sup>864</sup> Once the status of an inter-institutional agreement becomes clear, so too will its legal effects. Inter-institutional treaties may generate the same primary and secondary international legal effects as well as any domestic legal effects accorded by a State's legal system. The legal effects of inter-institutional contracts, like inter-State ones, will flow from the relevant governing law, while inter-institutional political commitments will not generate any direct legal effects, although States should be cognizant they could still generate some indirect ones.<sup>865</sup>

There is, however, one area where inter-institutional agreements—particularly inter-institutional treaties—raise a novel question. Specifically, to whom does an inter-institutional treaty's legal effects apply—the institution alone or the whole of the State with which it is associated? A number of Member States' practices suggest the latter view; even where the parties to a treaty are State institutions, its effects will still extend to the State as a whole.<sup>866</sup> This appears to be the case regardless of whether the State institution is part of the national government or a sub-national territorial unit. It is, moreover, the position taken by the ILC in the ASR. ASR Article 4(1) provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.<sup>867</sup>

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<sup>864</sup> For a definition of inter-institutional agreements, see *Guideline 1.5* and accompanying commentary. On the capacity of State institutions to conclude treaties, political commitments, and contracts, see *Guidelines 2.2, 2.4, and 2.6*. The methods for identifying treaties, political commitments and contracts are laid out in detail in Section 3 of these *Guidelines* and the accompanying Commentary.

<sup>865</sup> Jamaica Response, *supra* note 253 (describing domestic legal effects of inter-institutional agreements including their being “open to the interpretation of domestic courts”); U.S. Response, *supra* note 254 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”); *see also* Dominican Republic Response, *supra* note 46 (non-binding agreements done at the agency or sub-national level “are in no sense binding”);

<sup>866</sup> *See, e.g.*, Jamaica Response, *supra* note 253 (“International legal responsibility lies with the State. At the domestic level however, the agency or sub-national territorial unit has a responsibility to the Government to ensure that its obligations are performed under the Agreement”); U.S. Response, *supra* note 254 (“The United States considers treaties (as defined in Article 2 of the VCLT) concluded by its agencies to create legal obligations applicable to the United States, though in practice performance of those agreements generally rests with the agency that enters into them.”). Argentina likewise professed a preference for state responsibility, while noting the law was not entirely clear. Argentina Response, *supra* note 254. Outside the region, several States have adopted a similar view. *See, e.g.*, Switzerland Guide to Treaties, *supra* note 758, at 25 (“Under international law, it is the Swiss Confederation (see art. 6 VCLT) – and not the administrative unit, which does not have any legal personality – that can be held responsible for the obligations undertaken.”).

<sup>867</sup> ASR, *supra* note 136, Art. 4(1); *see also id.*, Art. 4(2) (“Any organ includes any person or entity which has that status in accordance with the internal law of the State.”).

Given these views, *Guideline 5.4.1* articulates a starting presumption: States may reasonably expect that an inter-institutional treaty will bind the States to which the institutions belong, not just the institutions themselves.

Such a presumption may generate at least three advantages for States. First, it may provide greater certainty to all States and institutions engaged in treaty-making. Knowing that a State is expected to stand behind commitments governed by international law and made by its institutions may encourage other States and their institutions to engage in such treaty-making. Second, it will ensure a more consistent set of direct legal effects for all treaties (rather than having to elaborate different effects for inter-State treaties from inter-institutional ones). Third, this approach comports with the basic architecture of public international law. If most State institutions are not discrete international legal persons, it follows that international law will resist according their activities direct legal effect, but rather attribute them to the State of which they form a part.

Despite such advantages, State practice on unitary State responsibility is not entirely uniform. Several States take the view that international legal responsibility could lie with the concluding institution, *not* the State as a whole, with one State—Mexico—adopting this view expressly.<sup>868</sup> While accepting that treaties concluded by the Mexican State bind Mexico, Mexico cites its federal structure to suggest that “it would be unconstitutional for [Mexico] to assume responsibility for interinstitutional agreements concluded by state and municipal areas and entities since this would encroach on the authorities conferred upon them by the Constitution itself.”<sup>869</sup> Instead, Mexico considers those inter-institutional agreements governed by international law only have effects for the institutions that conclude them.<sup>870</sup> Other States admit the situation is not always clear; Panama, for example, views “the possibility that a new international custom has arisen” with respect to responsibility for inter-institutional agreements.<sup>871</sup>

These Guidelines are not designed to resolve the discrepancy in how far inter-institutional treaty obligations extend. They may, however, help raise awareness among States that this is an issue to look for when their institutions pursue binding international agreements. Moreover, the consensual nature of the international legal order suggests a practice that States may use to avoid the issue. In cases where two States hold different views of how far an inter-institutional treaty binds, they may agree to a uniform position.

- States could, for example, agree to treat their institution’s treaty commitment as equivalent to treaties made in the name of the two States; or
- States could specifically consent to having the effects of an inter-institutional treaty extend only to the institutions involved.

States could include such conditions in the inter-institutional treaty itself or they could agree to them separately, whether generally or on a case-by-case basis. They would ideally do so in advance, although it would be possible to reach such an accommodation after the inter-institutional treaty has come into existence. Such a practice might be novel, but it

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<sup>868</sup> Hollis, Second Report, *supra* note 10, at ¶38-40 (describing views of Peru and Uruguay); Panama Response, *supra* note 251.

<sup>869</sup> Mexico Response, *supra* note 289. In addition, Mexico claims that “[i]t would also be unlawful [under Mexican Law] for the federal government to assume that responsibility, since the interinstitutional agreement was concluded without observing the formalities established by the Law on the Conclusion of Treaties.” *Id.* Peru denies that its institutions can conclude “treaties” but acknowledges that its inter-institutional agreements may create “a legal relationship . . . only for the institutions entering into them”. It does not, however, explain what law would govern that legal relationship. Peru Response, *supra* note 248.

<sup>870</sup> Mexico Response, *supra* note 289.

<sup>871</sup> Panama Response, *supra* note 251.

provides a way to bridge divergent views on responsibility that otherwise might lead to disagreements or the need for some form of dispute resolution.

Finally, there is a question of what, if any, legal effects States and other stakeholders should accord binding inter-institutional agreements concluded where one or more of the institutions involved did not follow the appropriate domestic procedures? In other words, how should States deal with unauthorized inter-institutional agreements? Giving such agreements domestic legal effects is likely to be problematic, especially within the State where the requisite procedures were not followed. In the Dominican Republic, for example, when its Deputy Secretary of State for Foreign Affairs concluded a Memorandum of Understanding (MOU) with the Inter-American Commission on Human Rights without following the constitutional rules for judicial review and National Congress approval, the Supreme Court treated the MOU as null and void.<sup>872</sup>

A number of Member States, moreover, believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects. Colombia, for example, has indicated that it “is not responsible for agreements concluded in violation” of domestic conditions for the legality of its international agreements.<sup>873</sup> Mexico emphasizes the personal liability of those who sign an interinstitutional agreement where the Secretariat of Foreign Affairs’ Legal Department has not issued its views.<sup>874</sup> Other States offer a more nuanced take, suggesting that international legal responsibility for an unauthorized inter-institutional agreement may best be determined based on the “nature of the agreement and circumstances surrounding its conclusion.”<sup>875</sup>

*Guideline 5.4.4.* proposes a best practice where States exercise any available discretion to decline to give legal effects to unauthorized inter-institutional agreements. The qualifier referencing “available discretion” is included to make clear that this guideline only applies where the State has a choice on whether or not to accord an agreement legal effects; it does not countenance avoiding legal effects that the State is required to afford, whether by international or domestic law. Still, where States have discretion, it would seem a best practice counsels against giving legal effects to unauthorized inter-institutional agreements. According inter-institutional treaties (or contracts) legal effects could incentivize State institutions to violate their own domestic laws and procedures if they perceive the benefits of reaching agreement with foreign actors outweigh the domestic consequences. These incentives would be especially perverse if the institution shared the costs of unauthorized agreements (in terms of responsibility and liability) with the State as a whole – the very State whose procedures were not followed.<sup>876</sup>

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

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

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<sup>872</sup> Dominican Republic Response, *supra* note 46.

<sup>873</sup> See also Ecuador Response, *supra* note 46.

<sup>874</sup> Mexico Response, *supra* note 289.

<sup>875</sup> Jamaica Response, *supra* note 253; see also Peru Response, *supra* note 248.

<sup>876</sup> This would, however, run counter to the presumption of validity accorded treaties done in violation of domestic procedures in the inter-State context by VCLT Article 46. See *supra* note 259. That said it is not clear that Article 46 constitutes customary international law. See Jan Klabbers, *The Validity and Invalidity of Treaties* in THE OXFORD GUIDE TO TREATIES 551, 564 (D. Hollis, ed., 2012).

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

**Commentary:** As these guidelines make clear, existing State practice with respect to international agreements is of critical importance to international law and international relations. Yet, it is also clearly not some simple set of tools that States and their officials may apply intuitively. Extant variations in definitions, capacities, methods of identification, procedures, and effects, require expert knowledge and attention to ensure a State is able to advance its foreign policy interests while avoiding confusion, misunderstandings, and disputes (legal or otherwise). As such, it is important for States to devote the resources to educate relevant officials on these topics.<sup>877</sup>

*Guideline 6.1* focuses on ensuring suitable training and education for Foreign Ministry officials on the various aspects of international agreements. Foreign Ministry officials are often charged with overall responsibility for a State's treaty practice. It makes sense, therefore, that States ensure that they have sufficient expertise to differentiate the State's treaties from the rising practice of other forms of international agreements, including binding inter-State contracts and inter-institutional agreements. Where needed, such training should also be extended to other relevant officials and offices.

Having well-trained officials across the region will help improve existing practices and alleviate existing confusion over both the status of various agreements (such as those bearing the heading "MOU") as well as with which institutions other States may conclude binding and non-binding agreements. Increased knowledge around the various types and effects of binding and non-binding agreements may allow Foreign Ministry officials to advise decision-makers on the relative trade-offs in pursuing one type of agreement over another.

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

- (v) *identifying and differentiating among the various types of binding and non-binding agreements;*
- (vi) *understanding who within the State has the capacity to negotiate and conclude which agreements;*

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<sup>877</sup> The Working Group on Treaty Practice solicited views on training relating to both binding and non-binding agreements. The responses revealed a diversity of formal and informal processes by which relevant treaty officials educate other officials, both in the Foreign Ministry itself and elsewhere in other ministries or agencies. *See, e.g.*, Working Group on Treaty Practice, *supra* note 40, at 4, 6-7, 22, 24 (detailing training and guidance offered by treaty officials in Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain).

- (vii) *following any and all domestic procedures involved in such agreement making;*  
*and*
- (viii) *appreciating the legal and non-legal effects that can flow from different types of international agreements.*

**Commentary:** Not all States will authorize inter-institutional agreements, whether as treaties, contracts, or political commitments.<sup>878</sup> For those that do, however, it will be necessary to ensure that institutions with an agreement-making capacity are sufficiently trained to use that capacity appropriately. This training may involve national-level exercises where non-Foreign Ministry officials of the national government are educated in international agreements, and just as pertinently, the procedures to be followed domestically to authorize them. Where sub-national territorial units can make agreements, they would benefit from similar training and education. Such efforts may mitigate situations where an institution acts without authority or otherwise enters into commitments to the detriment of the State as a whole. Increased knowledge around the various types and effects of binding and non-binding agreements may allow State institutions to develop an agreement practice that aligns with its interests while also accommodating national foreign policies and procedures.

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<sup>878</sup> See *Guideline 2.2* and accompanying commentary.