

## Conseil sur les affaires générales et la politique de la Conférence – mars 2017

<b>Document</b>	Document préliminaire <input checked="" type="checkbox"/> Document de procédure <input type="checkbox"/> Document d'information <input type="checkbox"/>	No 3 de mars 2017
<b>Titre</b>	Projet relatif à une éventuelle future Convention sur la coopération et l'accès à la justice au profit des touristes internationaux (projet Tourisme)	
<b>Auteur</b>	Bureau Permanent Rapport préliminaire préparé par Emmanuel Guinchard, Consultant.	
<b>Point de l'ordre du jour</b>	Point IV.4.	
<b>Mandat</b>	C&R No 7 du Conseil sur les affaires générales et la politique de la Conférence de 2014 C&R No 8 du Conseil sur les affaires générales et la politique de la Conférence de 2015 C&R No 19 du Conseil sur les affaires générales et la politique de la Conférence de 2016	
<b>Objectif</b>	Faire part de la première étape importante du projet en présentant le Rapport préliminaire du consultant.	
<b>Mesure(s) à prendre</b>	Pour approbation <input type="checkbox"/> Pour décision <input type="checkbox"/> Pour information <input checked="" type="checkbox"/>	
<b>Annexe(s)</b>	Annexe 1 : Rapport préliminaire préparé par Emmanuel Guinchard – <i>disponible en anglais uniquement</i>	
<b>Document(s) connexe(s)</b>	Sans objet	

## A. INTRODUCTION

1. Le projet, qui se rapporte à une éventuelle future Convention sur la coopération et l'accès à la justice au profit des touristes internationaux (ci-après, le « projet Tourisme »), est imputable à une proposition du Brésil en vue d'entreprendre des travaux dans ce domaine (ci-après, la « proposition brésilienne »). La proposition brésilienne a été présentée lors du Conseil sur les affaires générales et la politique de la Conférence (ci-après, le « Conseil ») de 2013, accompagnée d'un mémoire explicatif présentant en détail la raison d'être d'un tel instrument. En 2015, le Conseil a décidé de confier au Bureau Permanent le soin de mener à bien une étude consacrée à l'opportunité et à la possibilité de futurs travaux dans le domaine de la coopération en matière de protection des touristes et des visiteurs étrangers, compte tenu, entre autres, de la conformité du thème au mandat de la Conférence de La Haye et des travaux réalisés dans d'autres enceintes (ci-après, le Rapport préliminaire).

## B. LA RAISON D'ÊTRE DU PROJET TOURISME

2. La proposition brésilienne part du principe que plusieurs éléments justifient des travaux dans ce domaine ; on compte notamment l'augmentation du tourisme de masse et la place toujours plus importante des États en développement dans le secteur du tourisme ; l'évolution du profil des touristes ; la complexité croissante des contrats de tourisme ; le recours aux nouvelles technologies. En conséquence, il est nécessaire de mettre en place une meilleure protection des touristes que ce qui existe actuellement en vertu d'une multitude d'instruments principalement non contraignants et de certaines conventions qui s'appliquent à des contrats spéciaux.

3. Selon la proposition brésilienne, il serait possible de parvenir à une meilleure protection des touristes en élaborant des méthodes de protection rapides et simplifiées au profit des touristes internationaux, couplées à une coopération mondiale renforcée entre les organes nationaux de protection des consommateurs. En outre, la proposition met en exergue la nécessaire mise en place de mesures visant à garantir l'offre d'une protection sans discrimination entre les touristes nationaux et étrangers et sans préjudice des protections accordées aux consommateurs, y compris l'accès aux tribunaux dans leur État d'origine

4. Enfin, la proposition brésilienne suggère que l'un des principaux objectifs est de s'appuyer sur les autorités et instruments existants en vue de simplifier les demandes *ex ante*. Il convient également de prévoir la possibilité pour les touristes de présenter ces demandes après leur retour dans leur État d'origine, de renforcer la coopération internationale et l'assistance mutuelle et d'éviter ainsi les contentieux transfrontières a posteriori en matière de consommation.

## C. HISTORIQUE DU PROJET TOURISME JUSQU'À PRÉSENT

5. Concernant l'historique du projet Tourisme jusqu'au début de l'année 2016, les Membres peuvent se référer aux Conclusions et Recommandations (C&R) des réunions du Conseil de 2014, 2015 et 2016, ainsi qu'aux Documents préliminaires y afférents<sup>1</sup>.

6. En août 2016, le Bureau Permanent a reçu une généreuse contribution volontaire de la part du Gouvernement du Brésil en vue du recrutement d'un consultant pour la préparation de du Rapport préliminaire susmentionné. En septembre 2016, le Bureau Permanent a lancé une procédure de recrutement compétitive fondée sur le mérite ; l'avis de vacance a été largement diffusé<sup>2</sup>. Le Bureau Permanent s'est efforcé d'attirer tout particulièrement des candidats

<sup>1</sup> « Conclusions et Recommandations du Conseil sur les affaires générales et la politique de la Conférence (du 8 au 10 avril 2014) », C&R No 7, « Conclusions et Recommandations du Conseil sur les affaires générales et la politique de la Conférence (du 24 au 26 mars 2015) », C&R No 8, « Conclusions et Recommandations du Conseil sur les affaires générales et la politique de la Conférence (du 15 au 17 mars 2016) », C&R No 19, disponibles sur le site web de la Conférence de La Haye à l'adresse : < <https://www.hcch.net> >, sous les rubriques « Gouvernance », puis « Conseil sur les affaires générales et la politique ».

<sup>2</sup> Le Bureau Permanent a posté l'avis de vacance sur plusieurs sites pertinents, y compris UNJobs, Expatica et Indeed.

capables de mener des recherches préliminaires sur le sujet et d'analyser l'opportunité d'élaborer un nouvel instrument ou traité international. Au début du mois de novembre 2016, le Bureau Permanent a recruté M. Emmanuel Guinchard, universitaire spécialisé en droit international privé, droit comparé et procédure civile internationale qui travaille actuellement au Royaume-Uni. M. Guinchard a pris ses fonctions en tant que consultant à la mi-novembre 2016.

7. Entre mi-novembre et décembre 2016, le Bureau Permanent et M. Guinchard ont préparé, en collaboration, deux Questionnaires, l'un à l'attention des Membres de la Conférence de La Haye et l'autre à l'attention d'organisations non gouvernementales ; ces Questionnaires portaient sur la protection des touristes<sup>3</sup>. Le 14 décembre 2016, le premier Questionnaire a été envoyé aux Membres ainsi qu'à des États non-membres liés aux travaux de la Conférence, puis, le 16 janvier 2017, il a également été transmis à cinq États qui ne sont pas liés aux travaux de la Conférence mais qui représentent des destinations de voyage importantes ou émergentes<sup>4</sup>. Le 16 janvier 2017, le second Questionnaire a été diffusé dans l'optique de recueillir des informations pertinentes de la part d'organisations non gouvernementales. Ces deux Questionnaires visaient à recueillir des informations pertinentes, y compris en matière de législations nationales, de procédures de coopération existantes, ainsi qu'à évaluer la nécessité et la possibilité d'élaborer un instrument international dans ce domaine.

8. En outre, le Secrétaire général de la Conférence de La Haye a adressé une lettre au Secrétaire général de l'Organisation mondiale du tourisme (OMT), présentant brièvement le projet Tourisme. Cette lettre contenait également une proposition en vue d'établir une proche collaboration et de futurs échanges entre la Conférence de La Haye et l'OMT, y compris afin d'éviter d'éventuels redondances de tout instrument futur qui pourrait être élaboré. L'OMT a fait état de ses projets en cours, encourageant les efforts entrepris par le Bureau Permanent dans le domaine de la protection des touristes et prenant acte de la nécessaire coopération entre les deux organisations afin d'éviter tout gaspillage de ressources et en vue d'avancer ensemble au profit des États membres et du secteur du tourisme dans son ensemble.

9. Les réponses aux Questionnaires reçues avant le premier mars 2017, ainsi que les échanges entretenus entre la Conférence de La Haye et l'OMT à cette même date, sont incluses dans le Rapport préliminaire. Toute information reçue après cette date sera insérée dans le Rapport en temps utile.

#### **D. RAPPORT PRÉLIMINAIRE**

10. Le Rapport préliminaire établi par M. Guinchard vise à présenter aux Membres une première mise à jour concernant les progrès réalisés dans le cadre du projet Tourisme, notamment à l'occasion de la préparation de ce Rapport. Le Rapport préliminaire fait également état d'informations ayant déjà fait l'objet de recherches et extraites des réponses aux Questionnaires<sup>5</sup>, ainsi que des éléments d'analyse à cet égard. Enfin, le Rapport préliminaire propose une structure, fondée sur les recherches menées ainsi que sur les informations recueillies dans les réponses aux Questionnaires. Le Rapport reste susceptible de changer afin d'inclure toute information pertinente au projet Tourisme.

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<sup>3</sup> Les Questionnaires sont présentés dans le Rapport préliminaire.

<sup>4</sup> Ces États sont les suivants : Cuba, les Émirats arabes unis, l'Indonésie, les Seychelles et la Thaïlande.

<sup>5</sup> Voir para. 9 pour ce qui est de la date limite.

## Preliminary Report

### Study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists

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**Annexes**

## Part 1 Introduction

### 1.1 Background

At its meeting of 9-11 April 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Agenda.<sup>6</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. The work was to be done by an expert, hired by the Permanent Bureau, and financed by Brazil.<sup>7</sup> A competitive, merits-based selection process led to the appointment of the author of this report on a part-time basis starting 10<sup>th</sup> November.

### 1.2 Purpose and Methodology

#### Purpose

The final report will consist in a study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists.

This preliminary report primarily intends to:

- 1) Report on the steps taken in that direction and the progress made so far
- 2) Identify some of the difficulties faced by tourists as they have been expressed in the evidence gathered up to 7<sup>th</sup> March 2017 included
- 3) Demonstrate that the Hague Conference project does not compete with the work conducted in other fora
- 4) Indicate the likely future stages of the work

It is worth mentioning that a particular focus of the preliminary report is to assess whether any similar work to that conducted by the HCCH is carried out by the United Nations World Tourism Organization (UNWTO)<sup>8</sup>. In case of a positive answer, it would be necessary to ascertain the degree of similarity. If this degree were to be too high, there may be an argument to discontinue the study. If the similarities are moderate or low, it may be worth ascertaining gaps in the work of the UNWTO that fall squarely within the mandate of the HCCH and which could be considered pursuing. And of course, if there were to be no similarities, then work could pursue without constraint, however keeping in mind that pursuing complementarity with any instrument of the UNWTO may be desirable.

This assessment can be found in Part 7 of the present Report. Hopefully, it should alleviate the fear of confusion, and possibly perceived redundancy, as expressed by some Members States at previous Council meetings.

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<sup>6</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R Number 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>7</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R Number 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>8</sup> On the UNWTO, see *infra* section 2.1.

## Methodology

The methodology used involved a combination of traditional black letter law research and a socio-legal approach. The latter involved the creation of two sets of questionnaires following a close and fruitful collaboration with members of the Permanent Bureau (PB). One questionnaire was designed for the Member States, the other for non-Members, including, but not limited to, connected non-Member States. The primary aim of these questionnaires was to assess the existence, and to understand, the nature and degree of the difficulties faced by tourists in terms of access to justice. These questionnaires, which put a wide range of questions covering pertinent topics, can be found in the Annex to this preliminary report. The Hague Conference set up a specific e-mail address ([tourism@hcch.nl](mailto:tourism@hcch.nl)) in respect of the project and in particular in order to send questionnaires and receive answers.

The questionnaire for Members was circulated on 14 December 2016. On the same day, the questionnaire was also sent to connected non-Member States. On 16 January 2017, the same questionnaire was sent to the diplomatic missions of five States that are neither Members nor connected non-Member States, but which are important or emerging travel destinations<sup>9</sup>.

The questionnaire for non-Members that are not connected non Member-States was also circulated on 16 January 2017. In order to do so, the Author compiled a substantial list of contact details of bodies including:

- professionals of the tourism sector: associations of travel agents and tour operators; official tourism offices; tourist guides associations; bodies with a mixed membership;
- bodies protecting consumers' interests: ECC-Net, Consumer International (Headquarters), Governmental organisations members of Consumer International, non-governmental organisations members of Consumer International, other bodies;
- bodies dedicated to receiving complaints from tourists;
- members of the legal sector (tourism and travel Lawyers; legal academics) and of the insurance sector.

For the purposes of this Preliminary Report, only those responses that were received as of 7<sup>th</sup> March 2017,<sup>10</sup> could be included. This means that, given the short timeframe, only around thirty answers from Members and non-Members were received, analysed and included. Any responses received after that date, or that have been received since or will be received in the future, will be equally analysed and their data will be included in the Final Report, to be delivered to the 2018 Meeting of the Council.

Finally, contact was initiated with the UNWTO<sup>11</sup>. The ensuing correspondence is encouraging and any results of a possible cooperation between the two Organisations will also be included in the Final Report.

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<sup>9</sup> The five States are Cuba, Indonesia, Iran, the Seychelles, Thailand, and the United Arab Emirates.

<sup>10</sup> The task of the author of this report involved monitoring the specific e-mail address created for the purpose of this project and replying to any question which may be asked, whether from Members or non-Members. Queries raised included sending the questionnaires to the body effectively answering it within a Member State; explaining why members of (for example) the ECC-Net or the Tourism Department of the Ministry of a Member State were among the most qualified addressees to answer the questionnaire; advising on whether members of a professional association should answer in their individual capacity or draft an answer per country or answer as a whole; requesting a text from a Member which was supposed to be enclosed with the answer to the questionnaire; trying to explain to a Member why it had not received the questionnaire in the first place and sending it anew; etc.

<sup>11</sup> See Part 7.

### 1.3 Structure of the study

The Preliminary Report adopts the likely structure of the final report, albeit with reserved parts. The structure is the following. After a general introduction (this Part), Part 2 introduces key definitions, highlights the growing economic importance of tourism in the world and the subsequent increase in the probability of disputes involving tourists. It finally reports on existing relevant literature.

Part 3 addresses the particular vulnerability of the tourist and highlights the growing institutional recognition of the need and specificity of tourist protection in civil matters before providing a provisional overall assessment of bodies in charge of tourist protection in civil matters.

Part 4 conducts an initial identification of the difficulties faced by tourists as they appear from the evidence gathered through the questionnaires up to 7<sup>th</sup> March 2017 included. A provisional conclusion is provided.

Part 5 will discuss possible ways forward, depending on the identification of difficulties faced by tourists. As this identification is still at an early stage, this part is reserved.

Part 6 will examine the compatibility of the project with the mandate of the Hague Conference. As this part depends on the possible solutions to the problems identified in Part 4, this part is reserved.

Part 7 is dedicated to the assessment of the work conducted in other fora, more particularly the UNWTO projects in the general area of protection of tourists. This Part has been prioritised for the purpose of the preliminary report. The rationale is that in case the UNWTO projects and the Hague Conference projects were similar, it would be necessary to ascertain the degree of similarity. If this degree were to be too high, there may be an argument to discontinue the study. If the similarities are moderate or low, it may be worth ascertaining gaps in the work of the UNWTO that fall squarely within the mandate of the HCCH and which could be considered pursuing. And of course, if there were to be no similarities, then work could pursue without constraint, however keeping in mind that pursuing complementarity with any instrument of the UNWTO may be desirable. The provisional conclusion should hopefully alleviate the fear of confusion and redundancy expressed by some Members.

Part 8 describes likely future steps.

Finally, the questionnaires for Members and non-Members of, respectively, December 2016 and January 2017 are included as Annexes.

## Part 2 Concepts, Statistics and Literature

### 2.1 Tourists / Visitors / Travellers

#### UNWTO Definitions

The World Tourism Organization (UNWTO) is the United Nations agency responsible for the promotion of responsible, sustainable and universally accessible tourism. Its membership includes 157 countries, 6 Associate Members and 500 Affiliate Members representing the private sector, educational institutions, tourism associations and local tourism authorities. It is based in Madrid, Spain.

The UNWTO has elaborated detailed recommendations on the concepts of tourist / visitor / traveller for statistics purposes<sup>12</sup>. These recommendations are widely considered as reference guidelines by tourism administrations and industry. A traveller is defined as "someone who

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<sup>12</sup> International Recommendations for Tourism Statistics 2008, [https://unstats.un.org/unsd/publication/Seriesm/SeriesM\\_83rev1e.pdf](https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf).



moves between different geographic locations for any purpose and any duration"<sup>13</sup>. Visitors are a subset of travellers as a "visitor is a traveller taking a trip to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited"<sup>14</sup>. Tourists are a subset of visitors as a visitor is "classified as a tourist (or overnight visitor) if his/her trip includes an overnight stay"<sup>15</sup>. An important point is that the UNWTO definition of a tourist goes beyond the non-professional definition of a tourist, which tends to focus on leisure activities.

The UNWTO recommendations provides further calibrations<sup>16</sup>. For example, the existence of an employer-employee relationship "goes beyond the existence of a formal work contract between the provider of the labour service and a producer (businesses, government and non-profit institutions serving households) corresponding to a transaction between the traveller and a resident entity in the country visited"<sup>17</sup>. This criterion leads to the exclusion from the category of visitors of seasonal workers in agriculture, construction, hotels, restaurants and other services, with or without a formal work contract<sup>18</sup>. However, "if being employed and the payment received are only incidental to the trip, the traveller would still be a visitor (and the trip would still qualify as a tourism trip)"<sup>19</sup>.

### States practice

According to the Responses to the questionnaires for Member States and non-Member included, a majority of countries provide no legal definition for tourist and / or visitor. This is the case<sup>20</sup> for Argentina<sup>21</sup>, Bosnia and Herzegovina, Brazil, Croatia, the Czech Republic, France<sup>22</sup>, Germany, Japan, Korea, Morocco, Paraguay, Seychelles, Switzerland, and the Greek response.<sup>23</sup> However, several of these countries refer to the UNWTO definition of tourists for policy purposes. This is the case of Brazil, Germany and Seychelles. In addition, Mali<sup>24</sup>, Moldova and Philippines refer to the UNWTO definition without clarifying whether it is a legal definition.

Others have adopted a legal definition<sup>25</sup> that matches the UNWTO definition. For example, according to the Bulgarian Tourism Act, a tourist is "a visitor whose stay is at least 24 hours thus staying at least one night at the visited destination and whose purpose of visit is tourism, relaxation, sport, medical procedures, business, visit of relatives and friends, pilgrimage, participation in cultural, congress, conference or other event". Some exceptions — inspired by UNWTO recommendations — are provided such as refugees, diplomats, frontier workers, seasonal workers, people sent abroad by their company or their government as a place of work, people in transit and permanent immigrants. Similarly, in Venezuela, a Decree, which has the same value as the Organic Law for Tourism, defines, in Article 2,20, a tourist as "Any natural person who travels and stays overnight, for more than one night and less than six months, for the purpose of recreation, benefiting him/her self from any of the services provided by members of the national tourism system and whose visit is not remunerated in the place visited". The same law provides that a visitor is "Any natural person who moves outside his or

<sup>13</sup> Paragraph 2.4.

<sup>14</sup> Paragraph 2.9.

<sup>15</sup> Paragraph 2.13. The same paragraph adds that the same-day visitor is an excursionist.

<sup>16</sup> A clear picture of the classification of inbound travellers may be found in figure 2.1 on page 17.

<sup>17</sup> Paragraph 2.36.

<sup>18</sup> Paragraph 2.37.

<sup>19</sup> Paragraph 2.35.

<sup>20</sup> This list has been drawn up on the assumption that a lack of answer to question 1 should be interpreted as the absence of a definition. Unless otherwise stated, the response has been made by the Member itself. We note that Sweden did not directly reply to the question but refer to the reply of the European Union regarding definitions in EU-instruments. The EU's response to the questionnaire has not been received as of 7 March 2017 midnight GMT.

<sup>21</sup> Responses from Professor Liliana Etel Rapallini and ASADIP Argentina (Professor Juan José Cerdeira).

<sup>22</sup> France adds that a tourist is someone who travels for leisure.

<sup>23</sup> Switzerland notes that an implicit definition could be derived from immigration law and would cover a person entitled to visit Switzerland for up to 90 days (absence of a right to stay). It is stressed that this rule has no impact on access to justice.

<sup>24</sup> Response from Association des Consommateurs du Mali (Mrs Coulibaly Salimata Diarra)

<sup>25</sup> Spain does not provide for a uniform provision as tourism policy belongs to the regions (responses from ECC-Spain and FACUA-- *Asociación de Consumidores y Usuarios en Acción*).

her usual environment for less than twenty-four hours, for leisure, recreation and other reasons, and whose activity is not remunerated in the place visited."<sup>26</sup> Portugal seems to be in a comparable situation.<sup>27</sup>

Some countries such as Croatia define the traveller. France observes that a definition of traveller may be found in the new package travel directive.

Finally, some countries offer a definition that is distinct from that of the UNWTO<sup>28</sup>. In Romania, a tourist seems to be a consumer which buys or benefits from a bundle of tourism services. In Cyprus, a tourist is "Any foreigner who resides in Cyprus for a period not exceeding one month". In Israel, a tourist is "a person who entered Israel under a visitor's permit or a permit of transitory stay with an appropriate visa".

### **Provisional definition adopted in this report**

For the purpose of this Report, the UNWTO definition of tourists has been adopted with the important caveat that, unless otherwise stated, a tourist is understood to be a non-national.

The definition of a tourist would be necessary in a potential Hague Convention on Co-operation and Access to Justice for International Tourists, as it would contribute to the definition of its scope of application. A solution would be to adopt as a starting point the UNWTO definition, already known to many countries and which could ensure consistency with the work of the UNWTO. This seems to have been the policy in the Brazilian proposal (Article 2 a)). It is true that the UNWTO definitions are well established. However, they are promulgated for tourism law and policy purposes and, thus, are found precisely there: in Tourism Laws.

The Author notes that the question of these definitions' adequacy, when compared with equally well-established existing legal provisions on access to justice (*lato sensu*), may be raised. Thus, a debate could take place on the extension of the definition. Likely points of contention include whether some categories of tourism defined by their purpose such as business, medical or surrogacy tourism should be included or excluded. If the tourist is seen in this project as a specific consumer deserving added protection, in many jurisdictions the definition of a consumer would exclude business purposes when it comes to international jurisdiction rules or provisions on the applicable law or consumer centres. For example, ECC-France in its response to the questionnaire for non-Members pointed out that they "only deal with consumers so tourists for private purposes, not including business trips for example". As the ECC-Net has been put forward as a potential model by Brazilian literature in respect of the Hague Conference project, the point matters. Consequently, the definition of a tourist for the Hague Conference project will be further considered in the final report, including in and of itself, in relation to other Hague Conventions or projects, and together with national laws on the definition of consumers.

## **2.2 The growing economic importance of tourism in the world**

One of the UNWTO core activities is to regularly compile statistics on tourism. These statistics demonstrate that tourism is today a major category of international trade in services and tourism-related expenditure is still increasing.<sup>29</sup> Almost inevitably, dissatisfaction of tourists will also increase, reinforcing the need to ensure that they have effective access to justice.

<sup>26</sup> Response from Professor Claudia Madrid Martinez.

<sup>27</sup> Response from DECO (Consumers Association). The response from ECC-Portugal does not make any reference to 'legislation' or a 'decree'.

<sup>28</sup> The answer provided by Uruguay indicates that Law No. 19.253, dated 28 August 2014, defines tourism. However, no details are provided (the text of this law is not enclosed, in contrast with another one).

<sup>29</sup> We are far away from the time where a few rich tourists precipitated major developments in private international law in some States such as the Bauffremont Princess or the Patino spouses.

## Overview

According to the latest definitive figures available, i.e. the figures for 2015<sup>30</sup>, “International tourist<sup>31</sup> arrivals have increased from 25 million globally in 1950 to [...] 1186 million in 2015. Likewise, international tourism receipts earned by destinations worldwide have surged from US\$ 2 billion in 1950 to [...] US\$ 1260 billion in 2015. [...] In addition to receipts earned in destinations, international tourism also generated US\$ 211 billion in exports through international passenger transport services rendered to non-residents in 2015, bringing the total value of tourism exports up to US\$ 1.5 trillion, or US\$ 4 billion a day on average. International tourism now represents 7% of the world’s exports in goods and services [...] as tourism has grown faster than world trade over the past four years. As a worldwide export category, tourism ranks third after fuels and chemicals and ahead of food and automotive products. In many developing countries, tourism ranks as the first export sector”<sup>32</sup>.

Tourism now accounts for one in eleven jobs (direct, indirect and induced) and 10% of GDP (in terms of direct, indirect and induced impact)<sup>33</sup>. Its importance beyond economic value may also not be underestimated<sup>34</sup>.

## Key countries in 2015

In terms of international tourist arrivals, the leading countries were (in this order): France, United States of America, Spain, China, Italy, Turkey, Germany, United Kingdom, Mexico, and the Russian Federation<sup>35</sup>. All are Member States of the HCCH.

In terms of international tourism receipts — defined as “expenditure by international visitors on accommodation, food and drink, entertainment, shopping and other services and goods in the destinations”<sup>36</sup> — the top 10 countries were (in this order): United States of America, China, Spain, France<sup>37</sup>, United Kingdom, Thailand, Italy, Germany, and the Special Administrative Regions of the People’s Republic of China (China), Hong Kong SAR, and Macao SAR. All are Member States of the HCCH (both SARs through the People’s Republic of China), except for Thailand, which is a connected State (having ratified two Hague Conventions).

Regarding outbound tourism, the top 10 countries in international tourism expenditure were China, the United States, Germany, the United Kingdom, France, Russian Federation, Canada, Korea (ROK), Italy, and Australia<sup>38</sup>. Again, all are Member States of the HCCH. Other source markets which showed double-digit growth in expenditure in 2015 were: Spain, Sweden, Taiwan, Kuwait, the Philippines, Thailand, Argentina, the Czech Republic, Israel, Egypt, and South Africa. All these States are either Member States (Spain, Sweden, the Philippines, Argentina, the Czech Republic, Israel, Egypt, and South Africa), or connected non-Member States (Kuwait and Thailand).

<sup>30</sup> UNWTO Tourism Highlights, 2016 Edition, published in English in July 2016, <http://www.e-unwto.org/doi/pdf/10.18111/9789284418145>.

<sup>31</sup> International tourists are defined as ‘overnight visitors’ (UNWTO Tourism Highlights, 2016 Edition, op. cit., p. 4).

<sup>32</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p. 2.

<sup>33</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p.3.

<sup>34</sup> On the social importance of tourism, the points made by Members of the UNWTO World Committee on Tourism Ethics in Madeira (Portugal) on 16 June 2007 are still valid: “Tourism has [...] has become the biggest export industry; It is highly labour intensive and one of the biggest employers – especially for women and young people; It consists of more small-, micro- and medium-sized businesses than any other economic sector; It impacts strongly on local farming, fishing, trading (to include handicrafts), and services and the construction industry; It is a key strategy towards poverty-reduction; It plays a critical role in conservation and sustainable development; and It builds bridges of mutual understanding and tolerance between peoples and nations and promotes world Peace” (<http://cf.cdn.unwto.org/sites/all/files/docpdf/madeira-message-2014.pdf>). The Declaration adds that “The impact of tourism goes well beyond its economic value ».

<sup>35</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p.6.

<sup>36</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p. 5

<sup>37</sup> In other words, the “top four places in the ranking by international arrivals and the ranking by receipts are occupied by the same countries, albeit in a different order” (UNWTO Tourism Highlights, 2016 Edition, op. cit., p. 6).

<sup>38</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p.13.

With China and the USA, two Member States were also leading international departures (the top 10 figures are not fully available).

### Diversity of tourism (2015)

Travel for leisure accounted for just over half of all international tourist arrivals in 2015. Around 15% of all international tourists reported travelling for business purposes, and more than 25% travelled for other reasons such as visiting friends and relatives, religious reasons and pilgrimages, health treatment, etc. Most tourists visit destinations within their own region<sup>39</sup>.

### Available data for 2016 and predictions for 2017

According to data currently available data for 2016<sup>40</sup>, international tourist arrivals reached 1235 million. Asia and the Pacific led growth in international tourist arrivals in 2016. "Africa (+8%) enjoyed a strong rebound after two weaker years. In the Americas (+4%) the positive momentum continued. Europe (+2%) showed rather mixed results, with double-digit growth in some destinations offset by decreases in others. Demand in the Middle East (-4%) was also uneven, with positive results in some destinations, but declines in others"<sup>41</sup>. In terms of international tourism expenditure, significant increases were reported during the first three to nine months of 2016 (figures for the whole year are not yet available) from leading source markets as well as a range of other countries<sup>42</sup>.

According to the latest survey of UNWTO's Panel of Experts, the large majority (63%) of the some 300 respondents expected 'better' or 'much better' results for 2017 than in 2016.

### Conclusion

Over the past six to seven decades, tourism has become one of the largest economic sectors in the world. It should continue to grow and the UNWTO forecasts international tourist arrivals to reach 1.8 billion by 2030.<sup>43</sup> Tourism-related expenditure follows the same trend. Almost inevitably, the probability of dissatisfaction of tourists with the goods bought or the services provided will also increase, reinforcing the pressure on States to guarantee effective access to justice. The HCCH appears to be on the frontline of this development because all, or nearly all, key players in international tourism, whether in terms of arrivals / receipts or departures / expenditures, are either Member States or connected non-Member States. Therefore, it appears open to suggest that *prima facie*, there must be a strong interest in a proposal for a convention on the protection of tourists and more precisely their access to justice. Of course, some Members will necessarily have a stronger interest than others in the protection of their nationals abroad, while some (not necessarily others) will have a strong interest in developing or keeping a favourable legal environment for international tourist arrivals. In any event, it seems reasonable to argue that all States, whether connected to the HCCH or not, stand to benefit from increased protection of tourists and access to justice for tourists.

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<sup>39</sup> UNWTO Tourism Highlights, 2016 Edition, op. cit., p. 12. This fact could have an impact on, for example, the languages offered by tourist assistance bodies and the understanding of their complaints cultures.

<sup>40</sup> UNWTO, "Sustained growth in international tourism despite challenges", PR no 17003, 17 Jan 2017, <http://cf.cdn.unwto.org/press-release/2017-01-17/sustained-growth-international-tourism-despite-challenges>. More comprehensive data will be presented in the April 2017 issue of the UNWTO World Tourism Barometer.

<sup>41</sup> UNWTO, "Sustained growth in international tourism despite challenges", PR no 17003, op. cit.

<sup>42</sup> See for details UNWTO, "Close to one billion international tourists in the first nine months of 2016", PR no 16085, 7 November 2016, <http://media.unwto.org/press-release/2016-11-07/close-one-billion-international-tourists-first-nine-months-2016>.

<sup>43</sup> UNWTO Tourism Towards 2030, as per <http://cf.cdn.unwto.org/content/why-tourism>.

### 2.3 Existing literature

Given the economic and social importance of tourism, there are a multitude of tourism-related studies, focusing notably on the tourist as a consumer of services. They come from a variety of sources such as governments (*lato sensu*), academia (tourism studies), private companies or bodies.

The topics studied are themselves extremely diverse and include, besides those covered by the statistics mentioned above, the reasons for travelling abroad (whether on holidays or for a specific purpose such as health services) or for the attractiveness of popular countries of destination, the types of holidays taken and experiences sought, the profile of tourists in a specific destination or from a specific country, the key features of categories of tourists (such as senior tourists) in terms of preferences and behaviour, the profile of 'repeat visitors', the level of expectations according to the country of origin and social class, the attitude to complaints, the perception of tourism and tourist in countries of destination, etc. However, at this stage of the research, it appears that there are, *comparatively*, hardly any specific study on the private international legal aspects of tourism protection in relation to access to justice<sup>44</sup>.

The vast majority of tourism studies seem designed to provide relevant governmental and private organizations with the necessary information to attract and retain tourists. The existing studies are nevertheless indirectly useful to some extent. For example, a global trend is the decrease in the use of all-inclusive package travel. Observers have noticed a "rapid boom in low cost travel among a new generation of consumers who have never used a travel agent for their travel arrangements. Dynamic packaging, which enables consumers to build their own package of flights, accommodation, and a hire car, instead of having to book a predefined package, has further enhanced accessibility and flexibility for the consumer"<sup>45</sup>. European tourists prefer, in their majority, to purchase "their holidays outside of a package, whatever the length of their trip"<sup>46</sup>. More precise data is available for the most popular holiday, that is,

<sup>44</sup> These studies include but are not limited to: Claudia Lima Marques, The Need for a Global Cooperation Network to Protect Foreign Tourists/Consumers and the comeback of Private International Law, in The Permanent Bureau of the Hague Conference on Private International Law / Le Bureau Permanent de la Conférence de La Haye de droit international privé (ed.), A Commitment to Private International Law. Essays in honour of Hans van Loon / Un engagement au service du droit international privé. Mélanges en l'honneur de Hans van Loon, Intersentia (Cambridge, UK), 2013, p. 311 ; Claudia Lima Marques, Los esfuerzos de ASADIP para incluir el tema de la protección del turista en la Agenda de trabajo de la Conferencia de la Laya y la Propuesta de "Convención de cooperación en materia de protección de los visitantes y turistas extranjeros", in CEDEP (ed.), Derecho internacional privado y Derecho de la integración: libro homenaje a Roberto Ruiz Díaz Labrano. 1 ed. Asunción, 2013, p. 293 ; Claudia Lima Marques, Proposta brasileira de convenção sobre cooperação em respeito da proteção dos turistas e visitantes estrangeiros na Conferência de Haia de Direito Internacional Privado: por uma rede de cooperação global para proteger turistas estrangeiros / Brazilian proposal of a convention on cooperation in respect of the protection of tourists and foreign visitor in the Hague Conference on Private International Law: for a global network cooperation to protect the foreign tourists, In: Ministério do Turismo and Ministério da Justiça (ed.), A proteção internacional do consumidor turista e visitante, Brasília, 2014, p. 71 for the Portuguese version and p. 84 for the English version, available at <http://www.justica.gov.br/seus-direitos/consumidor/Anexos/a-protacao-internacional-do-consumidor-turista-e-visitante-2014.pdf>; Claudia Madrid Martínez, "Servicios, turismo y la protección del consumidor: una mirada desde el derecho internacional privado interamericano", in Derecho internacional, mundialización y gobernanza. Jornadas de la ASADIP, Lima, noviembre de 2012, Lima, CIAC, ASADIP, CEDEP, 2012, p. 353, <https://socioedip.files.wordpress.com/2013/12/madrid-servicios-turismo-y-protcccic3b3n-del-consumidor-una-mirada.pdf>; Maria Goretti Sanches Lima, Consumer Traveller's vulnerabilities and travel and tourism contracts: comparative analysis: Brazil and Europe, PhD. ('Dissertation'), Rostock University, 2016 (this PhD. is currently unavailable to the public and we are grateful to the author for having given us access to selected parts of her work); Maria Goretti Sanches Lima, The Supranational Organizations' initiatives aimed at protection of tourists. Why International Conventions are needed?, in Claudia Lima Marques and Dan Wei (ed.) . The future of international protection of consumers, Porto Alegre: PPGD/UFRGS, 2016, p. 94; Hector Valverde Santana and Sophia Martini Vial, "Proteção Internacional do Consumidor e Cooperação Interjurisdicional", Revista de Direito Internacional 2016. 397.

<sup>45</sup> Policy and Practice for Global Tourism, UNWTO, 2011, p. 18, [https://www2.gwu.edu/~iits/Sustainable\\_Tourism\\_Online\\_Learning/Mullis/Policy\\_Practices\\_UNWTO\\_book\\_feb.pdf](https://www2.gwu.edu/~iits/Sustainable_Tourism_Online_Learning/Mullis/Policy_Practices_UNWTO_book_feb.pdf)

<sup>46</sup> European Commission, Flash Eurobarometer 432, "Preferences of Europeans towards tourism", January / March 2016, p. 4, <https://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2016/surveyKy/2065>; see also p. 48: "overall, a majority of respondents prefer purchasing their holidays separately, outside of a package, while all-inclusive holidays are chosen by 20% of respondents or

the one lasting between 4 and 13 consecutive nights<sup>47</sup>: “a relative majority of the respondents (43%) had most often purchased tourist services separately. Just over a quarter of respondents mentioned other (not all-inclusive) types of package travel (26%), while just under a fifth of respondents (19%) had taken an all-inclusive holiday of this length” (idem, p. 53, where strong differences according to the country of residence are noticeable). For short-stay trips, “it appears that nearly half the respondents (48%) had most often purchased tourist services separately [...]. Just under a quarter had most often used other (not all-inclusive) types of package travel (24%), while just over one in ten respondents most often chose an all-inclusive holiday when taking short-stay trips (11%). Finally, almost one in five were unable to answer this question (17%), suggesting that it was a mix of these different solutions”<sup>48</sup>.

This type of information is important. When tourists do not buy a holiday package, it means that they may not benefit from the associated protection<sup>49</sup>, including in terms of redress procedures. For example, they may not be able to access the mediation or arbitration schemes that were established in their respective country to deal with complaints against a travel agent regarding a (bad) tourism experience. Indeed, when tourists buy a holiday package from a travel agent or tour operator who is a member of an association such as the Association of British Travel Agents, the Algemene Nederlandse Vereniging van Reisbureaus (ANVR – Dutch Association of Travel Agents<sup>50</sup>) or the French ‘SETO’ (syndicate of tour-operators) and ‘Les entreprises du voyage’ (association of travel agents)<sup>51</sup>, they may access the dispute resolution scheme set up in their country by this association for complaints against their travel agent or tour operator regarding their tourist experience abroad, thus clearly increasing their chances of access to justice (*lato sensu*). These schemes are useful, even if they may have some limitations. However, since many now travel without using the services of a travel agent or tour operator they do not benefit from this ‘safety net’<sup>52</sup>, hence increasing the need for the Hague Conference project on access to justice for tourists.

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less”. The study was carried out at the request of the European Commission in the 28 Member States, as well as in Turkey, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro and Moldova. More than 30 000 respondents were interviewed in their mother tongue over the phone.

<sup>47</sup> On the fact that it is the most popular, see Flash Eurobarometer 432, op. cit. p. 44, where it is stated that it is followed closely by short-stay trips, i.e. those lasting up to three consecutive nights.

<sup>48</sup> Flash Eurobarometer 432, op. cit., p. 48. Important differences according to the country of residence are again noticeable, with respondents in Denmark and the United Kingdom preferring to purchase tourist services separately, whilst respondents in Malta and Turkey being the most likely to have opted for all-inclusive arrangements: idem, p. 49.

<sup>49</sup> EU substantial law has since relatively long protected tourists who booked their holidays. However, this change of behaviour in the way tourists book their holidays led the EU to revise its 1990 Package Travel Directive (Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJEU, L 158, 23.6.1990, p. 59). In the future, starting 1<sup>st</sup> July 2018, Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJEU, L 326, 11.12.2015, p. 1) will apply. The concept of ‘package’ is clearly broadened in Article 3 and it includes customised packages. However, it still applies to package travel only (and linked travel arrangements for insolvency purposes).

<sup>50</sup> In this hypothesis, the Dutch Foundation for Consumer Complaints Board Travel will have ‘jurisdiction’. We would like to thank here Manuela Gluth, Lecturer in Tourism Studies at Spenden University (Netherlands) for having translated to us the key points of the latest report of this body.

<sup>51</sup> In this hypothesis, Médiation Tourisme et Voyage will have ‘jurisdiction’.

<sup>52</sup> On the recent impact — within the European Union — of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC) on tourism services purchased online, see Silvia Feliu Álvarez de Sotomayor, La resolución de litigios en línea aplicada a la comercialización de servicios turísticos, La Ley Union Europea no 42, 30 November 2016. In accordance with Article 2.1 of the Regulation, the parties must be based in the European Union (consumer resident in the EU and trader established in the EU).

### 3.2 Growing institutional recognition of the need and specificity of tourist protection

The existence of a dedicated tourist protection mechanism in a growing number of countries is an official acknowledgment of the need for tourist protection as well as its specificities due to the distinct weaknesses of tourists. However, there are various degrees of dedication and protection. Some countries offer a dedicated tourist complaint body, whilst other set up hotlines or specific channels for complaints.

#### Existence of a dedicated tourist complaint body (center, mediator or administration)

The latest dedicated tourist complaint body seems to be the South Korean Tourist Complaint Center, which was opened by the official Korean Tourism Organisation (KTO) in mid-October 2016<sup>53</sup>. It offers to help the tourist experiencing “inconveniences while travelling in Korea”<sup>54</sup> through linguistic assistance in English, Japanese and Chinese (with Russian, Malay, Arabic, Indonesian and Thai apparently to come soon<sup>55</sup>), and a variety of channels (including online, phone, email)<sup>56</sup>. The aim is to create an “optimal tourism environment”<sup>57</sup> at a time where tourism in South Korea is booming (according to the KTO, the number of international tourists to Korea doubled in 6 years<sup>58</sup>) and “increasing the number of foreign tourists who make a return visit to Korea is as important as increasing the number of foreign tourists who make their first visits to Korea”<sup>59</sup>. The Complaint Center does not deal with complaints where court proceedings have been instituted, are subject to the investigation of an authority, or are about companies based outside South Korea.

An example of a dedicated tourist mediator<sup>60</sup> (*Defensor del Turista*) may be found in the capital of Argentina (Buenos Aires), where a mediator specialises in dealing with tourist complaints, with the help of legal professionals, bilingual employees and professionals of the tourism sector<sup>61</sup>. Headquarters and several offices are spread throughout the capital, with a physical address (along with a google map), a phone number, and a specific e-mail address. An online form may also be found on the website<sup>62</sup>, which is available in several languages (Spanish, English (U.S.), Portuguese, French and German). Starting the week of the 6 February 2017, information about the tourism mediator is also available at the main airport of the country<sup>63</sup>.

Another example of a tourist mediator is the Tourism Service of the Austrian Federal Ministry for Science, Research and the Economy (*Bundesministerium für Wissenschaft, Forschung und Wirtschaft*). In contrast with the Buenos Aires *Defensor del Turista*, it operates at national level, and is less a physical person than an administration offering mediation services to tourists. Indeed, the Tourism Service aims to be the “central contact point for tourists and partners in the tourism and leisure industries”. Tourists, both from Austria and abroad, as well as companies and authorities may turn to the Tourism Service for information. One of the services offered is “free and impartial mediation in conflicts between travellers and specific businesses of the tourism industry (as in cases of complaints about shortcomings”<sup>64</sup>. A standard complaint

<sup>53</sup> Monday 17 October 2016, as per the press release of the KTO ([http://english.visitkorea.or.kr/enu/AKR/FU\\_EN\\_15.jsp?cid=2434790](http://english.visitkorea.or.kr/enu/AKR/FU_EN_15.jsp?cid=2434790), 14 October 2016).

<sup>54</sup> <https://www.touristcomplaint.or.kr/en/intro>. The press release of the KTO gave the examples of “a case of simple unkindness [or] a more serious issue like overcharging in a taxi or at a shop” ([http://english.visitkorea.or.kr/enu/AKR/FU\\_EN\\_15.jsp?cid=2434790](http://english.visitkorea.or.kr/enu/AKR/FU_EN_15.jsp?cid=2434790), 14 October 2016).

<sup>55</sup> “The national tourism organisation said the Tourist Complaint Center [...] will offer services in Russian, Malay, Arabic, Indonesian and Thai by next year” (Lee Jin-a, South China Morning Post, 9 November 2016, <http://www.scmp.com/news/asia/east-asia/article/2044365/korea-launches-website-foreign-tourist-complaints>). These new languages are not yet reflected in the website of the Complaint Center as of 7 March 2017: see <https://www.touristcomplaint.or.kr/>.

<sup>56</sup> The website is mobile-friendly in order to provide timely assistance.

<sup>57</sup> <https://www.touristcomplaint.or.kr/en/intro>

<sup>58</sup> From 7.5 million in 2009 to 14 million in 2015, [http://kto.visitkorea.or.kr/eng/overview/About/history.kto\\_](http://kto.visitkorea.or.kr/eng/overview/About/history.kto_).

<sup>59</sup> An official at the KTO, as per Lee Jin-a, op. and loc. cit.

<sup>60</sup> [www.defensoriaturista.org.ar](http://www.defensoriaturista.org.ar).

<sup>61</sup> <http://www.defensoriaturista.org.ar/institucional/>.

<sup>62</sup> <http://www.defensoriaturista.org.ar/contacto/>.

<sup>63</sup> <http://www.defensoriaturista.org.ar/la-defensoria-del-turista-portena-extiende-campana-difusion-al-aeropuerto-internacional-ministro-pistarini-ezeiza/>.

<sup>64</sup> <http://www.en.bmwfw.gv.at/Tourism/Seiten/TourismService.aspx>.

form is downloadable online. Identification of the parties (including the number of travellers) is required as well as a presentation of the complaint, whether compensation has been offered (amount and nature, i.e. cash or voucher) and the adequate compensation according to the tourist. The form may be submitted through different channels: e-mail, fax and traditional post. A telephone number<sup>65</sup> is also provided.

In Colombia, a detailed administrative procedure<sup>66</sup> is in place to protect the dissatisfied tourist, who may, within 45 days, complain to a central authority—the *Grupo de Protección al Turista*—about the level of service offered by professionals such as hotels, travel agents, travel guides, car rentals companies, etc. He will have to provide the usual information: name and addresses of the parties as well as a document proving his identity and of course a description of the dispute along with relevant evidence. The complaint may only be submitted in writing, by post. No e-mail or phone number or online form is provided. The authority will investigate the case and, accordingly, impose or not, administrative sanctions, which may ultimately be challenged before the administrative courts after the exhaustion of internal recourses within the administration. It seems however that the procedure is geared towards tourists from the Spanish speaking zone as the relevant webpage is not accessible in any other language. No mediation / conciliation is on the agenda as it appears to be first of all an administrative procedure which aims primarily to sanction the service provider rather than compensate the tourist.

### **Existence of a dedicated tourist hotline or complaint channel**

Some countries offer permanent dedicated hotlines for tourists. For example in Peru, the National Exportation and Tourism Promotion Commission (PROMPERÚ) set up iPerú. This free service offers not only information to tourists, but also “Guidance and counselling when tourist services were not provided according to that offered by the operators, giving users the ideal channel to get their queries and dissatisfactions”.<sup>67</sup> It has offices spread throughout the country, a hotline available on a 24 hours basis, and an e-mail address is provided. The presentation of the service on the website is available in several languages, including French and German. However, it is not known if, in practice, the offices and the hotline offer the possibility to communicate in languages other than English and Spanish, which seem to be the primary languages. Crucially, there does not appear to be any information on the way complaints are handled. The fact that iPerú provides ‘guidance and counselling’ seems to imply that no conciliation / mediation service between the international tourist and the local company complained about is offered.

Some countries offer temporary hotlines, notably at major events, with more or less success. For example, Switzerland offered in 2008 a hotline for Eurofoot. It was operated by the national consumer agency and was hardly used<sup>68</sup>.

In some circumstances, the experience gained from the operation of a tourist hotline seems to have led to the development of a complaint center, as in South Korea (which still operates the hotline in addition to the Complaint Center)<sup>69</sup>.

Several countries offer tourists the possibility to complain through dedicated media, thus testifying to their specific situation. However, there is no indication of any procedure or process following the submission of the complaint, or if advice to the tourist is offered. For example, the Lebanese National Tourism Authority<sup>70</sup> offers tourists the possibility to complain either by e-mail<sup>71</sup> or phone or through a hotline to the Tourist Control Department<sup>72</sup>. However, there

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<sup>65</sup> Available from Monday to Friday, mornings exclusively. However, it is possible to agree on a different time “by telephone arrangement”. The number provided seems to be a normal landphone number, without any added charge.

<sup>66</sup> [http://www.mincit.gov.co/minturismo/publicaciones/15846/proteccion\\_al\\_turista](http://www.mincit.gov.co/minturismo/publicaciones/15846/proteccion_al_turista).

<sup>67</sup> <http://www.peru.travel/iperu.aspx#>

<sup>68</sup> Switzerland, answer to question 6.

<sup>69</sup> The 1330 Korea Travel Hotline which may be contacted by phone but also Skype.

<sup>70</sup> [www.destinationlebanon.gov.lb](http://www.destinationlebanon.gov.lb).

<sup>71</sup> [complaints@destinationlebanon.gov.lb](mailto:complaints@destinationlebanon.gov.lb).

<sup>72</sup> See <http://mot.gov.lb/Contact>. The name of the Department may feel less welcoming than probably intended.



does not appear to be any information on the way complaints are handled and the overall efficiency of the scheme. In India one finds a Travel Trade Division<sup>73</sup> in charge of, notably, “All matters concerning complaints received from tourists”. The contact details of relevant members of staff are provided (e-mails and telephone numbers). However, it is not entirely certain that the above division deals with individual complaints. At least there is no indication of any procedure or process in this respect, such as an e-mail address to send complaints to or an online form, the offer of conciliation / mediation, etc.

Finally, in some countries, it is made clear that the tourist may complain, but that his complaint will not be processed but merely forwarded to the relevant professional. An example is the following webpage of Tourism Thailand<sup>74</sup>. It warns the tourist about its very limited role: “Please note that as a forum of information intended to provide assistance to visitors, Tourism Thailand has no mandate to investigate individual consumer complaints, or jurisdiction over individual operators, industry bodies, government agencies, or regional tourism organizations regarding services or products. If you provide us with information regarding your complaint, we will forward your information to the relevant party and ask that they respond; we also suggest that you contact the service provider that you wish to complain about directly”. The added value of the service offered to tourists seems here quite limited, apart from the ‘official’ recording of the complaint.

### **Part 7 The compatibility of the Hague Conference project with the work conducted in other fora**

(On the UNWTO projects in the general area of protection of tourists)

The UNWTO projects in the general area of protection of tourists originally arose out of “the need for greater protection for travellers in the event of serious disasters”, as highlighted by the severe disruption of the air traffic in Europe following the eruption of the Icelandic volcano in April 2010.<sup>75</sup> At “the height of the crisis, more than one million travellers over the world found themselves stranded far from their homes without the possibility of returning, for periods of up to ten days” and numerous tourists were completely neglected.<sup>76</sup> That same year, in June, the UNWTO Executive Council requested from the UNWTO Secretary-General “a draft document based on the principles of the Global Code of Ethics for tourism and/or any other existing international regulation concerning this issue”<sup>77</sup>. This document, entitled *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, was indeed presented a few months later at the 89<sup>th</sup> session of the Executive Council, in October 2010<sup>78</sup>. It notably recalled the existence of the Global Code of Ethics for Tourism adopted by the UNWTO General Assembly in 1999,<sup>79</sup> whilst pointing out its difficult implementation. The Study went on to analyse the causes of this situation and identified, “**above all**”, the non-binding nature of the GCET which makes governments wary of transposing its principles into national law, fearing that this would lead to distortions in competition and hurt the country’s tourism and enterprises, as such implementation would not be generalized at the worldwide level”<sup>80</sup>. The idea would ultimately lead to the draft UNWTO Convention on Tourism Ethics, which started in 2015 (section 7.2).

<sup>73</sup> <http://tourism.gov.in/travel-trade-division>.

<sup>74</sup> <http://www.tourismthailand.org/Send-Complaint>.

<sup>75</sup> UNWTO, Decisions taken by the Executive Council at its eighty-eighth session, Puerto Iguazú, Argentina, 8 June 2010, document CE/88/DEC, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/088\\_dec.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/088_dec.pdf), p. 2.

<sup>76</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, presented at the 89<sup>th</sup> session of the Executive Council, Kish Island, Iran, 24-26 October 2010, document CE/89/8, August 2010, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089\\_08.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089_08.pdf), no 4.

<sup>77</sup> UNWTO, Decisions taken by the Executive Council at its eighty-eighth session, document CE/88/DEC, op. cit., p. 3.

<sup>78</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, document CE/89/8, op. cit.

<sup>79</sup> Resolution A/RES/406(XIII). The Code is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetbrochureglobalcodeen.pdf>.

<sup>80</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, op. cit., no 3 (expression in bold and underlined in original).

However, the Study then stated that, with the Icelandic volcano crisis, the UNWTO realised the very high level of confusion regarding the “attribution of responsibilities in terms of the obligation to assist tourists in situations of force majeure and regarding rights on compensation for damages they may have suffered”<sup>81</sup>. The solution advocated was a new binding instrument on the rights and obligations of tourists / consumers and travel organisers,<sup>82</sup> with its suggested scope to include package travel and accommodation (Annex II). This idea led to the UNWTO Draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers, which started in 2011 (section 7.1).

Before embarking on the study of these two UNWTO Draft Conventions, it seems important to note that, in its Study, the UNWTO Secretariat listed in Annex I a list of instruments that, at the regional or world level, directly or indirectly, deal with the rights and obligations of tourists and tourist service providers. It observed that “this body of texts leaves important areas in the field of tourism without any regulation” (no 5). From the perspective of the HCCH project, this is all the more true as none of the instruments listed focus on access to justice in a cross-border context at a global level. In other words, subject to further investigation and updating of this background UNWTO work, there does not seem to be a need to examine the work carried outside the UNWTO when examining the compatibility of the Hague Conference project with the work conducted in other fora.

### **7.1 The UNWTO Draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers**

#### **The draft Convention on the Protection of Tourists and rights and obligations of Tourism Service Providers (process)**

After several years of negotiations, the Draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers nears a final stage. The UNWTO General Assembly has requested its Secretary-General to present the final text of the (then termed) Convention on the Protection of Tourists and Tourism Service Providers at its twenty-second session in 2017 for approval<sup>83</sup>. The information provided so far indicates that the project is on track to be presented at this twenty-second session<sup>84</sup>, which will take place in Chengdu, China, from 4 to 9 September 2017<sup>85</sup>.

A characteristic of the process is that the UNWTO was especially careful not to infringe on existing legal structures, either at the global or regional levels, and to minimize potential conflicts. It consequently liaised, among others, with world associations such as IATA (International Air Transport Association) on the subject of air transport or, on the subject of package travel, with the European Union at the time of revision of the original Package Travel Directive, in order to ensure precise consistency with the then upcoming proposal of the revised Package Travel Directive<sup>86</sup>. In the same spirit, a public consultation took place between August and November 2016.

<sup>81</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, op. cit., no 4.

<sup>82</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, op. cit., no 8.

<sup>83</sup> UNWTO, Resolutions adopted by the General Assembly at its twenty-first session, Medellin, Colombia, 17 September 2015, Resolution A/RES/654(XXI) on the report of the Secretary, Part I: Programme of Work, (d) Draft UNWTO Convention on the Protection of Tourists and Tourism Service Providers (4 August 2015, document A/21/8(I)(d)), [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_res\\_final\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_res_final_en_0.pdf).

<sup>84</sup> See *Working Group progresses on the Convention on the Protection of Tourists*, UNWTO Press Release no 17016, 8 February 2017, <http://media.unwto.org/press-release/2017-02-07/working-group-progresses-convention-protection-tourists>.

<sup>85</sup> <http://lmd.unwto.org/event/general-assembly-twenty-second-session-chengdu-china>.

<sup>86</sup> UNWTO, Report of the Secretary-General, Part I: Programme of Work, (d) Draft UNWTO Convention on the Protection of Tourists and Tourism Service Providers, 4 August 2015, submitted to the 22<sup>nd</sup> session of the General Assembly in Medellin, Colombia, 12 – 17 September 2015, document A/21/8(I)(d), no 5, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_08\\_i\\_d\\_draft\\_unwto\\_convention\\_on\\_the\\_protection\\_of\\_tourists\\_and\\_tourism\\_service\\_providers\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_08_i_d_draft_unwto_convention_on_the_protection_of_tourists_and_tourism_service_providers_en.pdf). The UNWTO also asked for the official confirmation of the European Union's competences on any issue covered by the draft Convention

## The draft Convention on the Protection of Tourists and rights and obligations of Tourism Service Providers (contents)

The title of the draft Convention changed overtime, reflecting evolving contents<sup>87</sup>, from *Convention on the Protection of Tourists/Consumers and Travel Organizers* to the current *Convention on the Protection of Tourists and rights and obligations of Tourism Service Providers*<sup>88</sup>, through the *Convention on the Protection of Tourists and Tourism Service Providers*. However, the latest publicly available draft only relates to the Convention on the Protection of Tourists and Tourism Service Providers<sup>89</sup>. The following analysis will therefore be based on the available draft convention as well as any amendments brought to the attention of the author of this report through relevant writings<sup>90</sup>. These amendments seem to be limited to the replacement of the expression force majeure situations by emergency situations (besides the change of title)<sup>91</sup>.

The preamble recalls in particular the need to increase legal certainty for tourists and tourism service providers and the desire to increase the confidence of tourists as consumers in tourism service providers<sup>92</sup>. The general part of the draft convention mostly contains provisions on its scope (notably the fact that it does not apply to standalone transport services), general principles and classical questions relating to the law of treaties (entry into force, amendment rules, denunciation, dispute settlement between States Parties through diplomatic channels or other means of peaceful settlement, etc.). Key definitions are also included in this part. In particular, the tourist is defined as “a person taking a trip which includes an overnight stay to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or placed visited” (Article 3). The substance of the Convention is in reality included in Annexes, which have the same value as the Convention (Article 4).

There are three annexes. The first Annex focuses on force majeure / emergency situations and details the applicable assistance obligations of States Parties (not private tourism service providers). Assistance to tourists includes all basic needs such as shelters, food, facilitating visa requirements, medicine and health care. States Parties have several duties such as facilitating the entry of official, medical and technical staff from the country of origin of tourists. They are invited to set up permanent professional crisis management services (recommended practice).

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<sup>87</sup> For the perspective of a major actor in the tourism industry, which participated in the relevant UNWTO working group, see the European travel agents' and tour operators' associations (ECTAA)'s Activity Report 2015 – 2016, section 1.2 p. 4, <http://www.ectaa.org/files/cms/ad16-182-123.pdf>; Activity Report 2014 – 2015, section 1.3 p. 6 (<http://www.ectaa.org/files/cms/ad15-194-123.pdf>); it initially advocated against the expansion of scope of the draft convention beyond assistance and repatriation to tourists in case of force majeure situations).

<sup>88</sup> UNWTO, Report of the Secretary-General, Part II: General Programme of Work, (a) Implementation of the General Programme of Work 2016-2017, 18 August 2016, submitted to the 104<sup>th</sup> session of the Executive Council in Luxor, Egypt (30 October – 1 November 2016), document CE/104/5(a), no 14 and title of Annex IV, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce104\\_05\\_a\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_2016-2017\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce104_05_a_implementation_of_the_general_programme_of_work_2016-2017_en_0.pdf). In contrast with previous practice, the latest draft of the Convention is not enclosed with this report of the Secretary-General.

<sup>89</sup> It may be found in UNWTO, Report of the Secretary-General, Part II: Implementation of the General Programme of Work, 5 May 2016, submitted to the 103<sup>rd</sup> session of the Executive Council in Malaga, Spain, 9-11 May 2016, document CE/103/5 rev.2, no 4 p. 43, with the 7<sup>th</sup> draft text starting p. 45, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce103\\_05\\_implementation\\_general\\_programme\\_of\\_work\\_rev2\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce103_05_implementation_general_programme_of_work_rev2_en_0.pdf).

<sup>90</sup> Maria Goretti Sanches Lima, *The Supranational Organizations' initiatives aimed at protection of tourists. Why International Conventions are needed?*, in Claudia Lima Marques and Dan Wei (ed.) . *The future of international protection of consumers*, Porto Alegre: PPGD/UFRGS, 2016, p. 94. The author is Executive Vice-President of IFTTA (International Forum of Travel and Tourism Advocates), which worked closely with the UNWTO on this project.

<sup>91</sup> Maria Goretti Sanches Lima, *The Supranational Organizations' initiatives aimed at protection of tourists. Why International Conventions are needed?*, op. cit., paragraph 4.3.1 p. 100.

<sup>92</sup> The latter may have contributed to the feeling of redundancy with the Hague Conference project in some quarters as the Hague Conference project proceeds from the same spirit, albeit on a different topic (access to justice).

Annex II relates to Package Travel issues, which include pre-contractual or contractual information obligations, alteration of the price of other package travel contract terms, failure of performance or improper performance, assistance obligation in case of force majeure, protection for insolvency of the organiser.

Annex III on accommodation related provisions focuses mainly on (pre-contractual and contractual) information obligations, failure of performance or improper performance and assistance obligation in case of force majeure.

The annexes tend to be quite detailed and contain recommended practices based on current best practices. They will undoubtedly increase the protection of tourists and clarify the rights and obligations of tourism service providers.

However, no provision relates to access to justice (*lato sensu*) save in an ancillary way: "Recommended Practice. States Parties should take the necessary measures to ensure that the package travel contract includes [...] e) Information on available complaint procedures and on alternative dispute resolution mechanisms" (Article 4.3 of Annex II on Package Travel Issues). It could help with the lack of information often faced by tourists. However, the impact of this provision would be limited to package travel, in the countries where the UNWTO Convention has been ratified and where recommended practices are followed. Furthermore, it is not clear whether the duty to provide information on alternative dispute resolution mechanisms also implies setting them up in case they do not exist in the first place. In all likelihood, it does not cover the question of efficiency and quality of the said alternative dispute resolution mechanisms. Finally, the provision covers access to justice *lato sensu* (ADR) but does not address the lack of information regarding access to justice *stricto sensu*.

There are also several provisions on the need to provide information on *internal* complaint procedures (internal to the tourism service provider), for example in Article 2. 1 c), f) and h) on (standard) pre-contractual information obligations in accommodation contracts (Annex II).

In brief, none of the provisions of the draft convention under consideration overlaps or is incompatible with the The Hague Conference project as currently expressed in the Brazilian proposal<sup>93</sup>. This should hopefully alleviate the concerns expressed by one Member State<sup>94</sup> in relation to the HCCH project. This Member State put forward arguments that show that these reserves are probably based on a misunderstanding, which is the multiplication of work on closely related topics in different fora and the confusion that could ensue. The work carried out by the HCCH does not seem to overlap, nor does it appear to be incompatible, with that of the UNWTO, especially the work referred to by that Member State, that is, the Draft Convention on the Protection of Tourists. The projects are complementary<sup>95</sup>. Moreover, contact has been

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<sup>93</sup> We do not have access to the latest draft, only to the latest publicly available draft as posted on the UNWTO website. However, there is little reason to believe that the draft convention has been completely re-vamped given the lack of fundamental changes in years (one may for example compare the 3rd and 7th drafts, i.e. the 2013 and 2016 versions, from the perspective of the Hague Conference project) and the fact that no information on any major change in the draft convention may be found in the August 2016 report of the UNWTO Secretary-General (document CE/104/5(a), *op. cit.*) and the 2017 UNWTO press release on this project (see *Working Group progresses on the Convention on the Protection of Tourists*, UNWTO Press Release no 17016, *op. cit.*). A request for the latest drafts in circulation of both UNWTO Conventions has been made early March 2017 following the exchange of letters between the Hague Conference and the UNWTO. However, given the need to ensure the circulation of this report before the meeting of the General Council of the Hague Conference, the report was compiled before the UNWTO could reply. Follow-up is therefore obviously on the agenda in order to be able to reach a definitive conclusion in the final report.

<sup>94</sup> Response to the questionnaire, *in fine*.

<sup>95</sup> The Member State also mentions the new EU travel package directive in order to support its reserves to the Hague Conference project. It is submitted that this directive does not deal with access to justice, save in an ancillary manner (necessity to mention available recourses in the contract). A clear parallel exist here with the UNWTO draft Convention (Annex II) since the EU directive inspired the UNWTO draft convention. The equivalent of the Hague Conference project in the EU would be the work carried out notably by the ECC-Net and related procedures such as the European Small Claims Procedure. They neither overlap nor are incompatible with the EU travel package directives but complement them in the field of access to justice. One should add that despite expressing strong reserves to the Hague Conference project on the previously mentioned grounds, France recognises that some improvements could be useful, namely the accessibility of

made between the two institutions in order to precisely rule out any possible overlap or incompatibility<sup>96</sup>.

## 7.2 The UNWTO Draft Convention on Tourism Ethics

### The Global Code of Ethics for Tourism (presentation and implementation record)

The UNWTO General Assembly adopted a Global Code of Ethics for Tourism in 1999<sup>97</sup>. It includes an article 8, entitled 'Liberty of tourist movements', whose paragraph 2 states that "Tourists and visitors [...] should benefit from prompt and easy access to local administrative [and] legal [...] services". However, the Code is a non-binding instrument and its practical impact relies on the good-will of interested parties.

Surveys on the implementation of the Code have been carried out since 2000 in order to assess the degree of its implementation<sup>98</sup>. The 2004 survey — i.e. five years after the adoption of the Ethics Code — revealed that several UNWTO Member States had either incorporated the principles of the Code into their legislative texts or used them as a basis when establishing national laws and regulations. However, the outcome of the survey was also deemed to be disappointing, notably because the survey "failed to mobilize one third of the [UN]WTO member States and territories, some of them of considerable importance -current and prospective- in the international tourism scene" <sup>99</sup>. Furthermore, the participation of the private and operational sector was very poor<sup>100</sup>.

In 2010, a study from the UNWTO Secretariat did not prove more optimistic. It stated that too few professionals and even administrations were aware of the Code; that it had hardly been transposed into law; that its overall effectivity remained limited and that the dispute settlement mechanism it instituted was little-used<sup>101</sup>.

The UNWTO has been working hard ever since on enhancing the implementation status of the Code of Ethics. For example, in 2011, it formulated a Private Sector Commitment to the Global Code of Ethics for Tourism, for the signature of private enterprises worldwide. In signing the commitment, companies pledge to uphold the Code and to report on its promotion and implementation to the World Committee on Tourism Ethics<sup>102</sup>. In reality, there is no obligation of results, only an obligation of conduct: the formula used in the template provided is that the "company / organization shall *endeavour* to adhere to the *principles* of the UNWTO Global Code of Ethics for Tourism"<sup>103</sup>. As of February 2017, 499 companies and associations from around

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the information provided to tourists (which should be offered in languages other than French) and the development of visio-conferences for parties based abroad.

<sup>96</sup> See *infra*.

<sup>97</sup> Resolution A/RES/406(XIII). The Code is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetbrochureglobalcodeen.pdf>.

<sup>98</sup> The Implementation Reports on the Global Code of Ethics for Tourism are available at <http://ethics.unwto.org/en/content/implementation-reports-global-code-ethics-tourism>.

<sup>99</sup> Report on the WTO Survey on the Implementation of the Global Code of Ethics for Tourism, presented to the UNWTO General Assembly in 2005, A/16/20 Add.1, <http://ethics.unwto.org/sites/all/files/docpdf/2005a-16-20add1.pdf>, p. 10. Moreover, several responding countries did not disseminate the Code nor planned to do so.

<sup>100</sup> *Ibidem*.

<sup>101</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, presented at the 89<sup>th</sup> session of the Executive Council, Kish Island, Iran, 24-26 October 2010, document CE/89/8, August 2010, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089\\_08.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089_08.pdf), no 2.

<sup>102</sup> Established in 2004 and reformed in 2011, the World Committee on Tourism Ethics is the body responsible for interpreting, applying and evaluating the provisions of the UNWTO Global Code of Ethics for Tourism (see UNWTO General Assembly resolution A/RES/607(XIX) of 2011, <http://cf.cdn.unwto.org/sites/all/files/docpdf/protocolofimplementationwcteres6072011en.pdf>). The nine members of the Committee for the 2013-2017 period were appointed in 2013 in their personal capacity. The Committee is currently chaired by P. Lamy, previously the World Trade Organisation Director-General. Its permanent secretariat is in Rome, Italy.

<sup>103</sup> The italics are from us. A template of the Private Sector Commitment is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/commitmentgcetprivatesectoren.pdf>. It is noteworthy to point

the world have signed this 'commitment'<sup>104</sup>. However, this is a self-proclaimed adherence to the Code. In order to partially address the issue, the UNWTO and its World Committee on Tourism Ethics launched in 2016 the UNWTO Ethics Award, which recognizes companies committed to making their business more responsible and sustainable through the implementation of the Global Code of Ethics for Tourism<sup>105</sup>.

### The UNWTO Draft Convention on Tourism Ethics (rationale and process)

Nevertheless, the non-binding character of the Code came to be seen as a core weakness. It was identified by the UNWTO Secretariat at the main cause for its poor implementation record: "**above all**, the non-binding nature of the [Code] which makes governments wary of transposing its principles into national law, fearing that this would lead to distortions in competition and hurt the country's tourism and enterprises, as such implementation would not be generalized at the worldwide level"<sup>106</sup>.

This analysis was shared by the UNWTO World Committee on Tourism Ethics and, consequently, the conversion of the Ethics Code into a binding instrument advocated: "The voluntary nature of the Code of Ethics itself is possibly one of the decisive factors explaining the so far moderate level of application of the ethical principles by NTAs [National Tourism Authorities], as well as the reluctance to report relevant implementation actions undertaken in this field. The World Committee on Tourism Ethics has therefore [...], in consultation with the UNWTO Secretariat, entrusted the Legal Adviser with the preparation of a proposal for converting the Code into a legally-binding international convention"<sup>107</sup>. This conclusion was reached by the said Committee at its meeting of 26-27 May 2015 and the text of the draft convention, along with an invitation to endorse it, was submitted to the UNWTO General Assembly at its twenty-first session in September 2015<sup>108</sup>. The General Assembly decided the creation of a special Working Group on the topic and expressed the wish for a convention to be adopted at its twenty-second session in 2017<sup>109</sup>. The latter will take place in Chengdu, China, from 4 to 9 September 2017<sup>110</sup>.

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out that the template provided does not mention Article 8.2, only Articles 2, 3, 5, 6, and 9. This is understandable given the targeted public.

<sup>104</sup> According to <http://ethics.unwto.org/content/private-sector-commitment-unwto-global-code-ethics-tourism> [last accessed on 28 February 2017]. For an illustration, see *Viajes El Corte Inglés commits to Global Code of Ethics for Tourism*, UNWTO, Press Release no 17013, 3<sup>rd</sup> February 2017, <http://media.unwto.org/press-release/2017-02-09/viajes-el-corte-ingles-commits-global-code-ethics-tourism>.

<sup>105</sup> UNWTO, Press Release no 16050, 16 June 2016, <http://media.unwto.org/press-release/2016-06-16/unwto-and-world-committee-tourism-ethics-launch-unwto-ethics-award>. For an illustration, see *Ilunion Hotels receives UNWTO Ethics Award*, UNWTO Press Release no 16095, 21 November 2016, <http://media.unwto.org/press-release/2016-11-21/ilunion-hotels-receives-unwto-ethics-award>.

<sup>106</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, document CE/89/8, op. cit., no 3 (expression in bold and underlined in original). See also UNWTO Secretary-General's Report on the World Committee on Tourism Ethics (Part II), presented to the Nineteenth session of the UNWTO General Assembly in October 2011 (A/19/14 (II), August 2011, [http://cf.cdn.unwto.org/sites/all/files/pdf/a19\\_14\\_wcte\\_part\\_2\\_e.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a19_14_wcte_part_2_e.pdf)), no 5 in fine: "In the longer term, it might be convenient to reflect upon the possibility to adopt the Code under the form of a convention".

<sup>107</sup> Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015, Addendum 1, Implementation of the Global Code of Ethics for Tourism (A/21/10 Add.1, 30 July 2015, <http://cf.cdn.unwto.org/sites/all/files/docpdf/a2110reportoftheworldcommitteontourismethicsadd1en0.pdf>), no 13. This document reports on the latest survey carried out (2014/15). No 13 concludes Part II on the implementation of the Ethics Code by UNWTO Member States. However, the transformation of the Ethics Code into a binding instrument should have consequences for the private sector, notably in the countries which rely on the private sector for the implementation of the Code (see no 8).

<sup>108</sup> Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015 (A/21/10, 30 July 2015, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_10\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_10_report_of_the_world_committee_on_tourism_ethics_en.pdf)), no 12 ff.

<sup>109</sup> Resolution A/RES/668(XXI), <http://cf.cdn.unwto.org/sites/all/files/docpdf/a2res667668669xxien.pdf>: "5. Expresses the wish that a convention can be adopted, after an in-depth consultation among the Member States, by the General Assembly during its twenty-second session in 2017".

<sup>110</sup> <http://imd.unwto.org/event/general-assembly-twenty-second-session-chengdu-china>.

### The UNWTO Draft Convention on Tourism Ethics (contents)

The publicly available Draft UNWTO Convention on Tourism Ethics<sup>111</sup> reproduces the nine substantial principles of the existing Ethics Code in Articles 1 to 9. The Chair of the World Committee on Tourism Ethics confirmed on 6<sup>th</sup> March 2017 that the draft Convention on Tourism Ethics only consists in an ‘upgrade’ of the current Ethics Code to a traditional international convention, i.e. a binding instrument, and that what has already been agreed by the UNWTO Members with the Code of Ethics is not changed<sup>112</sup>. Hence, Article 8.2 of the draft states that “Tourists [...] should benefit from prompt and easy access to local administrative [and] legal [...] services”. There is no change in comparison to the existing Article 8.2 of the Ethics Code<sup>113</sup>, save for the fact that Article 8.2 of the Convention would be legally binding on State Parties. Some innovation may be found in Articles 10 to 15 of the Draft Convention. However, no article elaborates specifically on Article 8.2. Most articles relate to the World Committee on Tourism Ethics (composition, function, functioning and rules, respectively Articles 11 to 14). Article 15 relates to the Assembly of States Parties (to the convention). Only Article 10 has any direct relation with Article 8.2, as it considers the ‘Obligations of the State Parties under the Present Convention’. However, the wording leaves a wide margin of discretion to State Parties and does not impose on them any strong legal obligation, let alone on access to justice. Article 10 is reproduced here for the convenience of the reader:

“States Parties to the present Convention

- (a) expressly accept the principles embodied in the Global Code of Ethics for Tourism, and agree to use them as a basis when establishing their national laws and regulations and to publish and make them known as widely as possible, in particular by disseminating it among all the stakeholders in tourism development and inviting them to give it broad publicity;
- (b) encourage tourism enterprises and bodies to include the relevant provisions of the Convention in their contractual instruments or to make specific reference to them in their own domestic or professional rules and to report on them to the World Committee on Tourism Ethics;
- (c) pledge to periodically submit a report to the World Committee on Tourism Ethics concerning the implementation of the Convention”.

### The optional protocol on Conciliation mechanism for the settlement of disputes

The *optional* protocol on Conciliation mechanism for the settlement of disputes is annexed to the Draft Convention. Prima facie, it does not seem to apply to individual tourists in their access to justice. According to provision (a), “Any party to a dispute opposing two or several States Parties to the present Protocol, or a State Party and two or more stakeholders in tourism development or two or more stakeholders of tourism development having the nationality of a State Party or if the dispute concerns incidents having taken place on the territory of a State Party against each other and concerning the interpretation or application of the UNWTO Convention on Tourism Ethics, may refer it to the World Committee on Tourism Ethics”. A stakeholder in tourism development seems, prima facie, to mean a member of the tourist industry. However, the protocol elaborates on Article 10.3 of the Ethics Code and the Procedures for consultation and conciliation for the settlement of disputes concerning the application of the Code of Ethics for Tourism<sup>114</sup>. Provision no 1 of these procedures states that “In the event of a dispute concerning the interpretation or application of the Global Code of

<sup>111</sup> Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015, Addendum 2, Draft UNWTO Convention on Tourism Ethics (A/21/10 Add.2, 30 July 2015, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_10\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_add\\_2\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_10_report_of_the_world_committee_on_tourism_ethics_add_2_en_0.pdf)), p. 8 ff.

<sup>112</sup> Interview of P. Lamy, Chair of the World Committee on Tourism Ethics, released on 6<sup>th</sup> March 2017 (the link is available on <http://media.unwto.org/press-release/2017-02-23/unwto-advances-conversion-code-ethics-international-convention>, which makes a renvoi to <https://www.youtube.com/watch?v=p4RDiyGjKNO>), at 1.36 and 1.45.

<sup>113</sup> The word ‘visitor’ disappeared. However, no practical impact is foreseen.

<sup>114</sup> Adopted by the World Committee on Tourism Ethics in October 2004 (WCTE/DEC/4(II)) and endorsed by UNWTO General Assembly resolution A/RES/506(XVI) of December 2005, <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetpassportglobalcodeen.pdf>.

Ethics for Tourism, two or more stakeholders in tourism development may jointly submit the matter of such a dispute [...] to the World Committee on Tourism Ethics". Interestingly, these procedures, in footnote 1, define the stakeholder in tourism development in the broadest way possible and it includes tourists: "For the purpose of the Code, the term "stakeholders in tourism development" includes: national governments; local governments with specific competence in tourism matters; tourism establishments and tourism enterprises, including their associations; institutions engaged in financing tourism projects; tourism employees, tourism professionals and tourism consultants; trade unions of tourism employees; travelers, including business travelers, and visitors to tourism destinations, sites and attractions; local populations and host communities at tourism destinations through their representatives; other juridical and natural persons having stakes in tourism development including non-governmental organizations specializing in tourism and directly involved in tourism projects and the supply of tourism services"<sup>115</sup>.

The optional protocol on Conciliation mechanism for the settlement of disputes annexed to the Draft Convention does not contain such definition. Therefore, we do not know if it will cover individual tourists. However, since it uses the same term it may well do so.

The protocol requires the Chair of the World Committee on Tourism Ethics to appoint a sub-committee of three members in order to examine the dispute referred to it. A decision will be reached within three months and recommendations to the parties suitable to form the basis of a settlement made. If the parties have failed within two months to agree on the terms of a final settlement, one of them may refer the dispute to a plenary session of the World Committee on Tourism Ethics (minus the members that served on the sub-committee). The Committee shall take its decision within three months. It is noteworthy to point out that States may declare that they accept in advance "as binding or subject to exequatur the final conclusions of the World Committee on Tourism Ethics in disputes to which their nationals are party or which should be applied in their territory" (provision (i)). Likewise, "(j) Tourism enterprises and bodies may include in their contractual documents a provision making the final conclusions of the World Committee on Tourism Ethics binding in their relations with their contracting parties" (provision (j)).

The draft protocol seems therefore closer to the Hague Conference project than the draft Convention itself. However, we can already identify reasons to foresee complementation, among others, the legal regime applicable to mediation, or the assistance for individual tourists<sup>116</sup>. More fundamentally perhaps, it is difficult to see how the nine members of the Committee would be able to deal with any dispute which may be referred to them from around the globe, even with the help of the current three alternate members, especially since the resolution of disputes is not their only activity. We note that the dispute resolution record of the previous World Committee on Tourism Ethics was deemed to be limited in the words of the UNWTO Secretary-General himself: "nearly eight years after its formation, it has become increasingly clear that the [World Committee on Tourism Ethics] continues to be far from achieving its expected goals. [...] the conciliation procedures for the settlement of disputes established by the Committee have not proven to be a success"<sup>117</sup>. The view is shared in legal literature<sup>118</sup>. It may also prove difficult to solve disputes involving tourists on the sole basis of the Code of Ethics, with the Chair of the World Committee on Tourism Ethics confirming on 6<sup>th</sup>

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<sup>115</sup> We underline.

<sup>116</sup> There is no right per se of financial assistance for individual tourists in case of a hearing for example. Would all individual tourists be able to travel to Rome, Italy, for this purpose? Subsidiarily, would modern distance communication methods be available at little or no cost?

<sup>117</sup> Report on the World Committee on Tourism Ethics (Part II), presented to the Nineteenth session of the UNWTO General Assembly in October 2011 (A/19/14 (II), August 2011, [http://cf.cdn.unwto.org/sites/all/files/pdf/a19\\_14\\_wcte\\_part\\_2\\_e.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a19_14_wcte_part_2_e.pdf)), no 3. Consequently, a reform of the function of the Committee was suggested (compare no 7 and 12-13).

<sup>118</sup> Michael G. Faure and I Made Budi Arsika, "Settling Disputes in the Tourism Industry: The Global Code of Ethics for Tourism and the World Committee on Tourism Ethics", Santa Clara Journal of International Law 2015. 375, spec. p. 406 and p. 409: "The Committee only dealt with one case in dispute resolution, and moreover, the outcome of the case is unknown". The independence of the former members of the Committee seems to have been a factor in the unsuccess of its dispute resolution work (see p. 410).



March 2017 that the draft Convention on Tourism Ethics will not be detailed<sup>119</sup>. In brief, the draft protocol is probably a useful tool. However, it appears that there may be other ways in which dispute resolution for tourists could be approached in ways that complement the draft protocol by the UNWTO (by contrast perhaps with other categories of would-be parties).

## Conclusion

The HCCH draft proposal appears to have the potential to complement and strengthen the tourist protection measures that are being developed by the UNWTO. Moreover, these measures could benefit from the long-standing and successful experience of the Organisation in drafting international conventions on cross-border matters and supporting their implementation<sup>120</sup>. It could complement the conversion of the Ethics Code into a binding instrument by elaborating on its Article 8.2 in a truly meaningful — i.e. practical and tourist-friendly — way. Therefore, properly designed, the work of the Hague Conference on Cooperation and Access to Justice for International Tourists could complement the work of the UNWTO. It is worth mentioning that most countries members of the UNWTO Working Group on the Convention on Tourism Ethics<sup>121</sup> are also Hague Conference Members and that none, in the response to the questionnaire for Members received up to 7<sup>th</sup> March 2017 included, raised the possibility of incompatibility or duplication with the Hague Conference project<sup>122</sup>.

### 7.3 Provisional conclusion

The UNWTO Draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers and Draft Convention on Tourism Ethics do not appear, at this stage, to overlap or be incompatible with the Hague Conference project. On the contrary, the Hague Conference project seems to complement the broader agenda of the UNWTO, in particular the desire to increase the confidence of tourists as consumers in tourism service providers highlighted in the preamble of the UNWTO Draft Convention on the Protection of Tourists, as well as the long-term objective of sustainable tourism<sup>123</sup>. However, revision of the UNWTO Draft Conventions is still underway. In order for a definitive assessment to be made on the compatibility of the Hague Conference project with the work conducted in the UNWTO, the final text of these conventions will have to be known. The two UNWTO projects started at different times but both seem to have now reached a final stage since the Conventions should be presented for consideration and possible adoption at the UNWTO General Assembly (Twenty-

<sup>119</sup> Interview of P. Lamy, Chair of the World Committee on Tourism Ethics, released on 6<sup>th</sup> March 2017 (the link is available on <http://media.unwto.org/press-release/2017-02-23/unwto-advances-conversion-code-ethics-international-convention>, which makes a renvoi to <https://www.youtube.com/watch?v=p4RDiyGjKNQ>), at 2.03.

<sup>120</sup> By contrast, the draft Convention on Tourism Ethics would be the first one concluded within UNWTO: “the Convention would represent an important step for UNWTO [...] as it would be the first international treaty of the Organization” (see *UNWTO advances the conversion of the Code of Ethics into an international Convention*, UNWTO, Press release no 17026, 6 March 2017, <http://media.unwto.org/press-release/2017-02-23/unwto-advances-conversion-code-ethics-international-convention>).

<sup>121</sup> UNWTO, Report of the Secretary-General, Part II: General Programme of Work, (a) Implementation of the General Programme of Work 2016-2017, 18 August 2016, submitted to the 104<sup>th</sup> session of the Executive Council in Luxor, Egypt (30 October – 1 November 2016), document CE/104/5(a), Annex V Report of the Working Group on the UNWTO Convention on Tourism Ethics, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce104\\_05\\_a\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_2016-2017\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce104_05_a_implementation_of_the_general_programme_of_work_2016-2017_en_0.pdf): Chad, Democratic Republic of Congo, Morocco, Republic of Congo; Brazil, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Puerto Rico; Bhutan, China, Indonesia, Japan, Macao China, Philippines, Samoa, Sri Lanka, Thailand; Azerbaijan, Bulgaria, Cyprus, Flanders, the Former Yugoslav Republic of Macedonia, France, Greece, Hungary, Israel, Montenegro, Poland, Portugal, Russian Federation, Slovenia, Turkey; Egypt.

<sup>122</sup> The question was not asked explicitly but could be deemed to be included in Question 20 and on another UNWTO project a Member spontaneously raised the issue of possible duplication with the Hague Conference project: see the word of caution issued by France in relation to the UNWTO draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers.

<sup>123</sup> 2017 has been declared by the United Nations as the International Year of Sustainable Tourism for Development (see *International Year of Sustainable Tourism for Development 2017 kicks off*, UNWTO Press release no 17007, 19 January 17, <http://media.unwto.org/press-release/2017-01-19/international-year-sustainable-tourism-development-2017-kicks>).

second session) in Chengdu, China on 4 September 2017<sup>124</sup>. More information should be made publicly available at the next meeting of the UNWTO Executive Council in May 2017 in Madrid (105th session). Furthermore, contact with the UNWTO has been initiated and the latter has already shown interest in developing co-operation between the Hague Conference and the UNWTO with a view to avoiding any waste of resources<sup>125</sup>. Therefore, the Hague Conference will have to follow the progress made on the UNWTO Draft Conventions. Steps have already been taken to ensure this is the case, and more generally to start a productive and successful working relationship between both international organisations for the benefit of tourists<sup>126</sup>. Given the timeline of the Hague Conference project, it is expected that the final report will be in a position to provide a definitive assessment on the compatibility of the Hague Conference project with the work conducted in the UNWTO.

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<sup>124</sup> Regarding the Draft Convention on Tourism Ethics, see *UNWTO advances the conversion of the Code of Ethics into an international Convention*, UNWTO, Press release no 17026, 6 March 2017, <http://media.unwto.org/press-release/2017-02-23/unwto-advances-conversion-code-ethics-international-convention>. Regarding the Draft Convention on the Protection of Tourists and the rights and obligations of Tourism Service Providers, see *Working Group progresses on the Convention on the Protection of Tourists*, UNWTO Press Release no 17016, op. cit.

<sup>125</sup> Letter of the UNWTO Executive Director for Programme and Coordination to the Secretary-General of the Hague Conference, dated 20 February 2017.

<sup>126</sup> Letter from the Hague Conference to the UNWTO Executive Director for Programme and Coordination and Executive Director for Competitiveness, External Relations and Partnerships, dated 6<sup>th</sup> March 2017.

**Annexes**

Questionnaire of December 2016 relating to the Proposal concerning a Draft Convention on Co-operation and Access to Justice for International Tourists (Questionnaire for Members, Connected States and 5 other States)

Questionnaire of January 2017 relating to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (Questionnaire for non-Members)



Questionnaire of December 2016 relating to the Proposal concerning  
a Draft Convention on Co-operation and Access to Justice  
for International Tourists

## INTRODUCTION TO THE QUESTIONNAIRE

At its meeting of 9-11 April 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Agenda.<sup>127</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. The work was to be done by an expert, hired by the Permanent Bureau, and financed by Brazil.<sup>128</sup>

Through a competitive, merits-based selection process, the Permanent Bureau hired the services of Mr Emmanuel Guinchard, a legal academic currently working in the United Kingdom who specialises in Private International Law and Comparative and International Civil Procedure.<sup>129</sup>

Mr Guinchard is currently conducting a preliminary background research on the topic of Co-operation and Access to Justice for International Tourists with a view to begin an assessment as to whether a new international treaty (i.e., a new Hague Convention) or other instrument should be developed in order to strengthen tourists' and visitors' access to justice.

The Permanent Bureau invites Members to answer the following questionnaire in order to obtain further information on legislation and to assess the need for and feasibility of an international instrument in this area. Your responses to this Questionnaire would be a valuable contribution to the current assessment.

The Permanent Bureau kindly requests that your answers be submitted (in either English or French) as soon as possible, but in any case by 28 February 2017. The responses to the Questionnaire will be analysed, and the findings are to be included, to the greatest extent possible, in the briefings submitted to the 2017 Meeting of the Council.

Responses should be sent by e-mail to M. Guinchard at <tourism@hcch.nl>,mailto: with the following heading and indication in the subject field: "Questionnaire on Co-operation and Access to Justice for International Tourists— [name of Member]." with the following heading and indication in the subject field: "Questionnaire on Co-operation and Access to Justice for International Tourists— [name of Member]."

Should you wish to provide any additional information in respect of this questionnaire you are welcomed to do so, notably by attaching extra sheets, if necessary.

Should you have any questions about this Questionnaire, please do not hesitate to contact M. Guinchard, at <tourism@hcch.nl>.

We are grateful for your time and assistance on this important project.

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<sup>127</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R Number 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>128</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R Number 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>129</sup> Some of Mr Guinchard's publications can be found at <<https://northumbria.academia.edu/emmanuelguinchard>>.

**IDENTIFICATION**

Name of Member:

For follow-up purposes:

Name and title of contact person:

Name of Authority / Office

Telephone number:

E-mail address:

**PUBLICATION OF RESPONSES**

The Permanent Bureau intends to publish the responses to this questionnaire on the HCCH website. Your response will be published in this manner unless, and to the extent that, you explicitly object to your response being so published

**Part I Definition**

1. What is the definition of a tourist<sup>130</sup> and / or visitor<sup>131</sup> in your legal system, if any?
2. What is the definition of a consumer in your legal system, if any?

**Part II Legislation****International Agreements** (including Regional Agreements)

3. Please briefly describe the main international source of law for access to justice<sup>132</sup> in your country (e.g. an international convention on human rights), if any, and whether it applies to tourists in the same conditions as nationals?
4. Is your country a party to an international agreement with provisions on the protection of tourists, and/or access to justice (applied to tourists in the same conditions as nationals e.g. the Hague 1980 Convention on Access to Justice)?

**National legislation and case-law**

5. Please briefly indicate the main domestic source of law (including statute or case-law) for access to justice in your country (e.g. a constitutional provision) and whether it applies to tourists in the same condition as nationals?

**Part III Information**

6. Are tourists, and more generally foreign consumers, specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures (in particular the small claims procedure, consumer mediation / conciliation and consumer arbitration), and how?
7. Is this information available in multiple languages? If so, to which extent and in which languages?
8. Have your nationals approached your consulates abroad seeking information on legal remedies and / or available consumers' complaint procedures in the visited country? Do you have any figures or other information to share in this respect?

**Part IV Mediation, conciliation and arbitration**

9. Is mediation / conciliation / arbitration available for tourists and / or consumer claims in your country? Please briefly describe it (source of law, scope of application, compulsory or voluntary nature of mediation / arbitration, existence of a specific consumer mediation / arbitration scheme or not, funding / cost, legal representation, control by the courts, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.
10. Is the physical presence of the parties required or modern communication technologies available?

**Part V Court proceedings**

11. Is there a small claims court and / or procedure in your country? If it is the case, please briefly describe it (source of law, composition, location, jurisdiction, etc.) and state whether tourists have access to it in the same conditions as national consumers.
12. Is there any court or procedure specifically dedicated to tourists or foreign consumers? If it is the case, please briefly describe it.

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<sup>130</sup> Unless otherwise specified, for the purpose of this Questionnaire, a 'tourist' is understood to be a non-national.

<sup>131</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to 'tourist' is understood to encompass a reference to visitor, including short- and long-term visitors.

<sup>132</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to 'justice' is understood to refer to 'civil justice' (as opposed to 'criminal justice').

13. Can you commence proceedings from abroad?
14. Do tourists have access to general judicial procedures (i.e. outside the small claims system, where available) in the same conditions as national consumers? If not, please state where the differences lie (e.g. caution judicatum solvi)?
15. Is court-annexed mediation available in your country? Is it compulsory? Are tourists in the same situation as nationals in this respect (e.g. have access to free legal advice where necessary)?
16. Are tourists required to express themselves in the language of the court or does the court accept foreign languages and which one(s)?
17. Are hearings compulsory in your legal system, especially for small claims procedures? Should this be the case, may they be conducted, or continued to be conducted, from abroad, or is the physical presence of the tourist compulsory?

#### **Part VI Assistance**

18. Is there any administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers / consumers in relation to access to justice or mediation / conciliation/ arbitration? Please describe it briefly.

#### **Part VII Assessment and Future**

19. In your experience, what are the main issues which arise in your jurisdiction with respect to access to justice for tourists? (i.e., what is being done well in your jurisdiction and what could be improved?)
20. Are there planned or on-going law reforms in the field of access to justice for tourists in your jurisdiction (including joining an international instrument, like the Hague 1980 Convention on Access to Justice)? If so, please describe them.





Questionnaire of January 2017 relating to the  
Proposal on a Draft Convention on Co-operation and  
Access to Justice for International Tourists

## INTRODUCTION TO THE QUESTIONNAIRE

At its meeting of 9-11 April 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH, [www.hcch.net](http://www.hcch.net)) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Organisation's Work Programme.<sup>133</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. To produce the study, the Permanent Bureau was invited to hire an expert who would be financed by Brazil.<sup>134</sup>

Through a competitive, merits-based selection process, the Permanent Bureau hired Mr Emmanuel Guinchard, a legal academic currently working in the United Kingdom, who specialises in Private International Law and Comparative and International Civil Procedure.<sup>135</sup>

Mr Guinchard is currently conducting preliminary background research on the topic of Co-operation and Access to Justice for International Tourists, with a view to begin an assessment as to whether a new international treaty (i.e., a new Hague Convention), or other instrument, should be developed in order to strengthen tourists' and visitors' access to justice.

The Permanent Bureau has circulated a Questionnaire to Members of the Organisation in order to obtain further information on legislation and to assess the need for and feasibility of an international instrument in this area. The input of non-governmental organisations which might have experience in this field would also be very beneficial. Your responses to this Questionnaire, sharing any information you may have based on expertise you or your organisation may have, would be a valuable contribution to the current assessment.

The Permanent Bureau kindly requests that your answers be submitted (in either English or French) as soon as possible, but in any case by 28 February 2017. The responses to the Questionnaire will be analysed, and the findings are to be included, to the greatest extent possible, in the briefings submitted to the 2017 Meeting of the Council.

Responses should be sent by e-mail to M. Guinchard at <tourism@hcch.nl>,mailto: with the following heading and indication in the subject field: "[name of non-governmental organisation] — NGO Questionnaire on Co-operation and Access to Justice for International Tourists". with the following heading and indication in the subject field: "[name of non-governmental organisation] — NGO Questionnaire on Co-operation and Access to Justice for International Tourists".

Should you wish to provide any additional information in respect of this questionnaire you are welcome to do so, notably by attaching extra sheets, if necessary.

Should you have any questions about this Questionnaire, please do not hesitate to contact M. Guinchard, at <tourism@hcch.nl>.

We are grateful for your time and assistance on this important project.

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<sup>133</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R No 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>134</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R No 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>135</sup> Some of Mr Guinchard's publications can be found at <<https://northumbria.academia.edu/emmanuelguinchard>>.

**IDENTIFICATION**

Name of your organisation:

Country / Countries where based:

Website of organisation, if applicable:

For follow-up purposes:

Name and title of contact person:

Telephone number:

E-mail address:

**PUBLICATION OF RESPONSES**

The Permanent Bureau intends to publish the responses to this questionnaire on the HCCH website. Your response will be published in this manner unless, and to the extent that, you explicitly object to your response being so published

## Part I – Definition

1. What is the definition of a tourist<sup>136</sup> and / or visitor<sup>137</sup> in your legal system, if any?
2. What is the definition of a consumer in your legal system, if any?

## Part II – Legislation

### International Agreements (including Regional Agreements)

3. Please briefly describe the main international source of law for access to justice<sup>138</sup> in your country (e.g. an international convention on human rights), if any, and whether it applies to tourists in the same conditions as nationals?
4. Is your country a party to an international agreement with provisions on the protection of tourists, and/or access to justice (applied to tourists in the same conditions as nationals e.g. the Hague 1980 Convention on Access to Justice)? If so, please describe the rationale for these provisions, their scope of application and contents and state, in your view / the view of your organisation, their main positive and negative features in theory and / or practice, as applicable. (Please attach another sheet, if necessary)
5. Is your country a party to an international agreement with provisions on the protection of, and access to justice for foreign consumers? If so, please describe the rationale for these provisions, their scope of application and contents and state, in your view / the view of your organisation, their main positive and negative features in theory and / or practice, as applicable. (Please attach another sheet, if necessary)

### National legislation and case-law

6. Please briefly indicate the main domestic source of law for access to justice in your country (e.g. a constitutional provision) and whether it applies to tourists in the same condition as nationals?
7. Please briefly describe access to justice for foreign consumers, in particular tourists, in your jurisdiction.
8. Does this regime differ from that of national consumers, whether in theory or practice?
9. Is there any specific legislation or case-law in relation to access to justice for tourists?

## Part III – Information

10. Are tourists, and more generally foreign consumers, specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures (in particular the small claims procedure, consumer mediation / conciliation and consumer arbitration)?
11. How are consumers, and more specifically tourists, made aware of their rights and legal remedies, as well as of the available dispute resolution procedures? For example, are relevant brochures systematically distributed to tourists on their arrival in the country, be it at the border or at their hotel or elsewhere? Where a visa is required, and granted, is information on the rights and duties of consumers / tourists systematically included, along with information on legal remedies and contact details of relevant bodies? In which formats (e.g. paper, electronic) is this information made available? Is this information provided to

<sup>136</sup> Unless otherwise specified, for the purpose of this Questionnaire, a 'tourist' is understood to be a non-national.

<sup>137</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to 'tourist' is understood to encompass a reference to visitor, including short- and long-term visitors.

<sup>138</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to 'justice' is understood to refer to 'civil justice' (as opposed to 'criminal justice').

tourists or simply made available, for example at the point of entry (e.g. an airport) or in tourist information centers or at hotels, etc. (i.e. is there proactive action in this respect)?

12. Is technical legal language used or is it drafted in everyday language?
13. How precise is the information given? Is it general information or detailed practical information with description of the procedure, guidelines on the identification of the court having jurisdiction (where applicable), contact details, amount of fees and ways to pay courts or mediators / conciliators or arbitrators fees (where applicable) and introduce a claim?
14. Is this information available in multiples languages? If so, to which extent and in which languages?
15. Would you say that there is a lack of available information? A lack of information directly and specifically provided to tourists?
16. Do you have any figures on how many tourists are aware of legal remedies and procedures in your country? Do you have any estimate? Do you have such figures for national consumers / consumers in general?
17. Are tourist information centres / tourism offices systematically equipped with information on legal remedies and procedures? If you are a tourist information centre / tourism office, how many tourists are you helping in this respect? Do you hear complaints from tourists / negative feedback about their stay? How often? How substantial do the complaints appear and what is your standard process in such a situation (e.g. provide a brochure informing the tourists about their rights and remedies)? Reverse, are you aware of complaints from the travel industry back home in relation to tourists (i.e. abuse of the complaints system)?
18. Are consumers organisations systematically equipped with information on legal remedies and procedures? How many tourists are they helping in this respect?

#### **Part IV — Mediation, conciliation and arbitration**

19. Is mediation / conciliation / arbitration available for consumer claims in your country? Please briefly describe it (source of law, scope of application, compulsory or voluntary nature of mediation / arbitration, existence of a specific consumer mediation / arbitration scheme or not, funding / cost, legal representation, control by the courts, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.
20. Is bicultural mediation / arbitration systematically offered in cross-border disputes? If not, is bilingual mediation / arbitration systematically offered in cross-border disputes where parties do not share the same language? If not, what is the language regime?
21. Is the physical presence of the parties required or modern communication technologies available?
22. Are mediators / arbitrators specifically regulated and trained in the handling of cross-border disputes?
23. Is there a mediation / arbitration scheme or body specific to tourism or associated sector (e.g. travel)? Please describe it briefly. Are they mostly helping tourists from their country who came back from their trip or are they also, and to what extent, helping foreign tourists still in the country or who just went back and are continuing proceedings started in the visited country? Are their services free to tourists and if not what are their costs for a claim of 1000 euros? 10 000 euros?

24. If you are an association of travel agents or tour operators, do you operate a mediation scheme for dissatisfied customers? Are the latter mostly resident in your country? How many complaints do you receive on average? How many are declared admissible? How many result in the satisfaction of the tourist? How many end up in litigation? What are the limitations of your mediation scheme, for example in terms of coverage or enforcement?
25. If you are a Complaint Board / Mediation board / Alternative Dispute Resolution entity, how many tourists are appearing before you? Are these tourists mostly resident in your country or abroad? What is the average value of the dispute and what are the most typical disputes about (e.g. hotel booking and services; shopping issues; etc.)? How many claims end with the satisfaction of the tourist? What are the limitations of your mediation scheme, for example in terms of coverage (e.g. do you have 'jurisdiction' for all claims relating to all the travel agents in your country? For all claims relating to any travel agent, wherever based? Quid of the tourists who do not use travel agents?) or enforcement?
26. Is there any assistance to tourists during the mediation / arbitration proceedings (for example by a consumer organization)?

### Part V — Court proceedings

27. Is there a small claims court in your country? If it is the case, please briefly describe it (source of law, composition, location, jurisdiction, etc.) and state whether tourists have access to it in the same conditions as national consumers.
28. Is there a small claims procedure in your country? If it is the case, please briefly describe it (source of law, scope of application, stages, legal representation, modern communication technology, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.
29. Is there a specific cross-border small claims procedure? If it is the case, please briefly describe it (source of law, scope of application, stages, legal representation, modern communication technology, etc.) and state whether tourists have access to it in the same conditions as national consumers.
30. Is there any court or procedure specifically dedicated to tourists or foreign consumers? If it is the case, please briefly describe it.
31. Do tourists have access to general judicial procedures (i.e. outside the small claims system, where available) in the same conditions as national consumers? If not, please state where the differences lie (e.g. *cautio judicatum solvi*)?
32. Is court-annexed mediation available in your country? Is it compulsory? Are tourists in the same situation as nationals in this respect (e.g. have access to free legal advice where necessary)?
33. How many tourists are appearing before your courts, especially your small claims courts (where applicable)? Are they mostly claimants or defendants?
34. How many tourists are involved in small claims procedure in your country (where applicable)? What is the average value of their claim (where applicable) and what are the most typical disputes about (e.g. hotel booking and services; shopping issues; etc.)?
35. How many tourists are involved in general judicial procedures in your country? What is the average value of their claim (where applicable) and what are the most typical disputes about (e.g. traffic accident; hotel booking and services; shopping issues; etc.)? How many claims end with the satisfaction of the tourist?
36. Is there any specific case-law in relation to tourists?

37. Are forms, such as small claims procedure or court-annexed mediation forms, easily available? Please describe briefly how and where they are made available? Are such forms available in multiple languages and which ones?
38. Do courts provide assistance to tourists for filling in the forms and if so, how (notably in which languages) and to what extent?
39. Are tourists required to express themselves in the language of the court or does the court accept foreign languages and which one(s)? Are there any pilot court or procedure in this respect?
40. Is the court communicating in its own language or is it possible for the court to communicate in the national language of the tourist or a language understood by the tourist, and which language(s)?
41. If the tourist must express himself in the language of the court, or / and that the court will express itself in its national language(s), is translation / interpretation at every step of the procedure (claim, defense, evidence, hearing, decision notably) free to the tourist? Would such translation / interpretation be provided to someone habitually resident in your country? More generally is legal advice and/or legal aid for court proceedings available to a tourist in the same conditions as for national consumers? Is there any public funding which is not accessible to tourists?
42. Are court proceedings free to tourists and if not what is the average cost for a claim of 1000 euros? 10 000 euros? Do these fees differ from similar domestic cases? May court fees be paid from abroad without having to specifically liaise with the court or pay extra charges other than bank fees?
43. Are lawyers' fees regulated in the same way for national and foreign clients? Are there differences in practice?
44. Are all civil procedures equally available both in domestic and cross-border cases? Do the costs differ depending on the domestic or cross-border nature of the case?
45. Are hearings compulsory in your legal system, especially for small claims procedures? Should this be the case, may they be conducted, or continued to be conducted, from abroad, or is the physical presence of the tourist compulsory? If hearings are not strictly speaking compulsory, are they often deemed necessary by the Court? If the physical presence of the tourist / foreign party is not compulsory strictly speaking, is it often deemed necessary by the Court?

## **Part VI — Assistance**

46. Is there any administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers / consumers in relation to access to justice or mediation / conciliation/ arbitration? Please describe it briefly. In particular, what help are they exactly offering? Do they offer only information on available recourses (judicial procedures, arbitration, mediation / conciliation)? Do they offer mediation or conciliation services? Do they provide assistance in filling in court forms, identifying the relevant court, the payment of fees, contacting relevant bodies (courts, lawyers, bailiffs, etc.), etc.? Are they specifically tasked in assisting tourists / consumers in cross-border disputes? Are they well equipped and funded to do so? Are these bodies helping out tourists / consumers only where no judicial procedure has been initiated? Are their services free to tourists / consumers and if not what are their costs for a claim of 1000 euros? 10 000 euros?
47. Are there consumer NGOs in your country? How important are they? Do they provide help to tourists? How many tourists are they helping every year? How many claims are solved to the satisfaction of the tourist? What are consumer NGOs doing, for example do they content themselves with providing information to tourists? Do they assist them on a

concrete basis, for example to fill the forms? Do they offer to act as mediators / conciliators with the other party? Are they entitled to assist the tourist in court as a friend (i.e. without legal representing the tourist)? Are their services free to the tourist? If not, what is the level of their fees for a claim of 1000 euros? 10 000 euros?

48. If you are a consumer NGO, how many tourists, *nationals of your country*, do you assist? How many *foreign* tourists do you assist? What are you doing on a concrete basis, for example do you provide information to tourists? Do you assist them in filling in the forms? Do you offer to act as mediators / conciliators with the other party? Are you entitled to assist the tourist in court as a friend (i.e. without legal representing the tourist)? Are your services free to the tourist from your country / from abroad? If not, what is the level of your fees for a claim of 1000 euros? 10 000 euros?
49. If your organization assists consumers, how many claims (for example insurance claims or credit card chargebacks) relate to tourism and what are the typical issues (e.g. traffic accident in the country visited; hotel booking and quality standards issues; shopping issues; etc.)? What is the average / median value of a claim? What is the preferred method of dealing with those claims (e.g. court proceedings or mediation) and where does it take place? What is the outcome?

#### **Part VII — Assessment and Future**

50. In the experience of your organisation / in your professional experience, what are the main issues which arise in your jurisdiction with respect to access to justice for tourists? (i.e., what is being done well in your jurisdiction and what could be improved?)
51. In the experience of your organisation / in your professional experience, how many potential claims are never put forward by tourists because of the deterring effect of perceived (whether real or not) obstacles to justice? Could you provide figures or give an estimate?
52. Are there planned or on-going law reforms in the field of access to justice for tourists in your jurisdiction (including joining an international instrument, like the Hague 1980 Convention on Access to Justice)? If so, please describe them.
53. Are there planned or on-going law reforms which could impact on access to justice for tourists in your jurisdiction? If so, please briefly describe them.
54. Are there situations of which you are aware where a new international Convention or instrument may be helpful to facilitate access to justice to tourists?
55. Do you see any potential conflict with the current work of the UNWTO (United Nations World Tourism Organization)?