



ASADIP PRINCIPLES

ON TRANSNATIONAL ACCESS TO JUSTICE (TRANSJUS)

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Preface

Scope, purposes and functions of the Principles

The purpose of the “ASADIP Principles on Transnational Access to Justice” (the “Principles”) is to improve access to justice for natural and legal persons in transnational private litigation, including cases where State entities intervene in disputes of a predominantly commercial nature or for acts *jure gestionis*. These Principles are not designed for judicial proceedings incidental to arbitration agreements or arbitral awards.

These Principles establish minimum standards to guarantee access to justice, without discrimination on the basis of nationality or residence and in accordance with both international human rights law as well as the principles embodied in most modern constitutions. They aspire, in turn, to become a part and vector of global governance, seeking to articulate State powers in a coordinated and cooperative manner in order to achieve effective transnational justice, as a necessary and imperative component of social wellbeing in the globalized world in which we live.

These Principles may be applied where the parties have agreed that procedural aspects of their legal relationship shall be governed by them, unless expressly prohibited by the law of the forum.

These Principles may apply in interpreting, integrating and complementing the applicable rules.



These Principles may equally serve to inform the codification of procedural law in civil and commercial matters, both nationally and internationally.

These Principles are also intended for administrative and judicial authorities, to the extent they are inspired by and apply principles of jus cogens, in particular, those pertaining to access to justice as a human right.

CHAPTER 1

General provisions and principles

Article 1.1. In proceedings initiated pursuant to transnational litigation, judges and other State authorities should seek to ensure, in a reasonable manner, adherence to the following principles:

a.- Principle of “maximum respect to human rights and access to justice”: Each State shall establish and apply its rules of procedure, seeking to ensure maximum respect for human rights, in particular, the right to access to justice.

b.- Principle of “favoring amicable solutions”: States and judges shall promote, facilitate and favor the amicable resolution of disputes through negotiation, mediation, conciliation or any other mechanism of alternative dispute resolution.

c.- Principle of “jurisdictional equivalence”: All judges exercise their judicial functions as an attribute of sovereignty, so they are to be considered equals with respect to powers and legitimacy in the transnational context.

d.- Principle of “transposition of procedural guarantees to the transnational context”: Judges and other state authorities will, to the extent possible, endeavor to transpose the rights and procedural guarantees available in domestic proceedings to transnational proceedings,



irrespective of the nationality or residence of the parties or of the place where the principal proceedings are being conducted.

e.- Principle of "international judicial cooperation": The right to access to justice imposes an obligation upon all States to assist other States in the administration of justice, beyond assistance of a purely judicial nature, in any case to which a foreign jurisdiction is connected.

f.- Principle of "transnational judicial activism": Judges and other judicial officials shall actively pursue effective justice, overcoming formalities which may hinder them. In fulfilling this duty, it shall be given effect to the procedural rights of the parties, adopting the necessary measures to protect the rights of the weaker party.

g.- Principle of "procedural expeditiousness": Judges and other judicial officials shall act expeditiously, without unjustifiably jeopardizing the rights of the parties.

h.- Principle of "procedural adjustment": Difficulties encountered in the application of domestic procedural rules to the needs and requirements of transnational litigation shall be resolved by adjusting the provisions accordingly.

i.- Principle of "protection of collective rights": States shall guarantee transnational access to justice in order to protect individual interests as well as diffuse and collective interests.

Article. 1.2.- In transnational litigation, the interpretation of legal concepts shall also take into consideration the following principles:

a.- Principle of "source dialogue" and interpretation according to human rights: Judges and other judicial officials shall construe substantive and procedural rules not only with reference to the text but also to the purposes of the relevant provisions, giving due consideration to these Principles, their coherent application with those informing international



human rights law, as well as the values underpinning most modern constitutions. Discrepancies arising from this diversity of sources shall be resolved through an interpretation which, to the extent possible, promotes coordination and harmonization.

b.- Principle of “in dubio pro cooperationis”: International legal cooperation is essential to the balanced consideration of the parties’ rights. In case of doubt generated by persistent normative conflict, solutions promoting international legal cooperation shall be favored.

c.- Principle of “interpretation according to comparative law”: In transnational litigation, judges and other judicial officials shall take into consideration the trends in interpretation and solutions favoring access to justice as afforded by comparative law analysis, as well as the relevant jurisprudence of international human rights bodies.

d.- Principle of “effectiveness of substantive rights”: In the interpretation of procedural rules, judges and other judicial officials shall take into account the fact that the ultimate purpose of the judicial proceedings is to give effect to substantive rights.

e.- General legal principles: After applying the aforementioned principles, any remaining doubt should be resolved with reference to other general legal principles.

Article 1.3.- Procedural issues are governed by the law of the forum. Notwithstanding the foregoing, the need to ensure access to justice may call for the application of rules, legal notions and procedures from other legal systems or from these Principles, as long as such application is technically feasible and does not result in an outcome manifestly incompatible with the fundamental principles of the applicable law.

The burden and standards of proof, as well as the admissibility and evaluation of evidence are governed by the substantive law applicable to the relevant legal relationship,



without prejudice to the fact that the procedural substantiation of such evidence shall be determined by the law of the forum.

Article 1.4.- Where the application of foreign law is required, judges and other authorities shall apply it ex officio and in the same manner as it would have been applied by the judge of the State whose law is being applied, without prejudice to the parties' right to plead the existence and content of such law.

Judges and other competent authorities may, availing themselves of the available mechanisms of judicial cooperation, make orders for the purpose of gaining a better understanding of the applicable foreign law.

The means of recourse provided for by the law of the forum shall be available to the parties regardless of the applicable law to the substance of the decision against which the appeal is filed.

CHAPTER 2

Treatment of the foreign litigant and subsidized legal assistance (legal aid)

Article 2.1.- States shall grant litigants of foreign nationality or residing abroad the same rights that are conferred to its own nationals or residents. The right to access to justice precludes requiring from foreign citizens or residents a bond, deposit or any type of security based exclusively on their foreign nationality or residency abroad or on the bases of reciprocity.

Article 2.2.- Free or subsidize legal assistance shall be made available to foreign nationals and residents on the same conditions as it is made available to nationals and residents.



Article 2.3.- Courts shall take into consideration the difficulties faced by foreign litigants and residents in participating in the proceedings, particularly those of parties with scarce financial resources.

Article 2.4.- States shall seek to establish subsidized legal assistance mechanisms for persons in need of transnational access to justice. States shall provide such assistance making use of available means but always on an equal basis as regards potential beneficiaries.

CHAPTER 3

Jurisdiction

Article 3.1.- The jurisdiction of each State, in the sense of the competence of its courts to hear and adjudicate private international cases, is, in principle, exercised concurrently with the exercise of jurisdiction by other States. This concurrent exercise jurisdiction shall be informed by the principle of judicial cooperation, which seeks to achieve effective justice. The prerogative of the courts of a State to exercise exclusive jurisdiction shall be conceptualized and interpreted restrictively.

Article 3.2.- The jurisdiction of the courts of a State shall be established according to substantial connections to the subject matter of, or the parties to, the dispute, taking into consideration the claimant right to access to justice without prejudice to the defendant's right of defense.

A substantial connection shall include the following circumstances, among others:



a.- A significant part of the act or event giving rise to the dispute has occurred in the forum State.

b.- The defendant is a natural person habitually resident in the forum State or a legal person incorporated, or with its seat or principal place of business in the forum State. Notwithstanding the foregoing, where a legal person is incorporated in another State, activities carried out by its branches, agencies or other establishments shall be deemed substantially connected to the State in which they are located.

c.- The property that is the object of dispute is located in the forum State.

Article 3.3.- The choice of a particular court, freely expressed by the parties, establishes a substantial and sufficient connection for the purposes of conferring or declining jurisdiction in the courts of that State. The choice of a particular jurisdiction shall be deemed exclusive, excluding any other forum, unless expressly stated otherwise by the parties.

In disputes where one party, according to the law applicable to the merits, is considered to be weaker, only this party may invoke a choice of court agreement concluded prior to the events triggering such a dispute. Judges and other judicial officials shall verify that those considered to be the weaker parties had sufficient access to the necessary information with respect to the proceedings in which they are participating.

Even in cases where choice of court agreements are restricted, the parties may reach an agreement after the events giving rise to the dispute have taken place, designating a jurisdiction of any State.

Article 3.4.- A choice of court agreement may be made expressly, by any means of communication that can be made available for consultation at a later date and that evidences



the free decision of the interested parties. The choice may be implied where the claimant brings an action before a court and the defendant takes any action in those proceedings without contesting the jurisdiction. Contesting a provisional or protective measure, or actions such as requesting copies, information, or other non-adversarial measures, shall not be considered to amount to an implied agreement to the choice of jurisdiction.

Article 3.5.- A choice of court agreement shall be considered an independent agreement from the other clauses of the contract. Its validity cannot be challenged solely on the ground that the contract in which it appears is not valid.

In matters in which the derogation from the jurisdiction is permitted, the court selected by the parties shall have exclusive jurisdiction to determine the validity of the choice of court agreement, unless the invalidity of the agreement is substantiated on the basis of a manifest violation of public policy or a fraud to jurisdiction.

Article 3.6.- States shall not assert jurisdiction on exorbitant grounds. A ground of jurisdiction is deemed exorbitant where the connection with the forum lacks reasonable relevance, thus violating defendant's right to defense or due process.

The following grounds, among others, are considered exorbitant:

a.- The place where a claim is served, or notice of the complaint given, to the defendant.

b.- The claimant's nationality, domicile or residence.

c.- The place where the assets of the defendant are located or have been seized, unless the claim concerns possession, tenancy or disposition rights of such assets.



d.- The mere performance of commercial activities of the defendant, unless the claim relates to such activities.

e.- The claimant's unilateral submission to the jurisdiction of the forum.

Article 3.7.- The courts of a State shall stay the exercise of their jurisdiction where a matter with the same cause of action, subject-matter, and between the same parties has already been commenced in a court of a State reasonably connected to the claim or the parties, unless it becomes evident that the dispute will not be resolved in a fair, efficient and diligent manner in that forum. The stay of the proceedings on grounds of *lis pendens* may be maintained until the decision in the foreign State attains the force of *res judicata*, provided that this decision is rendered within a reasonable period of time and has extraterritorial effect in the State where the stay was granted.

A claim is deemed to have commenced from the moment the statement of claim or equivalent submission is filed, provided the claimant proceeds with sufficient diligence so as to allow the participation of the defendant in the proceedings.

Article 3.8.- The domicile of one of the defendants shall suffice for the purposes of conferring jurisdiction upon the courts of the State of such a domicile with respect to other co-defendants not domiciled in that State, provided that the joinder and/or consolidation of claims against all co-defendants is reasonable and convenient due to a close relationship between those claims. A co-defendant may nonetheless bring a motion of *forum non conveniens*, if applicable pursuant to Article 3.9 of these Principles.



Article 3.9.- For the purposes of guaranteeing access to justice to all parties, the court, even on its own motion, may stay the proceedings if, notwithstanding its international jurisdiction to adjudicate the dispute, assuming jurisdiction is manifestly inappropriate due to a lack of substantial connection between the dispute and the forum, the availability of an alternative forum with international jurisdiction to adjudicate the connected claims, or under the circumstances of Article 3.8 of these Principles.

If a court decides to stay proceedings under this Article, it shall justify doing so on the lack of substantial connection between the dispute and the forum, or the disadvantages of asserting its own jurisdiction compared with the advantages of the alternative jurisdiction, first ensuring that the latter is able to exercise its jurisdiction pursuant to its own jurisdictional and procedural rules and that the claimant's right to access to justice is properly guaranteed. The court shall take into account the actual abilities of both parties to bear the burden of litigating abroad, as well as whether the decision of the alternative forum will have extraterritorial effect.

The stay of proceedings may be maintained until the decision rendered in the alternative forum reaches the status of *res judicata* provided this decision is able to be rendered within a reasonable period of time.

The proceedings shall not be stayed under this Article in cases of exclusive jurisdiction or in cases of non-contractual liability for environmental damages, civil liability in consumer matters, or relating to violations of human rights referred to in Article 3.3 of these Principles.

Article 3.10.- Even if the jurisdiction of the forum State cannot be established, it may, by way of exception, assume jurisdiction to ensure access to justice, provided that it establishes, taking into account the rights and abilities of both parties, that the claimant could not obtain effective and reasonable access to justice in another jurisdiction.



This exceptional conferral of jurisdiction may be exercised especially, but not exclusively, if the dispute relates to environmental damages, damages resulting from individual employment or consumer matters, or human rights violations, seeking to ensure efficient access to justice for parties which are particularly vulnerable, such as children, refugees, and low-income migrants.

Courts may always exercise jurisdiction to issue provisional measures of protection for persons or property within their territory, irrespective of the court which has jurisdiction to hear the merits of the matter, and ultimately subject to the decision of the internationally competent court.

Article 3.11.- Procedural motions for the purposes of affirming, declining, staying or resuming proceedings shall be dealt with special urgency and brevity.

CHAPTER 4

Inter-jurisdictional Cooperation

Article 4.1.- Inter-jurisdictional cooperation is an international obligation of all States, not only for the purpose of serving process, giving notice and holding hearings, but this obligation to cooperate extends to any other acts or measures needed during the course of the proceedings, including providing assistance with the processing and enforcement of protective measures, as well as with the identification, preservation and production of evidence.

Imposing restrictions upon the obligation to provide inter-jurisdictional cooperation amounts to a violation of the right to access to justice, unless such a restriction may be justified by the reasonable and necessary protection of fundamental human rights, or when the



requested cooperation comprises a violation of essential principles of the legal system of the requested State.

Requests for inter-jurisdictional cooperation shall be presumed excluded from the aforementioned exceptions. The cooperation shall be provided promptly and efficiently.

Article 4.2.- The practice of providing cooperation through warrants, letters rogatory or any other request for inter-jurisdictional cooperation imposes no obligation on a requested State to recognize the effect of any judgment eventually rendered in the principal proceedings, nor does it prejudge the jurisdiction of the court of the requesting State in which the proceedings are taking place.

Article 4.3.- Judges may request cooperation from the authorities of other States without being subject to any restrictions other than those imposed by the mandatory rules that are internationally applicable.

Article 4.4.- States shall permit, within their territory, foreign authorities or officers to carry out acts of procedure which are mere formalities, except those acts which involve compulsion. The unjustified refusal to provide this cooperation shall constitute a violation of the right to access to justice.

Article 4.5.- The requested State shall interpret and apply the rules on inter-jurisdictional cooperation in a particularly flexible manner, minimizing the relevance of formalities.

The courts of the requested State may act *ex officio*, making normative adjustments as necessary in order to carry out the corresponding procedural measures.



Where the law does not prescribe a specific form, method or means for the cooperation sought by the requesting State, the courts of the requested State shall have the authority to adopt any appropriate measures to carry out the requested assistance, always with a view to protecting the fundamental procedural safeguards.

Article 4.6.- With a view to ensuring security and maximum efficiency of inter-jurisdictional procedural measures, judges and other judicial officials may establish direct and impromptu means of judicial communication, using any appropriate mechanism to achieve certainty and security.

Accordingly, judges and other judicial officials may hold common hearings via videoconference or other available means, or coordinate their decisions so as to avoid conflicts and ensure the effectiveness of such decisions.

The parties shall have access to the communications between the courts or, where this is not appropriate, they shall be informed of such communications.

Article 4.7.- As long as the security of the communications can be guaranteed, judges and other judicial officials shall promote and foster the use of new information and communication technologies, such as telephone communications, videoconferencing, electronic messaging and any other means of communication appropriate for effecting the requested cooperation.

Article 4.8.- Judges and other judicial officials shall endeavor to use international liaison mechanisms facilitated by international networks of public officials, utilizing their respective roles in order to promote access to justice.



Article 4.9.- In the processing and enforcement of acts in relation to judicial proceedings involving foreign elements, including those of the type referred to in these Principles, and pursuant to Article 1.3, judges and other judicial officials shall seek to both take into account and apply those principles, standards, guidelines and guides of good practices developed by associations and institutions of recognized international standing.

CHAPTER 5

Service of process and other notices

(Participation of the defendant in the proceedings)

Article 5.1.- Service of process or the initial notification to the defendant shall be effected in person, through the methods of inter-jurisdictional cooperation promoted by these Principles, yet the claimant's access to justice cannot be delayed indefinitely until service has been effected.

The claimant may, in particular in those cases where personal service or notice is not possible, request that service of process or other notices to the defendant be effected by any available technological means, pursuant to Article 4.7 of these Principles.

Article 5.2.- Once the proceedings have commenced, a person within the jurisdiction of the court shall be identified for the purposes of addressing all notices subsequent to the initial defense. The proceedings shall not be postponed for the purpose of effecting service abroad.

Article 5.3.- If the defendant fails to appear, the judge shall ensure, with the assistance of the claimant, that the defendant was given due notice of the proceedings.



CHAPTER 6

Languages and foreign documents

Article 6.1.- Proceedings shall be conducted, in principle, in one of the official languages of the jurisdiction of the court. This language shall also be used for documents and oral communications.

Article 6.2.- The court may permit the use, in whole or in part, of other languages for the proceedings to the extent that this does not affect the parties' right to defense or considerations of due process. Documents submitted in a language other than that which is used by the authority to which they are presented shall neither be rejected nor disregarded, provided that both the authority to which such documents are addressed and the parties to the dispute are able to understand those contents.

Article 6.3.- Translations or simultaneous interpretations shall be provided when one of the parties or a witness does not understand the language of the proceedings. The parties may agree, or, if justified the court may order, that extensive or lengthy documents in a foreign language be translated only in part, insofar as the content, scope, and meaning of the document in question is not affected.

Article 6.4.- Translations that are unofficial, or that were not carried out by formally accredited professionals may be admitted if deemed sufficiently reliable in the opinion of the judge.



Article 6.5.- If the judge is able to establish the authenticity of a document issued abroad, the document shall not be rejected or disregarded by the mere fact that it lacks legalization or the Apostille.

CHAPTER 7

The effect of foreign decisions

Article 7.1.- The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.

Article 7.2.- The right to obtain extraterritorial effect of a foreign judicial decision shall not be infringed where such a decision has been issued in violation of fundamental rights related to the proceedings or where the full effects of its recognition or enforcement would be manifestly contrary to fundamental rights related to the substance of the dispute.

Article 7.3.- The requested State may also deny extraterritorial effect to a foreign judicial decision where a court of the requested State has rendered a prior definitive judgment on the same cause of action, or if a foreign court has rendered a prior definitive judgment on the same cause of action which may be able to be recognized in the requested State.

Article 7.4.- The recognition or enforcement of a foreign decision may be refused on grounds of indirect jurisdiction only in the following cases:



a.- Where the jurisdiction of the rendering authority is based on an exorbitant ground of jurisdiction.

b.- Where the jurisdiction of the rendering authority is based on a choice of court agreement not freely consented to by the affected party or that is in conflict with a prior agreement that was validly concluded.

c.- Where the jurisdiction of the rendering authority disregarded other pending proceedings in violation of Article 3.7 of these Principles.

Article 7.5.- The revision of the merits of a foreign judicial decision violates the right to access to justice, without prejudice of the prerogative of the requested State to impose the necessary safeguards to avoid the violation of fundamental rights.

Article 7.6.- The requirement of reciprocity for giving effect to decisions and acts of foreign authorities is presumed to violate the right to access to justice.

Article 7.7.- To ensure the extraterritorial effect of decisions, appropriate provisional measures of protection shall be facilitated, including prior to the commencement of homologation or exequatur proceedings in the State in which recognition is sought.

Article 7.8.- In order to ensure the extraterritorial effect of foreign decisions, they shall be treated analogously to their equivalents in the requested State, as long as they produce final and definitive legal effects in the State of origin, irrespective of their denomination. This rule shall also apply in cases where the relevant decisions were issued by public authorities different from those that would have been competent in the requested State.



Article 7.9.- A foreign decision produces effects in the requested State from the moment that the decision becomes effective in the State of origin.

Article 7.10.- When the effect of a foreign decision is invoked in the course of proceedings, the requested State shall afford it incidental recognition, without prejudice to the homologation or exequatur proceedings that the requested State may be able to initiate for its recognition or enforcement.

Article 7.11.- The homologation or exequatur of foreign decisions shall be decided pursuant to a motion for summary judgment, limited to a verification of the basic requirements for its recognition or enforcement in the requested State. The effective enforcement of such decisions shall be decided in an expeditious manner, with any provisional measures granted being maintained until enforcement has been finalized.

CHAPTER 8

Provisional Measures of Protection

Article 8.1.- The judges and authorities of each State shall take into account the particular need to provide for provisional measures of protection in transnational proceedings. These authorities may make orders for provisional measures to ensure effective access to justice, and considering requests of foreign authorities for cooperation relating to provisional measures of protection with particular diligence.



Article 8.2.- Where the party requesting inter-jurisdictional assistance reasonably demonstrates the existence or likely existence of a right, as well as the risk of imminent and irreparable damage or frustration of this right, the requested State shall grant any emergency, provisional, preservation or prospective measures aimed at facilitating pending proceedings or the preparation of future proceedings abroad, without prejudice to the right to require sufficient security from requesting party to guarantee the compensation of the harm that may be caused by the measure.

Article 8.3.- The permissibility of provisional measures of protection in aid of proceedings abroad shall be determined with reference to the additional prerequisite that the judgment to be rendered in the principal proceedings will be able to be recognized and enforced in the requested State. The permissibility and efficacy of the measures shall be conditional on whether the decisions in the principal proceedings are adopted within a reasonable period of time.

Article 8.4.- Notwithstanding the possibility of a provisional measure of protection being adopted ex parte, the person affected by the measure shall have the opportunity to contest it, as well as to substitute such a measure with a caution, bond or guarantee deemed sufficient in the opinion of judge.

Article 8.5.- In order to ensure the appropriate balance of the rights of the parties, the courts and competent authorities of different States shall strive to establish direct communications among each other, under the terms set out in Article 4.6 of these Principles, in order to adopt the necessary measures to facilitate proceedings conducted abroad.