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RAPPORT DE LA RÉUNION D'EXPERTS SUR LA COOPÉRATION INTERNATIONALE RELATIVE À L'INFORMATION JURIDIQUE EN LIGNE SUR LE DROIT INTERNE (La Haye, 19-21 octobre 2008)

établi par le Bureau Permanent

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ACCESSING THE CONTENT OF FOREIGN LAW

REPORT OF THE MEETING OF EXPERTS ON GLOBAL CO-OPERATION ON THE PROVISION OF ONLINE LEGAL INFORMATION ON NATIONAL LAWS (The Hague, 19-21 October 2008)

drawn up by the Permanent Bureau

Document préliminaire No 11 B de mars 2009 à l'intention du Conseil de mars / avril 2009 sur les affaires générales et la politique de la Conférence

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TABLE OF CONTENTS

INTRODUCTION 4

PART I – SETTING THE STAGE: ACCESS TO ONLINE INFORMATION AT PRESENT 5

A) Introduction 5
B) Brief presentations of existing online legal information providers 7
1) Institutions that provide online legal information on national laws for a given jurisdiction 7
2) Institutions that provide online legal information on national laws on a regional basis or for a number of culturally-linked jurisdictions or on the laws of a REIO 8
3) Libraries and research institutions that provide research assistance and resources on foreign, international, and national laws (who may have the capacity to provide legal opinions on foreign law) 9
4) Research institutions that are oriented toward the study of law and technology, particularly law and communications and applied information technologies 10
C) Geographic scope of online access to foreign legal information 10
D) Access to online databases by various national and international users (the general public, practitioners, judges, governments, etc.) 11
E) Material scope of online legal information 11

PART II - CROSS-BORDER CHALLENGES 12

A) Addressing barriers to the accessibility of online legal information 12
1) Improving general accessibility of online foreign legal information 12
2) Accessibility barriers due to linguistic diversity 13
3) Improving accessibility and information exchange through information re-use and interoperability standards 14
B) Issues of quality standards and reliability of online legal information 15

PART III - FUTURE CO-OPERATION 16

A) Summary of the content of the Guiding Principles 17
B) Discussion of Parts II and III of a potential new instrument or mechanism 18

CONCLUSION 19

ANNEX 1 GUIDING PRINCIPLES TO BE CONSIDERED IN DEVELOPING A FUTURE INSTRUMENT 21

ANNEX 2 LIST OF PARTICIPANTS 24

ANNEX 3 AGENDA – MEETING OF EXPERTS ON GLOBAL CO-OPERATION ON THE PROVISION OF ONLINE LEGAL INFORMATION ON NATIONAL LAWS (PERMANENT BUREAU, THE HAGUE, 19-21 OCTOBER 2008) 27

ANNEXE 4 KEY CONCEPTS RELATING TO ACCESSING THE CONTENT OF LAW 30

INTRODUCTION[1]

1. In April 2006, the then Special Commission (now Council) on General Affairs and Policy of the Hague Conference on Private International Law (the "Hague Conference") invited the Permanent Bureau to prepare a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.[2]

2. In order to begin to assess the need for such an instrument, the Permanent Bureau organised a meeting of experts in February 2007.[3] This meeting concluded "that there should be no attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonisation",[4] but agreed "that there is clearly a need to facilitate access to foreign law" and "supported the Permanent Bureau's continued work in the area."[5] The experts suggested that further work was required in order to reach an affirmative or negative answer regarding the feasibility of establishing an efficient and effective instrument under the auspices of the Hague Conference. In particular, the experts suggested that a questionnaire be prepared as part of a more elaborate scientific study.[6]

3. At its April 2007 meeting, the Council invited the Permanent Bureau to develop the above-mentioned questionnaire, with a view to identifying practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which information is required.[7] This questionnaire would also invite Members to comment on the models suggested in the Report on the meeting of experts and their possible implementation.[8] Finally, the questionnaire should seek to identify in particular whether there is a practical need for the development of such an instrument.

4. A Questionnaire was circulated to Members of the Organisation in October of 2007,[9] to which 31 Members[10] responded before 20 March 2008, in time to be included in a

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[1] The Permanent Bureau would like to thank Maja Groff, former Assistant Legal Officer–Intern, and Ivana Radic, Legal Officer at the Permanent Bureau, for their assistance in relation to this project.

[2] See "Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference", Prel. Doc. No 11 of June 2006 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, para. 4. This document is available on the Hague Conference website at the address < www.hcch.net >, under "Work in Progress" then "General Affairs."

[3] See "Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007", prepared by the Permanent Bureau, Prel. Doc. No 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs". Annex 1 of this document contains a list of the experts who attended the meeting. Annex 2 of this document contains a succinct analysis document drawn up by the Permanent Bureau and which formed the basis for the discussions at the experts meeting. The summary tables and sample of legal norms prepared for the experts meeting are reproduced in Prel. Doc. Nos 21 B and 21 C respectively; both documents are of March 2007 and are also available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[4] See *ibid*., Prel. Doc. No 21 A, 3rd para. of the introduction.

[5] *Ibid.*, 1st para. of the conclusion.

[6] *Ibid.*

[7] See "Report of the Council on General Affairs and Policy of the Conference of 2-4 April 2007", drawn up by the Permanent Bureau, Prel. Doc. No 24 of July 2007 for the attention of Commission I of the Twenty-First Session of November 2007, para. 5. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[8] See Prel. Doc. No 21 A of March 2007, *op. cit.*, note 3, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid*., Ann. 2, paras 54-65.

[9] See "Feasibility Study on the Treatment of Foreign Law – Questionnaire", drawn up by the Permanent Bureau, Prel. Doc. No 25 of October 2007 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference (hereinafter called "the Questionnaire"). This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[10] These Members included Argentina, Australia, Austria, China (Hong Kong SAR), Croatia, the Czech Republic, Denmark, Egypt, Estonia, the European Community (Part IV of the Questionnaire only), Finland, France, Germany, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, Malaysia, Netherlands, New Zealand, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America. All individual responses to the Questionnaire are posted on the Hague Conference website at the following address: < www.hcch.net > under "Work in Progress", "General Affairs" then "Individual Responses to the Questionnaire on the Treatment of Foreign Law".

Report for the attention of the Council of April 2008 on General Affairs and Policy of the Conference.[11]

5. At the April 2008 meeting of the Council on General Affairs and Policy of the Conference, the Council tasked the Permanent Bureau with the following work-agenda item, under the title of "Accessing the content of foreign law and the need for the development of a global instrument in this area":

> "The Council invited the Permanent Bureau to continue to explore mechanisms to improve global access to information on the content of foreign law, including at the litigation stage. The Permanent Bureau is invited to report and, if possible, to recommend future action to the Council in 2009."[12]

6. In response to this invitation, a Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws was organised at the Permanent Bureau from 19 until 21 October 2008. This meeting brought together online legal information experts, legal practitioners, academics and judges with acquired knowledge of foreign law and issues of cross-border access to law.[13] This meeting was convened primarily to discuss the use of information technology, in particular of the world wide web, to facilitate access to foreign legal information, as well as the possibility of developing cross-border co-operation in this area.[14]

7. Prior to this meeting, a questionnaire was circulated to the invited experts.[15] The purpose of this questionnaire was to gather information about existing providers of online legal information[16] with a view to: (1) developing a common understanding of the current international landscape of access to legal information online; (2) identifying the cross-border challenges in the provision, access and use of this information; (3) exploring possible future international co-operation and synergies in this field; and (4) outlining future steps that could be taken by the Hague Conference.

PART I – SETTING THE STAGE: ACCESS TO ONLINE INFORMATION AT PRESENT

A) Introduction

8. The responses to the October 2007 Questionnaire[17] revealed a low number of requests for information on foreign law made under existing multilateral and bilateral treaties (nine requests on average per year). Only half of the responding States cited

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[11] See "Feasibility Study on the Treatment of Foreign Law – Summary of the Responses to the Questionnaire", prepared by the Permanent Bureau, Prel. Doc. No 9 A of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs." Twenty-one of the 30 responding Member States indicated that they are a Party to the *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention"). Only one State indicated that it is a Party to the *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the "Montevideo Convention"). No responding State declared that it was Party to the *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the "Minsk Convention"). Sixteen States (of a total of 27 responding to this question) reported that they were Party to between one and 30 bilateral treaties on access to foreign law.

[12] See "Conclusions and Recommendations adopted by the Council", Council on General Affairs and Policy of the Conference (1-3 April 2008), This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs."

[13] The List of Participants is attached as Annex 2.

[14] The Agenda of the Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws (Permanent Bureau, The Hague, 19-21 October 2008) is attached as Annex 3.

[15] The Questionnaire addressed to organisations offering online access to legal information is available in "Accessing the content of foreign law – Compilation of responses to the Questionnaire of October 2008 for the Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws (Permanent Bureau, The Hague, 19-21 October 2008)", drawn up by the Permanent Bureau, Prel. Doc. No 11 C of March 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference.

[16] A compilation of the answers to the questionnaire, *ibid.*, in the original language in which they were submitted to the Permanent Bureau, can be found in Prel. Doc. No 11 C.

[17] Prel. Doc. No 25 of October 2007, *op. cit.*, note 9.

general satisfaction with these treaties; the other half referred to problems of long delays, lack of judicial education about the instruments, inadequate guidance on posing questions, ambiguity about cost matters and other complaints.[18] Most interestingly, the responses also revealed that online resources of law (official legislation, case-law and legal publications in general) ranked highly as a primary source of foreign legal information. Fifteen of the 16 States providing a response to this question cited this category as a resource within the top four, while ten of those States cited it as the number one source.[19] It was also mentioned that recent academic studies have suggested that questions concerning the application of foreign law before courts could be resolved in 25% of the cases by information found online, if judges received sufficient training and orientation regarding online resources.[20] An overwhelming majority of States[21] reported that they provide online information on their legislation via an official government website, a number with translations of this material into non-official languages. Further, a strong majority of States reported that they favoured the use of information technology in any future instrument or mechanism on the topic of access to foreign law to be developed by the Hague Conference.[22]

9. As an expert rightly recalled, however, the practice of private international law is not simply confined to the needs of judges at the litigation stage (who, for instance, must apply foreign law in a given case), but also includes such legal practitioners as notaries and others, and thus care should be taken in discussions to include the full gamut of international legal practitioners and others in need of access to foreign legal information. Similarly, some experts expressed a general concern that they had sometimes noticed in their home jurisdictions a "conspiracy of silence" with respect to the application of foreign law in domestic courts, whereby because of lack of education and access to foreign legal information, judges and parties declined to apply foreign law in a disproportionate number of cases. Other experts noted that foreign law was sometimes applied in domestic courts in a sloppy or inadequate manner.[23] One expert stressed that the application of foreign law is a comparative science that must be given due care, with proper education and support for national judicial authorities and other practitioners. Experts noted that such national habits, unless education and access to foreign legal information is improved, might prove increasingly problematic as globalisation will necessitate the increasing application of foreign law. Finally, one expert from a common law jurisdiction referred to the traditional common law method of applying foreign law in

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[18] See Prel. Doc. No 9 A of March 2008, *op. cit.*, note 11, pp. 10-12 for a summary of State comments on and criticisms of these instruments.

[19] Responding States reported that local or personal libraries which included printed legislation, case-law and legal publications were the second main source of information on foreign law, while Internet resources from private (external) databases were the third, and local or personal libraries which included local electronic databases were the fourth most popular resource.

[20] See Dr. Serge-Daniel Jastrow, LL.M. (East Anglia), Berlin, *Zur Ermittlung ausländischen Rechts: Was leistet das Londoner Auskunftsübereinkommen in der Praxis?* IPRax 2004, Heft 5, p. 402-405. Judge Jastrow has been involved in Council of Europe discussions about how to potentially improve the London Convention to make it more efficient and useful for judicial authorities.

[21] Twenty-nine of 30 responding States reported that they provide online information on their laws. See Prel. Doc. No 9 A of March 2008, *op. cit.*, note 11, p. 13.

[22] Nine of 13 Members (including the European Community), responding to the October 2007 Questionnaire on the topic of "Future development of an instrument and mechanisms to access information on the content of foreign law" (Part IV of the Questionnaire), indicated that they were supportive of the use of information technologies to improve access to foreign law under such a future instrument or mechanism.

[23] One expert noted that the common use of local experts on the laws of a foreign jurisdiction (who do not necessarily reside or practice in the foreign jurisdiction) often leads to low quality of this foreign legal information and its application in national courts.

national courts as the "Rolls Royce" of proof and application of foreign law rules.[24] That is, it is a powerful but expensive way to prove and apply foreign law within a national system which may, however, have significant access to justice issues for litigants. Thus, this expert was of the view that a new international convention with a variety of internationally-agreed upon options for accessing quality information to foreign law in a variety of circumstances could hold much potential for common law jurisdictions.

B) Brief presentations of existing online legal information providers

10. Institutions that provide online legal information can be grouped generally, often with significant overlap,[25] into four main categories: (1) institutions that provide online legal information on national laws for a given jurisdiction; (2) institutions that provide online legal information on national laws on a regional basis or for a number of culturally-linked jurisdictions or on the laws of a Regional Economic Integration Organisation (REIO); (3) libraries and research institutions that provide research assistance and resources on foreign, international, and national laws (who may have the capacity to provide legal opinions on foreign law); and (4) research institutions that are oriented towards the study of law and technology, particularly law and communications and applied information technologies.

1) Institutions that provide online legal information on national laws for a given jurisdiction

11. There were two main streams of online information providers represented at the meeting falling into this first category.[26] In a number of national jurisdictions it is the government through the Ministry of Justice or another aligned government agency that provides these services. This is the current state of affairs in most European jurisdictions. The other main group of information providers, which are found in multiple jurisdictions throughout the world, most of which belong to the "Free Access to Law Movement," consist of non-profit organisations that are generally named the Legal Information Institutes or "LIIs" usually attached to legal academic research centres.[27]

12. The Austrian Federal Chancellery and the *Sistema Argentino de Informática Jurídica* (Argentinean Online Legal Information System), which were both represented

[24] Parties to litigation generally must argue and prove foreign law, often with the help of expert witnesses, as foreign law is considered a matter of fact or "special kind of fact" in traditional common law jurisdictions. Because of this tradition, several scholars have noted that judges and legislators have not fully implemented or taken full advantage of the London Convention and other ways to access quality information on foreign law. See for instance B.J. Rodger and J. Van Doorn, "Proof of Foreign Law: The Impact of the London Convention" (1997) 46 I.C.L.Q. 151.

[25] Most institutions represented at the meeting in fact had significant and fruitful overlap among the listed categories, which gives testimony to the present state of collaboration and cooperation between various endeavours to provide quality international legal information and to the multidisciplinary strength of many of these institutions. For instance, The Institute of Advanced Legal Studies (IALS) in London serves as both a premier print and digital research institution and as host to the British and Irish Legal Information Institute (BAILII), a non-profit provider of free online legal information. LexUM, based at the University of Montreal, is both an innovator of online legal information technology and operates the Canadian Legal Information Institute (CanLII), *Droit Francophone*, and assists in other projects. Please see Prel. Doc. No 11 C of March 2009 (*op. cit.*, note 15) for a full detailing of functions and activities of the various institutions present at the meeting.

[26] It should be noted that private, for-profit companies who provide online legal information for a user fee were not directly represented at the meeting.

[27] For the principles of the Free Access to Law Movement, please see the Montreal Declaration on "Free Access to Law," available at http://www.worldlii.org/worldlii/declaration/ . For a very useful background of the Free Access to Law Movement and existing LIIs, please see "Legal Information Institutes and the Free Access to Law Movement," by Graham Greenleaf, published February 2008, available at http://www.nyulawglobal.org/globalex/Legal_Information_Institutes.htm#_Droit_Francophone (documents last consulted February 2009).

at the meeting of experts, fall under this first group of governmental institutions. The Austrian Federal Chancellery provides an online database called the *RechtsInformationsSystem* (legal information system) which offers free access to an online authentic version of the Austrian Federal Law Gazette and a non-authentic consolidation of the Federal laws of Austria, state law and English versions of selected Austrian laws. It also provides access to case law from the various Austrian courts. It is worth noting that Austria was the only State agency present that publishes the electronic version of the Gazette as its *only* official and authentic version of the law, rather than relying on an official print source.[28]

13. A number of member institutions of the Free Access to Law Movement, including the Legal Information Institute (LII), the Canadian Legal Information Institute (CanLII), and the Australasian Legal Information Institute (AustLII), were also represented at the meeting.[29] These institutions provide free and anonymous public access to legal information by republishing on the Internet legal information produced by public governmental entities such as legislatures, ministries of justice and courts. This information includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform studies.

14. It is worth noting that most of the members of the Free Access to Law Movement do not provide formally "authenticated" legal information.[30] However, the reliability and integrity of the information they provide is very high, if not sometimes higher, when compared to the original source.[31]

2) Institutions that provide online legal information on national laws on a regional basis or for a number of culturally-linked jurisdictions or on the laws of a REIO

15. This category was also represented by institutions which are funded primarily by governments and by institutions that consist primarily of non-profit organisations which are members of the international Free Access to Law Movement.

16. The *Droit francophone,* a legal information portal seeking to cover the French-speaking world, is a specialised service of the *Organisation Internationale de la Francophonie* (OIF) and a member of the Free Access to Law Movement.[32] Its website provides links to existing governmental national and regional organisational legal information databases and the network provides support and help to States so that they may develop their own national databases with collections of legal information.

17. The Eur-Lex and N-Lex online legal information portals, run by the Office for Official Publications of the European Communities, are EU governmental endeavours which provide, respectively: (a) free access to a non-official version of European Union law; and (b) free access to national legal information of the Member States of the European Union,

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[28] This trend to publish an official and authenticated version of legislation uniquely online is a trend in a number of jurisdictions, as with the *Journal Officiel* in France (http://www.journal-officiel.gouv.fr/, last consulted February 2009).

[29] The National Academy of Legal Studies and Research (India) and the *Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México* (Legal Research Institute of the National Autonomous University of Mexico) who were also represented at the meeting of experts appear to be potential members of the Free Access to Law Movement.

[30] One expert at the meeting defined an online "authentic" legal resource as a resource "whose content has been verified by a government entity to be complete and unaltered when compared to the version approved by the content originator" (see Prel. Doc. No 11 C of March 2009, *op. cit.*, note 15, p. 68). For instance, the online resource might include a digital signature or use other technology to assure users that it is the complete and unaltered version of the information obtained from the governmental provider.

[31] For instance, experts from LIIs described that when processing the original information received from the governmental departments or courts, a number of errors such as typos or cross-reference mistakes are sometimes identified by the software that is used to republish the information.

[32] Operating since 2003, *Droit francophone* aims at improving access to legal material from OIF member countries, most of which are located in the developing world.

run in co-operation with EU national governments. Eur-Lex access is available in the 23 official languages of the European Union. Both sites make use of the Eurovoc thesaurus, a multilingual search and indexing tool covering key EU institutional terminology (including law), which has capabilities in at least 22 languages. N-Lex, due to its reliance on the cooperation with national governments and their independent and varied legal databases, is still considered experimental.

18. The Asian Legal Information Institute (AsianLII), the Commonwealth Legal Information Institute (CommonLII), the British and Irish Legal Information Institute (BAILII) and the World Legal Information Institute (WorldLII) are non-profit initiatives of the Free Access to Law Movement supported by institutions such as universities, international organisations, governmental research grants, and other entities, private and public.[33] To date, these sites generally provide their legal information and comparative search facilities in only one language (notably English). The sites aim to include primary law resources (such as case law and legislation) as well as secondary resources (such as law reform material and treatises), and often contain collections of legal materials from regional or international organisations.[34]

19. The Global Legal Information Network (GLIN), an initiative of the United States Law Library of Congress, is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by GLIN members, who are national governmental agencies and international organisations. Thirty-four GLIN members contribute original-language, officially published, full text documents in electronic format. Each electronic document is accompanied by a summary in English and, in many cases in additional languages, plus subject terms selected from the multilingual thirteen-language thesaurus developed by GLIN.

3) Libraries and research institutions that provide research assistance and resources on foreign, international, and national laws (who may have the capacity to provide legal opinions on foreign law)

20. The Swiss Institute of Comparative Law (*Institut suisse de droit compare* – ISDC), The Institute of Advanced Legal Studies (IALS) of the University of London, the *Max-Planck-Institut für ausländisches und internationales Privatrecht* (Max Planck Institute for Comparative and Foreign International Private Law), Hamburg, Germany, and Cornell Law Library, Ithaca, New York, all have significant paper and electronic legal information collections on national, international, and in the case of ISDC and Max Planck in particular, specialized collections in international private law and foreign comparative law. All institutions have a variety of free-access links on their institutional websites to information on foreign laws. ISDC employs legal research staff who are trained in multiple jurisdictions from throughout the world and have the capacity to produce legal opinions on comparative law and the application of foreign law in multiple languages[35] for a number of jurisdictions.

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[33] For instance, CommonLII is supported by a number of Commonwealth institutions, such as the Commonwealth Law Ministers Meeting and the Commonwealth Secretariat Legal and Constitutional Division, although its funding support as of early 2008 has come largely from Australian academic and government sources.

[34] For example, AsianLII includes databases from regional organisations such as APEC, the Asian Development Bank (ADB) and the International Development Law Organisation (IDLO).

[35] ISDC can produce legal opinions in French, German, Italian, English, Spanish and other major languages.

4) Research institutions that are oriented toward the study of law and technology, particularly law and communications and applied information technologies

21. The last group of presenters was representatives of research institutions active in the fast-developing field of law and technology. The *Istituto di Teoria e Tecnica dell'Informazione Giuridica* (Institute of Legal Information Theory and Techniques), Florence, is allied with the Italian National Research Council and is tasked with research into and development of technologies in the field of information and communications technology applied to law and to public administration services. LexUM, at the University of Montreal, Quebec, "offers solutions and services and conducts advanced research in order to identify the best uses of technology to provide efficient access to legal material."[36] The MetaLex/CEN initiative (which includes organisers from the Leibniz Center for Law, University of Amsterdam, the Netherlands and from other European institutes) is an interoperability endeavour targeting both governments and the private sector in order to develop common norms and standards for the efficient and open exchange, linking, and access to legal information across institutions, countries and languages.

C) Geographic scope of online access to foreign legal information

22. As evidenced by expert presentations and comments, many existing databases or online collections of legal information, such as CanLII, AustLII and the Austrian *RechtsInformationsSystem* focus on providing free access to high quality national legal information online. The regional online or global information providers and research institutes, such as AsianLII, WorldLII, ISDC, etc. in turn rely on these national databases to populate their portals and provide materials for their search engines and comparative research work. Several experts strongly emphasised that access to quality legal information at a local level is the *sine qua non* of access to foreign private laws in a global context. Thus individual States and domestic providers must be involved and mobilised in efforts to increase global access to foreign laws.

23. While some experts lamented the fact that there are some regions of the world which seem to be notably under-represented in online presence of their national laws, other experts asserted that as of late 2008 there were very few regions of the world – perhaps none – where this state of affairs was not changing. Experts drew attention to the fact that there has been much progress in this field in a very short time, as with the Free Access to Law Movement and the LII network, which began with the first LII at Cornell University in only 1992, and now forms a rapidly-expanding global network, including practically all of the Asia-Pacific, African and North American regions where there historically haven't been strong governmental providers of online legal information. Further, there have been successful technology / skills transfer and "incubation" practices employed by the members of the LII network and GLIN in particular, whereby expertise and capacity are shared in order to establish local and independent institutes or governmental endeavours to disseminate national legal information.

24. As to outstanding general obstacles to increasing global expansion of free access to quality legal information, to name the primary obstacles, the experts mentioned a number of issues: lack of political will or funding[37] needed to prioritise or facilitate free (online) access to legal information, lack of transparency in emerging democracies, lack of human resources and technical expertise, and governmental policy barriers to the

[36] http://www.lexum.umontreal.ca/index_en.php (last consulted February 2009). LexUM staff have developed multilingual legal databases for a number of international organisations.

[37] However, although securing funding has been a challenge, experts involved in the LII movement noted that the LII model has a record of achieving high quality, comprehensive legal information coverage at relatively low costs. Development and international aid agencies have been significant partners in a number of the LII endeavours.

re-use or re-producing of legal information, whether in the form of traditional crown copyright regimes applicable to public legal information or in the form of "sweetheart deals" with private publishers in a given jurisdiction.

D) Access to online databases by various national and international users (the general public, practitioners, judges, governments, etc.)

25. The experts explained that, given that their databases are generally open to the public at no cost and are anonymous, it is difficult to track the exact profiles of users of the websites. However, it was clear from the presentations that the numbers of users are very high and that, with respect to the national databases, they include both abundant local users and significantly high levels foreign users.[38] LII experts explained that national surveys among lawyers specifically indicated that their websites were the first or among the first sources of information when searching for legal information online.

E) Material scope of online legal information

26. The experts highlighted that all forms of legal information were usually available on their databases: legislation, case law from as many judicial and administrative authorities as possible, and sometimes legal doctrine, law reform reports and other secondary legal materials. However, they added that the historic time-depth component of legislation (repealed acts, prior amendments, etc.) and other legal information (such as older case law, etc.) was not always available in online databases. Private international law experts present at the meeting noted that this can pose significant problems for legal research, particularly during litigation, where a snapshot of the law in force at a given time is often required.

27. Furthermore, the presentations showed that the main existing legal databases are generally not specialised in any one or several areas of the law, but rather seek to include legal information for a given jurisdiction or region that is as comprehensive as possible, across all areas of private law, administrative, public international, constitutional and criminal law.[39] Experts noted that it is desirable to have this comprehensive coverage, as in practice, legal questions and controversies often involve the intersection of a number of areas of law.

28. Most of the databases and institutions present at the meeting (save ISDC and the Max Planck Institute) do not provide access to legal opinions on foreign law in reference to a given case at litigation; they rather provide the user with access to the content of the law, sometimes with helpful navigation pages and introductory summaries of available resources. Experts noted that information in the form of legal opinions are often essential to understand how the foreign law would be interpreted or applied in specific cases, and in order to make the foreign law comprehensible to a national judge. Several information technology experts present at the meeting suggested that techniques of online information capture and re-use are currently underutilised and could be fruitfully applied to effect efficiency gains in the access to foreign legal information, by providing answers to common or repetitive problems or questions encountered by foreign legal practitioners.

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[38] Please see Prel. Doc. No 11 C of March 2009 (*op. cit.*, note 15), pp. 44-48 and 50-53, for logs of user information (based on domain name) of AustLII. The logs indicate, as well as significant levels of foreign usage, significant levels of usage by governmental agencies, international organisations and non-governmental organisations.

[39] One exception to this general rule is the LII at Cornell, which has always aspired to have targeted (such as Supreme Court jurisprudence) rather than comprehensive collections of US law. Further, it was noted that when a database is first set up, it sometimes focuses on commercial law at the outset, and then will incrementally increase the range of its legal information collections.

PART II - CROSS-BORDER CHALLENGES

A) Addressing barriers to the accessibility of online legal information

1) Improving general accessibility of online foreign legal information

29. Many experts stressed that putting "raw materials" (*i.e.*, primary source legal information) online in databases – while crucially important – is insufficient in itself to improving access to foreign legal information. Careful attention must be given to making these resources accessible and user-friendly, for a variety of users, including judges, legal practitioners, including notaries, the general public, legislators and others. Several experts noted that representatives from the general public were notably absent at the experts meeting table. They stressed that the real and immediate needs for individual citizens should be taken into account in any endeavour to improve cross-border accessibility to foreign legal information, and online legal information in general.[40]

30. A number of experts detailed the ways that their institutions had made efforts, and continued to make efforts, to improve the organisation, presentation and search capabilities of their portals or online legal information databases in order to make them more accessible to users. Their various types of search engines offer comparative analysis of law and flexible search options, websites have various navigation / organisation strategies, and some websites, such as N-Lex, seek to include introductory orientation sheets for each of the jurisdictions covered, in order to give users an overview of national online legal resources, and to some extent, the national legal system.[41]

31. One expert, a legal practitioner in private practice, strongly suggested the need for better online orientation guides for the various legal systems and national jurisdictions of the world that could accompany collections of national legal information. Several information management and presentation theorists[42] were cited as possible guides to designing these new orientation pages (using textual and graphic approaches), in order to give users rapid insight into the overall functioning of a foreign legal system.[43]

32. There was no argument among experts that individual databases and legal information systems are proliferating, therefore making national laws theoretically more accessible. One expert complained of a phenomena of "too much information" and lack of unified efforts to manage this information. The idea of one single "laws of the world" portal was tabled at the meeting, and remained an outstanding idea to simplify global access to the laws of the world. The WorldLII and GLIN websites were the two major globally comprehensive endeavours noted by experts. The WorldLII site links to GLIN materials so there exists in fact constructive overlap between these two impressive endeavours.

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[40] Such concerns dovetail into access to justice and rule-of-law principles, which experts urged to be taken very seriously. Please see *infra,* note 61.

[41] State members of the EU are asked to provide introductory general information sheets which give a three to four page guide to and inventory of a nation's online legal resources. See for example http://eur-lex.europa.eu/n-lex/info-pays.html?lang=en&pays=dk (last consulted February 2009).

[42] The work of Edward Tufte, author of *The Visual Display of Complex Information* (Graphics Press: Cheshire, Connecticut, 2001) and *Beautiful Evidence* (Graphics Press: Cheshire, Connecticut, 2006), which discuss the graphic display of complex information and strategies of data visualisation, was cited in particular.

[43] Another interesting endeavour to note is the University of Ottawa Faculty of Law "World Legal Systems" project (http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.html, last consulted February 2009) which has sought to produce maps, charts and inventories of the various types of legal systems (civil law, common law, customary law, Muslim law, and mixed) that exist throughout the world. Such a project is necessary, the project website explains, as a "modern tool" of the "legal community and business people" due to the context of ever-increasing international commerce and trade.

2) Accessibility barriers due to linguistic diversity

33. Experts noted that language and translation issues were a main concern in assuring the cross-border accessibility of foreign legal information. Translation services, and in particular legal translation services, are an expensive cost for legal information providers, be they governments or non-governmental organisations. Further, experts noted the complexity of the problem of legal translation is compounded when: a) one takes into account the reality that the translation of legal terminology is actually part of the science of comparative law (as there are often no exact equivalencies between legal terms and concepts between legal systems); and b) one might desire translations of national legal materials that would be considered "official" translations.

34. The Office for Official Publications of the European Communities and the Eur-Lex online legal information site had the most comprehensive mandate, under EU law, and corollary funding support to provide for extensive translation of European Union legal materials into the official languages of the EU.[44] GLIN includes facilitatory summaries in English of foreign legal materials on its site as well as the original texts in multiple languages.[45] The *Droit Francophone* and CommonLII portals both rely on a common linguistic heritage to fruitfully share information on foreign law in an accessible way. Finally, some sites, such as AsianLII, rely on a common *lingua franca* (in this case English) in a linguistically diverse region while still providing links to sites and materials in original languages.

35. While some multi-lingual jurisdictions (such as the EU, Switzerland, Canada, Hong Kong Special Administrative Region, and others) have a governmental mandate to provide official translations of their legal materials in a number of languages, the experts underlined from the outset that asking for official translations of foreign legal information in general was deemed a futile exercise as it would likely only burden the accessibility to legal information, due to excessive costs and the other challenges of legal translation.

36. Several experts expressed a main practical issue that foreign legal information needed to be available in a language commonly used and understood by a majority of the population of users, and at least accessible in more than one language. The experts explained that the databases which provided legal information for countries, other than English-speaking ones, primarily do so in English where it is not the original language.[46] Some experts urged an incrementalist approach, to start with what is immediately available and build online multilingual collections over time.

37. Concerning the issue of translation of legal terminology, experts detailed how some databases have developed thesauri in order to search foreign legal materials in multiple languages. The expert from Eur-Lex referred to the Eurovoc thesaurus which allows for users to search EU documents in 22 of 23 EU official languages with a glossary of 9000 terms.[47] Experts were very pleased that the Eurovoc thesaurus belongs to the public domain, and this tool can thus be freely down-loaded and re-used. The Eurovoc thesaurus is still a work in progress, and continues to be expanded, developed and refined. The expert from GLIN added that GLIN has developed a legal terminology thesaurus which allows for 13 linguistic combinations. Its ongoing development is the

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[44] Eur-Lex provides legal information in all 23 official languages of the European Union (although the coverage is not yet uniform).

[45] GLIN contains information in 13 original languages: Arabic, Chinese (traditional), English, French, German, Italian, Korean, Lithuanian, Portuguese, Romanian, Russian, Spanish and Ukrainian.

[46] This is the case of AsianLII, for example.

[47] In addition to capabilities in 22 EU official languages, Eurovoc has to date been translated into Basque, Albanian, Russian and Ukrainian. Please see http://europa.eu/eurovoc/sg/sga_doc/eurovoc_dif!SERVEUR/menu!prod!MENU?langue=EN (last consulted February 2009).

responsibility of a committee of international legal experts made-up of GLIN international members who work together on all 13 languages. The experts agreed that the further development of thesauri for legal terminology would be essential to ensure online access to as many foreign laws as possible.[48]

3) Improving accessibility and information exchange through information re-use and interoperability standards

38. Experts pinpointed the topics of open or "free access"[49] to national law and of international harmonisation of information technology standards as integrally related to the topic of general cross-border accessibility to foreign law.

39. The issue of free re-reproduction / re-use[50] of national legal information was discussed at length, as part of ensuring maximal access to legal information, nationally and transnationally. At present, experts noted that in most countries where they operate, free re-production / re-use of a nation's legal information is allowed. Great progress has been made to educate many States on the benefits of free access to legal information for multiple downstream users, economically, democratically, and otherwise.[51] A number of countries have overturned crown copyright policies on legal information, so that the information may be used and circulated freely.

40. Representatives of the MetaLex/CEN interoperability endeavour, which has been European-centred to date, suggested that they would like to see the initiative extended internationally. It was recommended that the use of non-proprietary software should be encouraged, to avoid "vendor lock-in" to proprietary softwares which would compromise maximal accessibility of information and systems. The development of uniform case citation and open-source legislative drafting techniques, programs, and standards —all efforts that could greatly improve the accessibility, cross-linking, and transfer / exchange of legal information- were also recommended. Such topics are regularly debated at international conferences where expert research and national endeavours are shared, and collaborative working groups are established and maintained in order to systematise international cooperation in this field.[52]

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[48] Recent feasibility studies have been carried out examining the interoperability of five different thesauri (including Eurovoc), searching multiple information collections from a single user interface. See Enrico Francesconi, Sebastiano Faro, Elisabetta Marinai, "Thesauri Alignment for EU eGovernment Services: a Methodological Framework", in *Frontiers of Artificial Intelligence and Applications* series (Vol. 189, 2008), *Legal Knowledge and Information Systems- JURIX 2008: The Twenty-First Annual Conference* (IOS Press: Amsterdam, Berlin, Oxford, Tokyo, Washington, DC; 2008), edited by Enrico Francesconi, Giovanni Sartor, and Daniela Tiscornia, pp. 73-77.

[49] The concept of "free access to law" could be summarized by an excerpt from the Montreal Declaration on "Free Access to Law" (see *supra*, note 27): "Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge."

[50] The concept of "re-use" is the preferred term of experts present, as it is a broader and the meaning of "re-publishing" could be misunderstood to have a limited definition. See glossary set out in Annex 4.

[51] Note, for example, EU developments stating the importance of the free re-use of public sector information (PSI), including legal information. See http://ec.europa.eu/information_society/policy/psi/index_en.htm (last consulted February 2009) for links to general PSI / "information society" resources in the EU. See also the Directive 2003/9 8/EC of Parliament and Council on the re-use of public sector information (PSI), adopted on 17 November 2003, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf (last consulted February 2009).

[52] The regularly held "Law via the Internet" international conferences (of the LII movement; see for example http://conf.lexum.umontreal.ca/en/index_en.php, last consulted February 2009) and meetings of the CEN/MetaLex working group are several notable examples of such cooperation.

B) Issues of quality standards and reliability of online legal information

41. Some experts, mainly those with a legal librarianship background, expressed concerns about the potential compromised quality and longevity of online legal information, as digital or electronic media is theoretically a less durable and stable medium than traditional acid-free print sources.[53] Experts expressed corollary concerns that many States were putting their laws online as "official" sources of law, as sometimes the only official resources of law, rather than also having a paper based official version, and without adequate concern given to ensuring that these online renditions of the law are of as sufficient quality and stability as print sources would be.[54]

42. Some experts expressed concern that potential problems of quality of online legal information could have implications for the acceptance of versions of legal information in courts, as the quality of online legal information can vary from country to country. Some governmental providers of legal information (such as France and Austria) offer online official versions of their laws which are "authenticated"[55] whereby the origin and integrity of the information can be assured. Finally, some librarianship experts expressed concern that issues of preservation and archiving of so-called "born-digital" materials and websites with legal materials needed more attention, and presented a technological challenge.[56]

43. In contrast to the above concerns, many experts, primarily from the LII or the Free Access to Law Movement, countered that one must be careful not to overstate the case of the inherent unreliability of online legal information and of the superiority of governmental legal information providers versus "downstream" publishers of this information. From the experience of LIIs, their services often act as a quality check to governmental providers of legal information, catching errors and notifying governmental providers of these errors so that they may correct them. They are also sometimes the sole sources of some national legal information.

44. Experts from LIIs described some of their internal institutional best practices that had contributed to the high quality of their online legal information, and urged a "standards-based" rather than "status-based" approach to the quality and reliability of online legal information. That is, they suggested that the quality of legal information should be evaluated on a database by database basis, grounded on acceptable standards, practices and proven quality, rather than necessarily on officially-designated or other status. A number of experts present expressed the concern that a system of centralised accreditation or heavy standard-setting applicable to legal information, either through national authorities or an international authority, could paradoxically run the risk

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[53] That is, among other concerns, online legal information is theoretically more susceptible to the tampering of third-parties and therefore would generally be of lesser quality than print sources. It would also theoretically be more difficult to archive effectively, due to the nature of the ever-changing Internet and also because digital information relies on current technologies which are susceptible to redundancy when new technologies develop. However, a LII practitioner noted that there had not been an incident to date of third party tampering of a LII online legal resource. Also, there are notable examples of capable archiving of online legal information (see *infra*, note 56).

[54] The American Association of Law Librarians has recently published a study expressing these concerns. See the March 2007 report *State-by-State Report on Authentification of Online Legal Resources*, available at http://www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf (last consulted February 2009). See also Prel. Doc. No 11 C of March 2009 (*op. cit.*, note 15), pp. 66-68 for one expert's discussion of the issues of "official" versus "authentic" sources of digital legal information.

[55] See *supra*, note 30, for a definition of what could be meant by "authentic".

[56] The experience of the *Bibliothèque nationale de France*, within the scope of its Legal Deposit Mission (dating back to legislation from 1537), is one example that seems to show the successful adaptation of a traditional archiving institution to harvest and archive legal materials on the web and in digital form.
See http://www.ifla.org/IV/ifla71/papers/074e-Lupovici.pdf and
http://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_wk_ge_08/wipo_cr_wk_ge_08_www_105916.pdf (last consulted February 2009).

of holding up the provision of quality information. Several experts suggested that the use of legal information from a database by legal practitioners, namely lawyers and judges, in a given jurisdiction could be used as an appropriate litmus test as to the quality and reliability of information from the given database.

45. Not withstanding the above debate, all experts agreed that it was the responsibility of States, as the original producer of legal information, to provide authoritative texts of their law and make these freely accessible to citizens. The experts suggested that use of "open format" and meta-data technology[57] could be effectively used in order to help in solving the issue of accuracy and reliability of re-published legal information (*i.e.*, for instance to provide links back to original governmental sources, or electronic markers to indicate that the copy reflects the original governmental text). Several experts from LII providers of legal information said that they would be amenable to such markers of quality and provenance of legal information, as long as the measures were practical and not too expensive. The experts underlined that if such standards were developed and accepted, there would be very few issues concerning the accuracy and reliability of re-used information, and its acceptability to be used in foreign courts.

PART III - FUTURE CO-OPERATION

46. Given the deficiencies of existing Conventions and treaties[58] and the clear need for a global solution for improving access to foreign law, including at the litigation stage, the experts considered three complementary Parts of a potential new global cooperative framework or instrument under the auspices of the Hague Conference:

I. Part I – Facilitating access to online legal information. This part would focus on assuring the free accessibility of a country or REIOs main legal materials, particularly legislation, case law and international agreements (and potentially doctrine that would be important in civil law jurisdictions) for online publication and re-use; it could possibly provide some guidance on realistic quality standards or best practices for such free access and online publishing, and perhaps provision for a permanent experts' body to monitor the development of practical standards and best practices in these areas, also with a view to the compatibility or "interoperability" of global online publishing standards;

II. Part II – Cross-border administrative and judicial co-operation. This part would provide for the handling of requests for information in response to concrete questions on the application of foreign law in relation to a specific matter that arises in court proceedings (and possibly also in other contexts), and for which information available on the Internet is not sufficient; the design of this part would build on the critiques and problems that have been noted in existing instruments;

III. Part III – A global network of institutions and experts for more complex questions. This part would address situations where there may be a need for accessing more in-depth information on complex legal questions in specific areas (*e.g.*, insolvency or inheritance) or in the course of complex litigation that involves the interface of multiple areas of foreign and local law(s). Here one might think of a series of networks of qualified organisations (bar associations, comparative law institutes, organisations of notaries and other specialists, whose services would not be free) facilitated via the Permanent Bureau.

[57] See glossary set out in Annex 4.

[58] Problems include that existing instruments are merely regional in nature, they are not well-known, they have no mechanisms for reviewing their practical operation, have time delay problems, and have other efficiency problems. See Prel. Doc. No 9 A of March 2008, *op. cit.*, note 11, pp. 10-12 for a discussion of State commentary on these instruments.

47. The experts' discussion focused primarily on what the above-described Part I might look like. A document entitled "Guiding Principles to be Considered in Developing a Future Instrument" (hereafter the "Guiding Principles") was prepared and discussed by the experts during the 19-21 October 2008 Meeting.[59] This document is in part based on the experience of the successful and globally far-reaching Free Access to Law Movement, and also includes the input of the experts from a diverse array of institutions present at the meeting.[60] Experts noted again that such principles merge with concerns of economic development (including international trade and cross-border economic development), governmental respect for the rule of law, governmental transparency and the access of citizens, private practice legal practitioners and other actors of civil society who use legal material and who benefit from efficient access to these resources.[61]

48. The experts expressed a word of caution during the meeting regarding the use of a binding instrument model for a potential Part I. They indicated that any new instrument should not impede private initiatives such as the Legal Information Institutes (LIIs) since a formal structure could be unwieldy and expensive and may impede or slow-down rather than facilitate the growth and success of institutions which provide legal information. For this reason, the Guiding Principles follow a principles-based approach. The idea would be to broaden the Free Access to Law Movement and encourage States and organisations to collaborate in developing networks of quality providers of legal information.

A) Summary of the content of the Guiding Principles

49. As noted above, many experts at the meeting stressed the concept that access to quality information on foreign law is dependent upon free access to quality information on local laws. Therefore, a new instrument should promote free access at the domestic level to legal materials such as legislation, judicial and administrative decisions and international agreements, as envisioned in the Guiding Principles (Art. 1). Furthermore, this information should be made accessible both to local users and foreigners. The experts also agreed that preserving legal materials and providing access to historical materials were laudable objectives and necessary for the proper functioning of a legal system (Arts 2 and 7).

50. Many experts stressed the concept that providing free access to legal information means allowing this governmentally-generated information to be published by as many

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[59] See Annex 1.

[60] The Guiding Principles are a rough draft of the main consensus concepts agreed upon by the experts present at the meeting, but does not reflect full consensus on all wording of the principles, and it remains a document subject to further development, refinement and discussion.

[61] In fact, there are a great number of international and regional organisations and global statements that address these and related points. For instance, the International Federation of Library Associations and Institutions (the IFLA) has established a permanent Law Libraries Section based on a statement of 6 December 2005 stating that "equitable and permanent public access to authentic legal information is a necessary requirement for a just and democratic society." The Geneva Declaration of Principles of the World Summit on the Information Society, para. 1, states:

> "We, the representatives of the peoples of the world, assembled in Geneva from 10-12 December 2003 for the first phase of the World Summit on the Information Society, declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights." (Available at http://www.itu.int/wsis/docs/geneva/official/dop.html, last consulted February 2009.)

In the trade and economic development realm, the World Trade Organisation (in provisions of the General Agreement on Tariffs and Trade (GATT)) and other regional trade agreements and treaties (such as The North American Free Trade Agreement (NAFTA) and others), have provisions regarding the timely publishing of national legal materials. The above is just a sample of a number of international statements on this topic.

"downstream" information providers as possible in different media. Thus all experts were of the view that impediments to the re-use of a country or REIOs original legal information should be removed (Art. 3). According to experts, this does not mean to say that States or REIOs are without obligations. They were of the view that the information provided by States Parties should be authoritative (Art. 4).

51. Regarding issues about ensuring the reliability of published legal information most experts were of the view that where information is recycled that it should meet some reliability and integrity standards (so-called "downstream authentification") (Art. 5). However, a strong caveat was offered by many experts. It was also indicated that obstacles to the recognition of these materials by the courts should be removed (Art. 6). Possible measures in this respect would be to encourage States to adopt neutral methods of case-law citation that would be medium-neutral, provider-neutral and internationally consistent through the use of open formats and proper utilisation of the meta-data in the case of information in an electronic format (see Arts 8, 9 and 12).

52. It was also recognised in relation to global access to foreign law that it was important to address language barriers that may impede cross-border access to foreign legal information. Experts recognised that cooperation in this respect could facilitate the translation of legal information into different languages, generally in the form of non-official translations or facilitatory summaries, and the development of multilingual thesauri to simultaneously search legal information in different languages (Arts 13, 14 and 15).

53. Experts were of the view that States should be encouraged to develop more interactive knowledge based systems to be shared (Art. 10), as they notably exist at present in some governmental online systems in the area of tax and immigrations laws, in order to assist the public with the application and interpretation to legal materials.

54. Finally, States were exhorted to meaningfully cooperate and collaborate in both practical and general ways with each other. Practically, States should involve themselves in various interoperability and networking endeavours, also support organisations which fulfil the objectives of the Guiding Principles, and assist other State Parties in fulfilling their obligations concerning access to legal information (Arts 16 and 17). Article 18 encourages State Parties to generally cooperate with each other on this topic.

55. It should be noted that the current version of the Guiding Principles does not provide for an international body of experts that may meet on a regular basis under a new international mechanism or instrument of the Hague Conference, an idea that had been tabled at the meeting. How such a body might be provided for and composed is a topic of future discussion.

B) Discussion of Parts II and III of a potential new instrument or mechanism

56. With regard to a possible Part II of a new international instrument or mechanism, the experts agreed that no matter how sophisticated and well organised a system for free online access to foreign law was, there would always remain a need for a mechanism allowing judicial authorities in national courts (and possibly other actors), to ask questions about the precise status of the law in a foreign jurisdiction by way of foreign governmental authorities, primarily at the litigation stage. Thus, some form of inter-administrative or inter-judicial cooperation, likely in the form of a greatly improved London or Montevideo structure, would remain necessary.

57. Since it was recognised that a mechanism for administrative or judicial cooperation as envisaged by a possible Part II could also have its limits, because of unwieldy governmental administrative costs and complexity of questions, it was agreed that there may be a need for an additional Part III dealing with more complex or specialized questions, using the skills of private practitioners and specialized institutes. Several private international law experts were very insistent on such a portion of a new instrument or mechanism, stressing that the science of foreign comparative law is easy

to misunderstand and foreign law can be applied poorly in national courts. As this topic was not the main focus of the experts meeting, the substance of a Part III would require further thought and elaboration at a later date. One expert spoke of the potential of a "roadside assistance" model under this Part whereby national judges and practitioners could easily locate expertise in a given foreign legal jurisdiction and in a given subject matter through a decentralised, yet adequately monitored and maintained, international network of expertise.

CONCLUSION

58. The meeting ended on a positive note with experts and expert institutes offering further support, assistance and collaboration with the Hague Conference on this topic. The impressive network of experts and institutes in attendance at the meeting represented a group with extensive global reach and considerable strength and diversity of expertise in this field. Experts expressed significant support for the potential gains to be made through global collaboration and cooperation in this field. There also seemed to be a consensus at the meeting about the increasing global need and demand for better access to quality information on foreign law, linked to a general need to improve the administration of foreign law in many national courts.

59. Many experts expressed support for the three-part model of a new instrument or mechanism (referred to by one expert as "cascading optional system" of legal information choices), as the range of options under such a model offers national judges and other practitioners choice, flexibility, and maximal types of information on foreign law suitable for a variety of contexts, at a variety of cost options.

60. Regarding a Part I, it was suggested that the Hague Conference could provide, through a new instrument or mechanism, a supportive or facilitatory structure that would not create barriers to access online law. However, meanwhile, a standing experts panel under the auspices of the Hague Conference could still promote and refine best practices and principles in the field and work with already-established quality providers of online legal information. An expert suggested that the Hague Conference might also help with a global inventory of online legal information in existence.

61. From discussion at the table, it was clear that the effective provision of online legal information in a cross-border context was a fast-evolving field where technological solutions to challenges were being developed on a regular basis, and where a great deal of fruitful international cooperation already exists.

62. Further, as one expert noted, even allowing for the costs associated with ensuring the reliability and preservation of online and digital legal information, this mode of legal publishing still may represent "a saving over existing traditional methods of publishing and distribution of laws and a genuine added value to the justice system and to individual citizens."[62] The experience of the LIIs has shown a low-cost model of the provision of online legal information that also produces information of very high quality. Experts noted that States without a real print-publishing tradition of their national laws could greatly benefit from "leap-frogging" beyond print media straight to digital media. Further, experts suggested that commercial publishers of legal information, who base their value-added services on public information, and others in the private sector who benefit from the information may be persuaded to contribute to some of the costs of free access to law databases.[63]

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[62] See Prel. Doc. No 11 C of March 2009, *op. cit.*, note 15, p. 65.

[63] This is already the case to some extent at several of the LIIs. For example, the operating budget of CanLII includes monies from individual members of the national bar association of Canada and the AustLII budget includes monies from members of the legal profession and business and industry organisations. AustLII describes its model of funding as a "multi-stakeholder" model, drawing contributions from governmental, non-governmental, industry, individual and other sources.

63. Finally, experts' conversations suggested that costs for the provision of information on national laws, and hence foreign legal information, could also be kept low by, among other things, enhanced dialogue and the sharing of expertise between institutions, the use of open-source software, technological harmonisation, the use of information technology for such things as information capture and re-use (for repetitive questions posed by foreign legal practitioners, for example) and other innovations. Collaboration could also help ensure, as one expert remarked, that global, regional and national efforts are not duplicated.

ANNEX 1

GUIDING PRINCIPLES TO BE CONSIDERED IN DEVELOPING A FUTURE INSTRUMENT

Guiding Principles to be Considered in Developing a Future Instrument[64]

Free access

1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are available for free access in an electronic form by any persons, including those in foreign jurisdictions.

2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.

Reproducing and re-use

3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use.

Integrity and authoritativeness

4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.

5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).

6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.

Preservation

7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.

Open formats, metadata and knowledge-based systems

8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as available.

9. States Parties are encouraged to cooperate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.

10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use.

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[64] Principles developed by the experts which met on 19-21 October 2008 at the invitation of the Permanent Bureau of the Hague Conference on Private International Law as part of its feasibility study on the “access to foreign law” project.

Protection of personal data

11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymized in order to make them available for free access.

Citations

12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent.

Translations

13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.

14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.

15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.

Support and co-operation

16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of interoperability and networking.

17. State Parties are encouraged to assist in sustaining those organisations that fulfil the above objectives and to assist other State Parties in fulfilling their obligations.

18. State Parties are encouraged to co-operate in fulfilling these obligations.

ANNEX 2

LIST OF PARTICIPANTS

Réunion d'experts sur la coopération internationale relative à l'information juridique en ligne sur le droit interne

Experts Meeting on Global Co-operation on the Provision of Online Legal Information on National Laws

(19-21 octobre / October 2008)

Liste définitive des participants / Final List of Participants

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ANNEX 3

AGENDA

MEETING OF EXPERTS ON GLOBAL CO-OPERATION ON THE PROVISION OF ONLINE LEGAL INFORMATION ON NATIONAL LAWS (PERMANENT BUREAU, THE HAGUE, 19-21 OCTOBER 2008)

AGENDA

MEETING OF EXPERTS ON GLOBAL CO-OPERATION ON THE PROVISION OF ONLINE LEGAL INFORMATION ON NATIONAL LAWS

(Permanent Bureau, The Hague, 19-21 October 2008)

It is proposed that each day the meeting will begin at 9.30 a.m. and end at 6.00 p.m. (at the latest on 21 October). Lunch breaks will be from 1.00-2.30 p.m. Coffee breaks will normally be from 11.00-11.15 a.m., and tea breaks from 4.00-4.15 p.m.

The suggested timetable will be followed with a certain degree of flexibility and may need to be modified in the light of progress in the discussions.

Sunday 19 October 2008

7.00 p.m. Informal dinner at Restaurant Fouquet, 31-A Javastraat, The Hague (tel.: 070-360-6273)

Monday 20 October 2008

9.30-10.00 a.m.

Opening of the meeting

Remarks by the Secretary General of the Hague Conference on Private International Law

Appointment of a Chair

Remarks by members of the Permanent Bureau
- Background information regarding the feasibility study on global access to information on the content of foreign law
- Challenges regarding global provision and access to legal information on national laws in a cross-border context

10.00-12.00 p.m.

Online legal information on national laws
Brief presentations of existing systems (10 minutes maximum per presentation)

- LII (Legal Information Institute)
- CanLII
- RIS (LII)
- AustLII
- AsianLII
- CommLII
- WorldLII
- GLIN
- Official Publications of the EC (EuroLex / N-Lex)
- Droit francophone OIF
- Institut suisse de droit comparé
- Max-Planck-Institut für ausländisches und internationales Privatrecht
- Institute of Advanced Legal Studies, University of London
- Cornell Law Library
- ITTIG-CNR (Institute of Legal Information Theory and Techniques Italian National Research Council)
- NALSAR (National Academy of legal Studies and Research, India)
- CEN Metalex
- Jordanianbusinesslaws.com / SADER
- Hague Conference on Private International Law

12.00-1.00 p.m.	**Current state of affairs & ways forward** Current status of global provision and access (offer and demand) to legal information in a cross-border context – How best to make global online legal information optimally useful through global co-operation in relation to: - Geographic scope - Access by different users (general public, practitioners, judges, governments, etc.) - Material scope (areas of the law / types of sources / transformed information (digests / summaries / fact sheets / country profiles)) - Additional services for foreign users
2.30-4.00 p.m.	Continuation of the discussion from the morning
4.15-6.00 p.m.	**Cross-border challenges** Overcoming through global co-operation the challenges regarding global provision and access to legal information on national laws in a cross-border context - Language barriers – translation issues - Accuracy, reliability, authenticity and up-datedness of the information - Quality standards (editing, web publishing, Internet access, etc.)

Tuesday 21 October 2008

9.15-10.45 a.m.	**Future co-operation** Possible role of the Hague Conference in working with institutions and supporting endeavours concerning the provision of online legal information, for example: - What – Types of co-operation measures (knowledge sharing, training, portals, common standards) to be contemplated - Who – International network of experts or institutions responsible for implementing and monitoring the co-operation measures
11.00 a.m. – 1.00 p.m.	**Possible synergies** Possible interactions between mechanisms providing general online legal information on the one hand, and on the other hand, mechanisms oriented toward providing information on specific legal questions on foreign law, *e.g.* at the litigation stage
2.30-6.00 p.m.	**Future Steps** - Report to the April 2009 Meeting of the Hague Conference Council on General Affairs and Policy - Discussion of a list of measures and future steps to improve the provision and access to legal information in a cross-border context - Discussion of the best vehicle to implement such measures and futures steps (formal or informal means (*i.e.*, binding or non-binding instrument) or a combination of the two)

ANNEXE 4

KEY CONCEPTS RELATING TO ACCESSING THE CONTENT OF LAW

KEY CONCEPTS RELATING TO ACCESSING THE CONTENT OF LAW[65]

1. The Internet has become the channel *par excellence* for the circulation of legal information. Whether the object is to reach the site of a government agency distributing official instruments, the site of a publisher offering free access to databases, or portals for free access to law, the Internet is now a privileged means of accessing these resources.

A) Terms of access

2. Various governments provide access to a **digital and official version of their legislative instruments**, as provided for by specific legal rules. When the online instruments are official copies, the foreign user may definitely use them with full confidence.

3. These official government sources are supplemented by many other government sources providing access to legislative instruments without an official status having been granted to them by specific legal rules. Such governmental sites are free of charge, and whether or not they offer documents with an official status, their reliability is widely recognised within the local legal community.

4. **Commercial publishing** supplements the governments' offer. In those systems providing research tools, the publishers usually integrate legislation, case-law and legal writing. These databases rarely have official standing, but they are nevertheless used systematically by professional lawyers. It should be noted that the leading commercial publishers operate on a worldwide scale, enabling them to offer access to foreign law in globalised environments. On the other hand, access to the commercial bases of legal data of a given country is not convenient for foreign lawyers not having subscribed for such services in advance.

5. The sites operating according to the **free access to the law** model are a more recent form of access to legal information. Like the sites set up by governments, access to them is free of charge, and like commercial sites, they integrate legal documents of different natures. They are not restricted to distribution of one State's legislation only, as government sites often are, but they offer compendiums of legislation and case-law from dozens of sources within a country. Their access over the Internet is direct, free of charge, and requires neither user name nor pre-agreed password.

6. The legal instruments distributed by the AustLII, BAILII and CanLII have no official status; however, those sites, like others connected with the Free Access to Law movement, have gradually built up trust among the local lawyers and the highest judicial authorities. These sites allow an access to foreign law that would have been a pipedream just a few years ago.

7. The rules governing the use of the instruments distributed diverge widely according to the source consulted by the user. The commercial sites are usually the most restrictive, the government sites and especially the sites connected with the Free Access to Law movement are more permissive.

B) Features and legal value of the contents

8. Legal information is contained in **documents**. These are the texts of statutes, regulations and other forms of delegated legislation, court and administrative tribunal rulings and the writings of legal authors. The document is the source of legal information, and that document is borne by a **medium**, paper or electronic.

9. Each document has corresponding metadata, which may be more or less elaborate. **Metadata** are data relating to the data. They provide indications as to the source of the information, the date when it was prepared, its quality, and so on. For a legislative

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[65] The Permanent Bureau is grateful to Daniel Poulin, LexUM, University of Montreal, for the drafting of this memo. Daniel Poulin is one of the experts who took part in the meeting held at the Hague from 19 to 21 October 2008.

instrument, such as a statute, the customary metadata include for instance its title, an alphanumeric identification code, the date of its sanction, the date of its enactment and the identity of the legislative authority issuing it. For a court ruling, the metadata will include the date of judgment, the number of the case, the name of the court, the name of the judge or judges, its official reference and parallel references. The same is true of metadata relating to legal writing. The examples of metadata provided above are often supplemented by other metadata of a less factual and more qualitative nature, such as one or more terms relating to a classification.

10. The **reliability** of legal information determines its worth. In this connection, the concepts of **authoritative character**, **official status** and **integrity** need to be considered. The validity of an **authoritative legal document** is presumed, it does not require proof. The same is true in certain countries where the texts are granted an **official status**. In the electronic world, the **concept of integrity** of the information assumes great importance owing to the ease of duplication. For instance, the law may provide that a document transferred from paper to electronic form has the same legal value if its integrity has been secured. In addition, the document's integrity is secure when it is possible to ascertain that the information it contains has not been tampered with and that it has been retained in full, and that the medium bearing that information provides it with the **stability** and **durability** required. It should also be noted that the source or provenance of the information contributes to reinforcing its reliability. Naturally, a court ruling found on a personal website or on a lobby's blog does not offer the reliability required for this ruling to be cited in a professional legal environment. Nevertheless, the same document, if offered by a reliable source of legal information, will be used without hesitation by a lawyer for professional purposes.

11. The **methods for citation** of legal instruments have given rise to a literature that is demanding, but nevertheless more abundant than in other areas. The citation needs first to identify correctly the source of law quoted or cited. However, citation also plays other parts. Citing a court ruling using its reference in a highly-renowned collection where the criteria for selection of the judgments reported are very tight informs the reader not only as to the information's source, but also as to its worth, as the ruling was considered to be sufficiently important to be selected in that collection. A citation, and especially a citation of a decision published in an electronic base of rulings, serves one further function, it has a commercial role: a reference such as "*Walker v. Rosser*, [1999] O.J. N° 3645 (ACMEDatabase)" requires the reader to subscribe for and access ACMEDatabase's service if he or she wishes to obtain the judgment cited. That reader might be able to find the cited ruling in his or her library, from another commercial provider of legal materials, on the Court's website or on a site offering free access, but recourse to the **"proprietary" citation** rules out such a choice. This is why neutral methods of citation appeared about ten years ago.

12. **Neutral citations** are designed to be attached to the rulings of the court itself, and are to accompany the judgment of which they are a part. These citations are very simple. They consist of the indication of a year, a code associated to a court and a serial number within that year. As they are under the courts' control, the neutral methods of citation reinforce the public nature of the precedents. They prevent the obscurity that would arise from systematic use of proprietary references in an environment of electronic sources. That situation could result in privatisation of a country's legal information. Finally, for whoever wishes to access foreign law, neutral citations are of particular interest: as their use gradually becomes widespread in our countries, the foreign lawyer is ensured the ability to recover the document cited in all the sources that can provide access to it.

13. The change from the paper medium to the electronic medium highlights another aspect of the new methods of citation. The adoption of neutral citations is accompanied by adoption of a system of paragraph numbering in court rulings: it is of little use to mention the page of a document in a context where that document now circulates mainly

in electronic form. Use of the neutral citation is accordingly supplemented by the reference to the paragraph to which the reader's attention is intended to be drawn.

14. In sum, neutral citations are provider-neutral (*i.e.*, neutral in relation to the legal publisher having published the judgment) and media-neutral, since they are used whether the judgment is consulted on paper or through an electronic system. Neutral citations are accordingly known as **open citations**.

15. When borne on an electronic medium, the documents comply with a format, the various formats may also be described as **open formats** or **proprietary formats**. **Formats** are in the form of flags and commands which are added to the documents' contents. They mark the end of a word, line or paragraph. They specify the typographical attributes attaching to the various elements of the content. The format attaching to common office-automation tools such as WordPerfect and especially Microsoft Word are **proprietary formats**. They are defined for the specific purposes of the businesses having designed them. The Microsoft Word format, however, is so common that it has almost become a *de facto* standard for electronic documents.

16. Other formats have been designed from the outset to be accessible to everyone and by any software, *i.e.*, by software developed by others than those who defined the formats. These are **open formats**. The best known are **HTML**, **XML** and **PDF**. **HTML** (Hypertext Mark-up Language) is the mark-up format used on the Web. An HTML-formatted document can be read by any browser on any kind of computer. **XML** (Extensible Mark-up Language) is similar to HTML, but is far more general. In fact, HTML is a specific application of XML. XML allows the definition of other applications. It is possible using XML to predefine a structure that will identify the various items in a whole class of documents. Flags can be defined to identify titles, the text quoted, the author, and so on. **PDF** (Portable Document Format) was initially a proprietary format designed by the Adobe company. It became an open format when Adobe released it for use as an ISO standard.

17. For the purposes of access to foreign law, the ideal situation occurs when a document is identified by a neutral citation and is accessible in an open format.

C) The technology for distribution of the law

18. Technologies are now assuming a central role in the definition of access to the law. The Internet is naturally the global network through which the information can be accessed.

19. Against this background, the servers, usually **Web servers**, offer sets of documents and databases for consultation. In their simplest form, Web servers provide access to a number of documents accessible by browsing HTML pages which contain links to those documents. When they are more elaborate, Web servers rely on database systems. A **database** hosts information structured in the form of records. For instance, a record may consist of a number of fields containing respectively the date, the neutral citation, the case or registry number, the heading or title, and finally internal information specifying where the document may be found in the system, or even the document itself. The use of a database lets a website's operator offer its users an opportunity to perform more structured searches, by field.

20. From the user's point of view, websites provide an opportunity to browse in order to seek the desired information, an opportunity to perform queries through a search engine, and sometimes both. The legal websites set up by governments and by parties involved in free distribution of the law usually provide an opportunity to browse the information distributed. The commercial sites distributing the law rarely offer browsing, they merely allow the use of a search engine. The sites offering free access to law usually allow both browsing and searches through a search engine. Both these forms of access are

important, especially with respect to legislative information: the legal documentation is usually highly structured and the documents' context assists in their intelligibility. The organisation of legal information accordingly assumes great importance for the design of a good search tool for the law.

21. The Web technologies and HTML, the Internet document format, allow the insertion of **hypertext links** between the parts of a document and between documents. In the world of Web-based legal-information systems, hypertext links are generally used in order to allow legal citations to be followed up. This approach is rarely used on government sites, frequently on commercial sites, and systematically on sites offering free access to law.

22. Search engines vary considerably. Some restrict the user to **structured searches** and allow searches only within the fields of a database. With these, only the information stored in the records by title, date or case number can be sought. Other search engines allow **full-text searches**, making it possible to perform a search within the very text of the documents, these are most frequently used for the establishment of legal-information systems. Yet others, the best, allow combination of the criteria of a structured search within the fields with other full-text criteria. The full-text criteria make use of a query language allowing the expression of boolean queries using terms sought in the document's text. The best search engines allow the formulation of such queries specifying that such and such terms must be found no more than so many words apart, and that some other term should be absent from the document. The full-text search engines make use of indexes of terms, these list all the words in all the documents and exploit these lists when queried in order to be effective.

23. Indexing in the traditional sense is very different from indexing in a search engine. A **search engine's indexing** is designed to produce a data structure allowing efficient automated location. **Indexing in the traditional sense** is an entirely different operation. It requires the involvement of specialists, or at least of individuals aware of the document's contents and who attach one or more terms of a classification index to it. The designers of commercial legal-information sites combine both approaches and thereby facilitate the users' searches. The designers of sites offering free access usually do not have the financial resources that would enable them to hire the necessary staff to perform traditional indexing of legal documents.

24. **Citators** are another structure shared by many legal-information systems. A citator is a database which stores information regarding the relations among documents. To date, the citators offered by the leading commercial publishers are more comprehensive than those that are offered by some of the sites offering free access to the law. The commercial citators exploit the idea having appeared over a century ago with publication in the USA of Shepard's Citations. These books presented rulings that had been cited in subsequent court rulings. For each, the Shepard's specified, in particular and in highly-condensed form, whether the ruling citing the older one had upheld or reversed the ruling cited. Modern electronic citators have simplified the information's presentation, as they are no longer bound by the space constraints of paper. Commercial citators, like the Shepard's, offer information relating to the subsequent treatment of the decisions cited. The citators offered by the sites providing free access simply present a list of subsequent rulings citing a given ruling, legislative instrument, or even a section of a statute.

25. One final technical issue needs to be mentioned in this context, system interoperability. Systems are **interoperable** when they are able to exchange information and use it. The interest of interoperability for access to foreign law is due to the fact that

if, for instance, all the sites offering free access to the law were interoperable, all the information they have collected could be browsed in a relatively seamless manner.

D) Other relevant information systems and services

26. Over the past twenty years, researchers have sought to create more advanced systems which, somewhat like experts, could answer questions asked of them in a specific area of expertise. The designers of these **"knowledge-based systems"** can provide them with documents, but above all they wish to load them with knowledge. The expression of knowledge in a form that can be handled by a computer program without losing too much nuance is not an easy problem to solve. Likewise, the system's understanding of queries and the design of inference engines for the handling of knowledge are fairly intricate issues.

27. Some scientists consider nevertheless that the advancement of science now allows the creation, if not of genuine expert systems, at least of systems using databases. These are supposedly now able to perform inferences which, without reaching the sophistication of a lawyer's, could nevertheless assist citizens and, more specifically, those approaching foreign law, in finding their way about.

28. Systems have appeared more recently on the Internet, which are commonly referred to collectively as **Web 2.0** technologies. The "traditional" Web is the Web consisting of major websites offering a content prepared centrally by the site's operators. Sites such as CanLII or AustLII are definitely good examples of the traditional Web. Unlike the latter, the Web 2.0 calls rather upon participation, collective intelligence and interoperability of resources through Web services. The users very frequently create the content they seek to consult, they add information to the site, whether consciously or not. **Youtube**, **Flickr** and **Wikipedia** are examples of such sites.

29. A **blog** is a public log prepared by one Web user. Blogs provide commentary, usually brief, most commonly drafted by a single author. The information in a blog is most commonly chronological. Having said that, certain blogs, and the best among them, are collaborative works. Many blogs also allow consultation of their contents by theme, according to the theme associated with the commentary by its authors.

30. **RSS** (Really Simple Syndication) **threads** allow the syndication of contents. Anyone, including bloggers in particular, may produce them and combine them in order to stay informed of matters of interest to them. RSS threads are structured according to a few standardized formats. Several programs complying with these standards allow them to be subscribed for and consulted. RSS threads may be used, for instance, to warn a user of amendment of a legislative instrument.

31. **Wikis** allow the collaborative development of contents. **Wikipedia** is certainly the most accomplished example of the use of this technology. Unlike blogs, wikis are almost always collaborative. They are organised by theme rather than chronologically. Unlike traditional websites, the content is provided by the users.

32. Finally, Web-based services allow use of the Web by programs. They allow communication between sites by automated means. Thus, a site can provide access to a **legal citator** by means of Web-based services. In practice, this will allow a program to send a legal citation to that site and to receive in return the Internet address of the document corresponding to that citation, or the address of documents mentioning that citation. Many such services can be developed, and allow in the medium term very broad **interoperability** of the sites offering legal content on the Web.