

IAJC GUIDELINES ON BINDING AND NON-BINDING AGREEMENTS (WITH COMMENTARIES)

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From 2017-2020, the Inter-American Juridical Committee (IAJC) took up the topic of binding and non-binding agreements, culminating in its recent publication – *IAJC Guidelines on Binding and Non-Binding Agreements, with Commentaries* (“*Guidelines*”). In 2016, several OAS Member States’ Foreign Ministry Legal Advisers had proposed the topic based on their observation of a rising number of non-traditional international agreements, including non-binding agreements among States and agreements in both binding and non-binding form concluded by government ministries and sub-national territorial units. This growing diversity of agreement forms and agreement-makers may facilitate greater coordination and cooperation on the international stage. Yet, the landscape’s heightened complexity and diversity also poses new challenges. Many States in the region had questions about what legal status these new agreement forms have, who can conclude them, how to identify them, and what legal effects, if any, they generate. Without further clarifications and elaboration, there were concerns that existing agreement practices could lead to inconsistent understandings, unaligned expectations, and even disputes among OAS Member States, to say nothing of the international community as a whole.

Professor Duncan Hollis served as the Rapporteur for the project on Binding and Non-Binding Agreements throughout his four year tenure on the IAJC. His presentation tracks the project’s origins, the process employed over the course of seven reports, and the contents of the *Guidelines* as adopted by the IAJC in August 2020.

The *Guidelines* aim to assist OAS Member States in clarifying the various types of binding and non-binding international agreements in existence today and better aligning their expectations with respect to making, implementing, and interpreting them. They offer a concrete and detailed set of definitions, understandings and “best practices” for OAS Member States (and perhaps 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. The *Guidelines*’ ambitions, however, are modest; they do not aspire to codify or develop international law (although they do note several areas where existing international law is unclear or disputed). Instead, they offer a set of voluntary understandings and practices OAS Member States can employ to improve knowledge in these areas and reduce the risk of future difficulties with other States in the region and beyond.

A key point of departure for the *Guidelines* is their employment of the term “agreement” with respect to both binding and non-binding forms, noting how under-developed the *concept* of agreement is in international relations (even as the *term* itself is often reserved for usage in treaties). Hence, the *Guidelines* look to move beyond the formalities of terminology and cover the full range of international agreements – commitments regarding

future behavior to which international actors give their mutual consent. The *Guidelines* divide such “agreements” into two basic categories:

- (i) agreements 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) agreements 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.

In terms of coverage, the *Guidelines* divide into six sections:

- i. **Definitions** – The *Guidelines* offer definitions for—and commentaries on—each of the three main categories of international agreement – treaties, political commitments and contracts. They also define an “inter-institutional agreement” based on the actors who form it.
- ii. **Capacity** – The *Guidelines* examine the capacities of “State institutions” (e.g., government ministries or agencies as well as sub-national territorial units such as provinces or regions) to conclude treaties, political commitments, and contracts. They propose best practices aimed at ensuring transparency and communication among States as to the extent of authority State institutions have to make various forms of international agreement.
- iii. **Methods of Identification** – The *Guidelines* take the view that any agreement’s status should be identified on a case-by-case basis. They flag the possibility that different states may use different tests to determine whether their agreement constitutes a treaty. As a result, the *Guidelines* propose a best practice where States will be more transparent in their negotiations (or in the agreement text itself) as to their understanding of an agreement’s status. The *Guidelines* also offer a list of suggested terms, provisions, and features indicative of treaties, political commitments, and contracts. Note, however, these suggestions are merely indicative and *not* determinative of an agreement’s status. There are no magic words to convert a text into a treaty (or a political commitment, or a contract). At the same time, if States become more attune to the usual terms and forms employed in each agreement type, they are more likely to avoid misaligned understandings on the nature of the agreement reached.
- iv. **Procedures:** The *Guidelines* confirm the freedom evidenced in State practice for States to adopt their own internal procedures for approving the negotiation and conclusion of treaties (as that term is used in international law) and contracts. For non-binding agreements, the *Guidelines* endorse two best practices: (i) that States develop and implement policies and procedures for authorizing the negotiation and conclusion of political commitments by the State, its ministries, or sub-national territorial units for which it is responsible; and (ii) that each State consider having a national registry or database for cataloging its political commitments.
- v. **Effects:** The *Guidelines* summarize the different effects, if any, that State practice suggests treaties, political commitments, and contracts may generate. They propose a best practice where States contemplate what effects, if any, they want to generate as one way to determine what type of agreement to pursue. The *Guidelines* note

substantial State resistance to according political commitments any direct legal effects, even as they recognize an array of indirect ways these commitments may assume legal significance.

- vi. **Training and Education:** The *Guidelines* recommend a set of concrete training and education efforts to ensure that relevant actors within a Foreign Ministry are capable of identifying and differentiating among various types of binding and non-binding agreements. They also recommend such training and education for other institutional actors authorized to make international agreements by the State with which they are associated.

The *IAJC Guidelines on Binding and Non-Binding Agreements* resulted from multiple rounds of careful analysis and communications within the IAJC, among various OAS Member States, and officials from other States and international organizations. Thirteen Member States (Argentina, Brazil, Canada, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Uruguay, and the United States) offered official views in response to a questionnaire from the Committee. An August 2018 meeting of the IAJC with OAS Member State Foreign Ministry Legal Advisers allowed more direct inputs into an early draft of the *Guidelines*. Efforts by Canada and Colombia to convene an informal, global working group of treaty experts in May 2019 provided an additional opportunity to receive feedback and input. Canada's assistance was particularly noteworthy in securing permission to share the results of its own survey on non-binding agreements among two OAS Member States (Canada and Mexico) as well as Finland, Germany, Israel, Japan, the Republic of Korea, and Spain.

The *Guidelines* have now been published in four languages (English, French, Portuguese, and Spanish). It is hoped they will be of sufficient value that the OAS Member States will opt to adopt and implement their best practices and recommendations. At the same time, these *Guidelines* may have value to States outside the OAS region. Other States and organizations such as the Council of Europe may wish to consider drawing on them for their own best practices or the project as a whole to catalyze similar efforts by other organizations or regions.