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**A LEGAL ARCHITECTURE DESIGNED BY AND FOR ELITES: REVEALING THE
GUATEMALAN APPROACH TO FOREIGN AFFAIRS**

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Introduction

Constitutionalism, regionalism and international law all may be used to embed elite influence and corporate power with weak political accountability. One way in which this occurs is through the influence of elites in creating legal facades and distorting essential elements of liberal governance for their own benefit. There is growing literature on the influence of private actors and the role of the law in entrenching social and economic inequality through the process of designing market conditions and trade.¹ Yet, the role and methods of how these elites participate in the process of state-building, law-making, judicial reasoning and policy-design from a multilevel legal standpoint has not yet been fully sketched. Moreover, little is discussed on how the interaction of international law with domestic legal systems can be used to entrench an economic regime which excludes political accountability. This article provides evidence on how liberal concepts, such as judicial independence, can entrench a system of benefits for elites

¹ This is the Law and Political Economy school of thought. For an overview, see A. Harris and J.L. Varellas, 'Law and Political Economy in a Time of Accelerating Crises' (2020) 1 *Journal of Law and Political Economy* 1; D.S. Grewal, 'The Laws of Capitalism' (2014) 128 *Harvard Law Review* 626; N. Tzouvala, *Capitalism and Civilization: A History of International Law* (Cambridge: Cambridge University Press, 2020); S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011). On a more recent and general description of the concept, see S. Moyn, 'Reconstructing Critical Legal Studies' (2024) 134 *Yale Law Journal* (forthcoming), available at SSRN: <https://ssrn.com/abstract=4530596>.

through their informal influence. It also provides evidence of how the selective use of international law is used to avoid political scrutiny.

This article uses Guatemala as an illustrative example to map how elites can have an impact in the legal design of a state, its decision-making processes, its interactions with other states and judicial rulings to preserve historical privileges. Guatemala is a country where elites have come to entrench a political, economic and social regime where colonial privileges are still very much alive. Their influence on the Executive, Congress and Judiciary is present in the creation and perpetuation of economic rules and market conditions. This influence has created a multilevel economic regime, where the national constitution, regional integration norms and international trade instruments converge in creating an exclusionary state. National elites, and their lawyers have legally entrenched private interests into the decision-making processes on foreign policy in Guatemala at the expense of democracy and without political accountability. This article shows how Guatemalan institutions are legally designed to privilege traditional economic elites and, as a corollary, how they create the conditions for political inequality in negotiating and implementing treaties and/or other international instruments.² It also examines the underlying reasons, interpretation methods and institutional design that have made national courts complicit in preserving the privileges of these same elites by transforming legal transplants and doctrines. Therefore, Guatemala shows how Elites can and do have an impact in legal institutional design and policy outcomes.

To show how foreign economic policy is legally designed to perpetuate elite interests in a country like Guatemala, this article takes a three-pronged approach. Part I presents the contextual backdrop underlying the current legal framework for foreign relations in Guatemala. It highlights how elites have managed to entrench their participation and interests in the country's state-building processes, and their particular interest in foreign economic policy. It shows how national elites, particularly through industrial conglomerates (in Spanish, *cámaras*), have since the mid-20th century promoted state reform in a manner that has aligned economic foreign policy with their political and economic interests. Part II details the legal framework, institutions and actors involved in the development of the Guatemalan economic foreign policy agenda. It shows how elites' interests are entrenched in the Constitution and in the many statutes and bylaws that regulate the procedures for economic policymaking in the country and their participation in the negotiation of trade agreements. It also shows how the Guatemalan Constitutional Court has been complicit in the preservation of privileges for elites in international trade issues by changing its interpretation in radical ways. Part III discusses the political implications and consequences for democracy of this legal framework of economic foreign policymaking. It provides a critique of Guatemala's approach to foreign policy, including of how it sacrifices other political and human rights commitments to preserve this economic vision. The final part, Part IV, discusses democratic and theoretical insights that can aid the country in providing accountability for decision-making in its foreign relations policy processes. It suggests that accountability should be designed with a two-dimensional perspective, reviewing first the many stages where law interacts on multiple levels (national, regional and international); and secondly, the many stages of decision-making, negotiation and

² Political science papers have already informed of this phenomenon from their respective discipline. See B. Bull, 'Towards a Political Economy of Weak Institutions and Strong Elites in Central America' (2014) 97 *European Review of Latin American and Caribbean Studies* 117.

implementation of trade rules. This two-axis approach provides a solid basis for the design of accountability procedures.

1. Part I. Entrenching Privileges: The context of national policymaking and the role of elites and their lawyers in Guatemala

Elites, for the purposes of this article, refers to the dominant political, social or economic groups within a polity that are linked by common features.³ These links reflect their common identity and values, and are not necessarily entirely rational.⁴ These links can be inherited from family or developed through work, economic ties, etc. This article does not utilize the term elite as functional actors within societies (academics, military groups or political parties). Instead, it is associated with groups with colonial backgrounds, social privileges and with higher economic status, and influence within public decision-making. A feature of these groups is their inherent self-preservation and tendencies to protect their privileges through different means of governance (i.e., law or violence).⁵ Studies show that elites have an impact on the centralization of power, control of resources and the how the law can be used as violent measures to defend private interests.⁶ In Guatemala, elite rule is characterized by the preservation of traditional social structures and the arbitrary use of power to rule over other peoples in society.⁷ These Elites are nowadays organized in agricultural and industrial conglomerates that have been awarded political participation in policymaking under the law and their lawyers have influence in judicial outcomes. This becomes evident by observing the current decision-making procedures and institutional design, which reflect a colonial mindset of extractivism for the exploitation of the land by traditional elites as next described.

Elites in Guatemala have traditionally influenced politics and have entrenched their exclusionary participation through many legal decision-making processes.⁸ This process of elite consolidation has spanned well over a century and is still present.⁹ Guatemalan politics, social and cultural context, institutional setup and law are reflective of this history. Further, this

³ On the role of elites, I draw from V. Pareto, *The Rise and Fall of Elites: An Application of Theoretical Sociology* (New Brunswick: The Bedminster Press, 1968).

⁴ Ibid., at 86 (on their rigidity and exclusivity), 88 (focus on tax, interest in production, and need to keep them close to governance), 91–94 (on their underlying features of ideology, lack of rationality and self-positioning in society), 98–99 (failure to speak up when favoured by government and tolerance of abuse to others to preserve their benefits), 99 (the idea that elite rule is best challenged in theory, rather than exposing the elites behind ideology).

⁵ Ibid., at 60–61, 69, 86 (detailing that when a ruling class declines, they resort to fraudulent practices or other forms to aid the enemy of their enemy).

⁶ Bull, *supra* note 3, at 119.

⁷ Ibid., at 758–766. On a Latin American focus, see G. Zabłudovsky, ‘Max Weber y la dominación patrimonial en América Latina’ (1986) 124 *Revista Mexicana de Ciencias Políticas y Sociales* 75.

⁸ On a more general overview of how Latin American states have preserved elite rule through constitutions and constitutionalism, see R. Gargarella, *Law as a Conversation Among Equals* (Cambridge: Cambridge University Press, 2022), at 38–50.

⁹ Over initial conflict on elites and their ideology in constitution making in early Latin America, see R. Gargarella, *Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution* (Oxford: Oxford University Press, 2013).

vision of state-building is a colonial feature inherited from Spain.¹⁰ The colonial structures of extractivism persisted long after independence (1821) without dispute.¹¹ Moreover, the colonial and extractivist features of trade linger today, as Guatemalan society and social hierarchies have changed very little throughout generations.¹² Today, historical and large industrial conglomerates connected to Elites concentrate the largest economic revenue in the country.¹³ Meanwhile, medium and small businesses, usually from other backgrounds (mestizo or indigenous) struggle to compete in fair market conditions.¹⁴ Laborers in large agricultural estates work in informality, without access to social pension and with wages incapable to keep up with inflation.¹⁵ Trade and governance in Guatemala have become a reflection of this elitist mindset.¹⁶

Colonial families have kept their status, perpetuating themselves as self-preserving oligarchies with control of the economic policy agenda.¹⁷ A key feature of this colonial and extractivist vision of trade has been the use of land for exportation and trade purposes.¹⁸ This has led to the historical acquisition of land by large companies and the expulsion of indigenous small landowners or their transformation into laborers or, more recently, blue-collar workers.¹⁹ This is still observable in recent times with the growing *maquila* (sweatshop) industry since the

¹⁰ H. Lindo Fuentes, 'Economía y sociedad (1810–1870)', in H. Pérez Brignoli (ed.), *Historia General de Centroamérica*, Tomo III: *De la Ilustración al liberalismo* (San José: FLACSO, 1992)

¹¹ J.F. Valdez, *El ocaso de un liderazgo: las élites empresariales tras un nuevo protagonismo* (Guatemala: FLACSO, 2003), at 110–111.

¹² From an economic perspective, see A. Segovia, *El gran fracaso: 150 años de capitalismo ineficiente, concentrador y excluyente en Centroamérica* (San Salvador: FyG Editores, n.d.); J.A. Fuentes Knight, *La economía atrapada: gestores de poder y Estado encadenado* (Guatemala: FyG Editores, n.d.); and V. Bulmer-Thomas, *The Political Economy of Central America since 1920* (Cambridge: Cambridge University Press, 1987). From a historical perspective, see S. Martínez Peláez, *La patria del criollo: An Interpretation of Colonial Guatemala* (Durham: Duke University Press, 2009); and H. Pérez Brignoli (ed.), *Historia General de Centroamérica* (San José: FLACSO, 1992). From a sociological perspective, see C. Guzmán Böckler and J.-L. Herbert, *Guatemala: una interpretación histórico-social* (Guatemala: Siglo Veintiuno Editores, 1970); E. Torres Rivas, *Revoluciones sin cambios revolucionarios* (Guatemala: FyG Editores, 2011); and J.M. Paige, *Coffee and Power: Revolution and the Rise of Democracy in Central America* (Cambridge, MA: Harvard University Press, 1997). From a political science perspective, see P.J. Dosal, *Power in Transition: The Rise of Guatemala's Oligarchy, 1871–1994* (Westport: Praeger, 1995).

¹³ Oxfam e Instituto de Investigación y Proyección sobre Economía y Sociedad Plural, *Entre el suelo y el cielo: Radiografía multidimensional de la desigualdad en Guatemala* (2019), at 38–39.

¹⁴ *Ibid.*, at 37.

¹⁵ *Ibid.*, at 39–42, 44–46.

¹⁶ J.F. Valdez, *Guatemala: Las entrañas del Estado. Historia de sus crisis, dualidad institucional y poder de regeneración*, Vol. I (Guatemala: Cara Parens, 2024), at 88–104; R. Krznaric, *What the Rich Don't Tell the Poor: Conversations with Guatemalan Oligarchs* (London: Blackbird Collective, 2022), at 205–219.

¹⁷ J.H. Elliott, 'Spain and America in the Sixteenth and Seventeenth Centuries', in L. Bethell (ed.), *The Cambridge History of Latin America*, Vol. I: *Colonial Latin America* (Cambridge: Cambridge University Press, 1984) 298.

¹⁸ Lindo Fuentes, *supra* note 33, at 199; Torres Rivas, *supra* note 35, at 41–51.

¹⁹ Martínez Peláez, *supra* note 35, at 275–280.

1990s.²⁰ In contrast to other countries in the region, Guatemala has not experienced any land reform process. Indeed, elites and foreign intervention successfully blocked two major land reform efforts, in 1951²¹ and the mid-1990s.²²

In the 1930s, Guatemala's elites started to organize themselves in major trade and commercial conglomerates (*cámaras*, in Spanish).²³ Since then, these conglomerates have become influential actors in shaping Guatemalan politics.²⁴ Examples of these are the sugar conglomerate (Asazgua, founded in 1957), the coffee association (Anacafe, 1960), and the industrial conglomerate (CACIF, 1957). These conglomerates had, and continue to have, a clear vision for state-building.²⁵ They have opposed any major social or land reform, labeling such efforts as communism. The control over the land is now guaranteed through public and criminal laws which allows for the swift expulsion of groups, even by force.²⁶ Moreover in 2021, the National Prosecutor created the *Fiscalía contra el Delito de Usurpación* (Office against the crime of usurpation²⁷), which has been used to evict indigenous families from the land they emigrated because of Guatemala's internal civil war.²⁸ The Interamerican Court of Human Rights held that the state of Guatemala was responsible for using violence against indigenous groups using public means and allowing intimidation from private groups in their efforts to secure native land.²⁹

Guatemala suffered a civil conflict spanning over 40 years (mid-1950s to 1996). During this time, elites aided the government by providing political and economic assistance to the military (including air support to the military with private aircrafts).³⁰ Elites had close ties to the military dictators, ensuring their political privileges and economic benefits.³¹ Because of this relationship, these conglomerates avoided competition among themselves and created

²⁰ Congreso de la República de Guatemala, *Decreto Número 29-89, Ley de Fomento y Desarrollo de la Actividad Exportadora y de Maquila* (Law for the Promotion and Development of Export and Maquila Activity).

²¹ P. Gleijeses, 'The Agrarian Reform of Jacobo Arbenz', 21 *Journal of Latin American Studies* (1989) 453–480.

²² Krznaric, *supra* note 30, at 145–150.

²³ Dosal, *supra* note 35, at 67–81.

²⁴ *Ibid.*, at 111–153.

²⁵ CACIF, Nuestra Historia: [Nuestra Historia - CACIF GUATEMALA](#). "El CACIF se creó en un panorama político caracterizado por la lucha contra la amenaza comunista, avivada tras la muerte del presidente Carlos Castillo Armas, que nunca fue aclarada, y la convocatoria a elecciones". See also Dossal, 132–133, and for a more recent account of these economic elites and their wage against communism, see: Alejandra Colom, *Disidencia y Disciplina: Cómo Las Élités Tradicionales sofocan el Disenso y Qué Sigue Ahora* (F&G Editores, 2021).

²⁶ Ministerio Público, *Instrucción General Número 03-2012*, issued on 8 May 2012, by the Public Prosecutor's Office of Guatemala, establishing expedited procedures for the removal of indigenous groups from private land.

²⁷ *Instrucción General Número 03-2012*, *supra* note 26.

²⁸ Ministerio Público, *Ministerio Público inaugura Fiscalía contra el Delito de Usurpación*, 3 October 2021, available at <https://www.mp.gob.gt/noticia/ministerio-publico-inaugura-fiscalia-contra-el-delito-de-usurpacion/> (last accessed 24 March 2025).

²⁹ AP News, *Guatemala: queman casas de campesinos en violento desalojo*, 17 November 2021, available at <https://apnews.com/article/noticias-e2f5e7a785e26b642e01c62ec2c896ec> (last accessed 24 March 2025).

³⁰ IACtHR, *Case of Comunidad Indígena Maya Q'eqchi' Agua Caliente v. Guatemala*, Judgment, 16 May 2023. Decision available at https://www.corteidh.or.cr/docs/casos/articulos/resumen_488_esp.pdf

³¹ Krznaric, *supra* note 30, at 63–66, 69–74.

³² Dosal, *supra* note 35, at 120–133.

conditions for large foreign companies to enter Guatemalan without receiving major blows to their revenues.³² This made Guatemala into an oligopoly, where private industries dominated market conditions through law and influence in politics.³³

The influence of elites in politics, trade and law is historical and deeply intertwined. Through the law, elites have been awarded tax exemptions, subsidies, special protection to their land, and a direct voice on many of the issues related to trade governance and international investment (including expropriation of land for public-private projects,³⁴ wages and salaries,³⁵ social security coverage,³⁶ currency policy³⁷ and more).³⁸ In the early 2000s, they also promoted a series of modernization laws including a new development model that favored private enterprises.³⁹ During this period, new laws were enacted for state procurement,⁴⁰ outsourcing most services to private companies, new conditions to stimulate activity in specific industries,⁴¹ and the decentralization of governance to allow private companies more direct access to public funds.⁴² New laws reinforcing the extractivist model were also approved, such as the Mining Law.⁴³ This law provides the lowest revenue share for a state for mining extraction activities in the entire Latin American region (only 1%).⁴⁴

Also important is the historic role many lawyers of elites groups have played in drafting the Constitution and statutes and influencing judicial appointments in the country.⁴⁵ Their role has been essential in securing private interests in the policymaking processes and boards of public institutions.⁴⁶ Many of these lawyers have occupied high-level positions on state boards as well as advising private businesses.⁴⁷ Through constitutional provisions, property rights, limitations of public power, and the positioning of these private entities at the center of the country's socio-economic development have been entrenched. The 1986 Constitution enshrines a judicial

³² Segovia, *supra* note 35, at 36–38.

³³ Valdez, *supra* note 34, at 101–104.

³⁴ Congreso de la República de Guatemala, *Decreto Número 16-2010, Ley de Alianzas para el Desarrollo de Infraestructura Económica*, Art. 66.

³⁵ Congreso de la República de Guatemala, *Decreto Número 11-73, Ley de Salarios de la Administración Pública*

³⁶ Congreso de la República de Guatemala, *Decreto Número 295, Ley Orgánica del Instituto Guatemalteco de Seguridad Social*, Art. 2.

³⁷ Constitución Política de la República de Guatemala, Art. 132.

³⁸ O. Sanchez, 'Tax Reform Paralysis in Post-Conflict Guatemala', 14 *New Political Economy* (2009) 101–131.

³⁹ Valdez, *supra* note 34, at 99–176.

⁴⁰ Congreso de la República de Guatemala, *Decreto Número 57-92, Ley de Contrataciones del Estado*.

⁴¹ Congreso de la República de Guatemala, *Decreto Número 19-2016, Ley Emergente para la Conservación de Empleo*.

⁴² Congreso de la República de Guatemala, *Decreto Número 14-2002, Ley General de Descentralización*.

⁴³ Congreso de la República de Guatemala, *Decreto Número 48-97, Ley de Minería*.

⁴⁴ *Ibid.*, Art. 63.

⁴⁵ M.A. Morales, 'Constitucionalismo en Guatemala: Patrimonialismo y Corporativismo', in C.A. Villagrán Sandoval (ed.), *Constitucionalismo guatemalteco frente a lo global: estudios de una nueva generación de voces* (Guatemala: Cara Parens, 2020).

⁴⁶ L.F. Rodríguez Quiroa, *Empresarios con poder: al menos 58 instancias del Estado en las que las cámaras tienen voto o voz*, Plaza Pública, 30 January 2018, available at <https://www.plazapublica.com.gt/content/empresarios-con-poder-58-instancias-del-estado-en-las-que-las-camaras-tienen-voz-y-voto> (last accessed 24 March 2025).

⁴⁷ Valdez, *supra* note 34, at 134–135.

selection process that allows elites to nominate judges to the Constitutional Court and the Supreme Court.⁴⁸ Through their influence on the judicial appointment process, the Constitutional Court has developed case law that, among other things, preserved the interests of elites after Guatemala's civil conflict.⁴⁹ In addition, the 1986 Constitution facilitated elite control of the legislative and executive policy agenda through judicial review. In Guatemala, any private person, with the assistance of three lawyers, can challenge any law as unconstitutional before the Constitutional Court.⁵⁰ The Constitution also establishes the right of *amparo* (constitutional injunction), by which any executive or administrative action can be rendered without effect by the courts.⁵¹ As shown later in this article, it has been through the *amparo* that the Constitutional Court has upheld and reversed many foreign economic relations policies to the benefit of private elites.

In the area of foreign relations, elites have used their influence on the government to influence talks regarding business and human rights and the ratification of International Labor Organization conventions (particularly those related to improved work conditions and expanded social coverage for woman and domestic workers).⁵² They also successfully derailed ratification process of the *Escazu Agreement*, that is, the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, signed by Guatemala in 2018.⁵³ Due to this pressure, many international agreements have been stalled in Congress for many years, never being debated.

Elites also participate in the formulation of policies in informal ways. This includes direct contact with public officials regarding governance obligations under free-trade agreements. Elite groups often directly influence Guatemala's response to the administrative bodies of free-trade agreements, by providing technical information to bureaucrats involved in the many

⁴⁸ See the discussion by the Constituents of the 1985 Constituent Assembly, Session 74, 25 April 1985 (on file with the Archivo del Congreso de la República de Guatemala). In this discussion, it was mentioned that Congress only had a second-hand vote over a judicial selection process already defined by influential groups within the legal college. See also E.S. Morales and R.J. Guzmán, 'Loyalty and Willpower: Strategic Designing of Judicial Appointments in Constitutional Courts. The Case of the Dominican Republic and Guatemala', 99 *Revista de Derecho Público* (2023) 53, at 59–60; and D.M. Brinks and A. Blass, *The DNA of Constitution in Latin America: Politics, Governance and Judicial Design* (Cambridge: Cambridge University Press, 2018), at 108.

⁴⁹

See for example, E. Ortiz, 'Corte de Constitucionalidad: ¿árbitro de última instancia del juego político? La ruptura con el legalismo', in C.A. Villagrán Sandoval (ed.), *Constitucionalismo guatemalteco frente a lo global: Estudios de una nueva generación de voces* (Guatemala: Cara Parens, 2020); and R.E. Bowen, *The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America* (Cambridge: Cambridge University Press, 2017), at 154–159.

⁵⁰ Decreto Número 1-86, *Ley de Amparo, Exhibición Personal y de Constitucionalidad*, Art. 134(d).

⁵¹ Ibid., Art. 42

⁵² Prensa Libre, *Empresarios piden no ratificar Convenio 190 de la OIT, normativa contra la violencia y el acoso laboral*, available at <https://www.prensalibre.com/economia/empresarios-piden-no-ratificar-convenio-190-de-la-oit-normativa-contra-la-violencia-y-el-acoso-laboral/> (last accessed 24 March 2025).

⁵³ United Nations, *Statement of 20 December 2022 on Guatemala's intention not to become a party to the Escazú Agreement*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en (last accessed 24 March 2025).

decision-making processes or by joining them in their negotiation travels.⁵⁴ They have also created the *Observatorio de Derechos de Propiedad* (Observatory of Property Rights), with the purpose of protecting the right to property in Guatemala.⁵⁵ The Observatory has links with many public institutions (including the Criminal Prosecutor's Office, the Property Registry of Guatemala and the Constitutional Court), as well with private legal groups publicly known for their efforts to guarantee rights of these elites.⁵⁶ The Observatory publishes legal guides and reports and facilitates workshops on the protection of private property. By doing so it has created a registry of cases and convictions in Guatemala.⁵⁷

2. Part II. An elite's game: the legal framework for negotiating international economic law

The Guatemalan experience reveals some of the tactics that elites use to influence state building and legal regimes for their benefit. These include the selective invocation of international law and judicial independence to foster the powers of elites rather than liberal visions of the rule of law. Treaties furthering elite interests have been constitutionalized, while other treaties are not ratified. Therefore, the manner on how treaties are negotiated, and by whom, reveals the influence within the design of institutions and their colonial heritage.

The previous section provided the context for how elites have come to dominate the political economy of Guatemala. It showed how elites have consolidated political and economic power in the decision-making processes relating not only to economic foreign relations but in Guatemalan governance more broadly. This section shows how the law reflects this political economy setup designed to entrench privileges for elites.

A. The constitutional monopoly

The Guatemalan Constitution of 1986 establishes a series of principles on how foreign relations should be dealt with. The Constitution requires that Guatemala should engage other countries in a manner that respects the principles, norms and practice of international law, all to maintain peace, respect and guarantee human rights and democracy, and strengthen international institutions.⁵⁸ The Constitution also requires that Guatemala, as part of the "Central American community," adopt all measures to achieve partial or total political or economic union with the rest of the Central American subregion.⁵⁹ Last, the Constitution establishes that the Guatemalan state shall maintain cooperation agreements with other countries that have similar economic, social and cultural features.⁶⁰

⁵⁴ E. Lacs, *La negociación del CAFTA: Principales dificultades, principales resultados y lecciones para futuras negociaciones* (2004) (Working Paper for the Programa Regional Centroamérica en la Economía del Siglo XXI), at 233; Krznaric, *supra* note 30, at 104–106.

⁵⁵ Observatorio de Derechos de Propiedad, *Delitos contra propiedad inmueble*, available at <https://www.observatoriopropiedad.org/delitos-contra-propiedad-inmueble/> (last accessed 24 March 2025).

⁵⁶ Observatorio de Derechos de Propiedad, *Aliados estratégicos*, available at <https://www.observatoriopropiedad.org/about/> (last accessed 24 March 2025).

⁵⁷ Observatorio de Derechos de Propiedad, *supra* note 56.

⁵⁸ Constitución Política de la República de Guatemala, Art. 149.

⁵⁹ Constitución Política de la República de Guatemala, Art. 150.

⁶⁰ Constitución Política de la República de Guatemala, Art. 151

When it comes to implementing these principles, the institutional design reveals very few democratic and political checks and balances. The Guatemalan Constitution establishes that foreign affairs is a subject belonging solely to the executive.⁶¹ This means that the design and implementation of the foreign policy agenda, both political and economic, are in the hands of the executive alone.⁶² It also establishes that any decentralized, autonomous state institution must follow the policy set out by the executive when it engages in relations with foreign and international actors. Congress has very few prerogatives to act as a political counterweight to the Executive. Through its individual members or through the Foreign Relations Commission, Congress may summon and question the ministers in charge of foreign affairs and trade.⁶³ However, it seldomly does so.⁶⁴ It may also impeach ministers, but only in matters that have been concluded.⁶⁵ This excludes any issues still being still negotiated.⁶⁶ In Guatemala, Congress has no role in appointing or approving diplomatic staff.⁶⁷ Additionally, neither Congress nor individuals may access diplomatic records, as these are protected by the Constitution.⁶⁸ This creates many knowledge gaps for members of Congress, individuals and courts regarding the conduct of foreign affairs. It has led, among others, to situations where national courts have not applied Guatemalan reservations to international instruments.⁶⁹ This imbalance of power over foreign affairs is a legacy of previous constitutions. The Guatemalan constitutions of 1879⁷⁰, 1945⁷¹, 1956⁷² and 1965⁷³ all included very few checks

⁶¹ Constitución Política de la República de Guatemala, Art. 183 (o)

⁶² Congreso de la República de Guatemala, *Ley del Organismo Ejecutivo*, Arts. 32(2) (regarding the Ministry of Economy and its role over international trade and investment) and 38 (regarding the Ministry of Foreign Affairs).

⁶³ Constitución Política de la República de Guatemala, Art. 166; Congreso de la República de Guatemala, *Ley del Organismo Legislativo*, Art. 139.

⁶⁴ G. Orellana, *Diario de Sesiones del Congreso de la República de Guatemala*, Período Ordinario 2002–2003, Tomo III, Miércoles 25 de septiembre de 2002, Sesión Ordinaria Número 053; and S. Jovel, *Diario de Sesiones del Congreso de la República de Guatemala*, Período Legislativo 2018–2019, Jueves 8 de marzo de 2018, Sesión Ordinaria Número 15.

⁶⁵ Constitución Política de la República de Guatemala, Art. 166; Congreso de la República de Guatemala, *Ley del Organismo Legislativo*, Art. 139. On the Sandra Jovel impeachment, this constitutional provision allowed her to not answer questions from members of Congress; see *supra* note 64, at 27.

⁶⁶ *Ibid.*

⁶⁷ Constitución Política de la República de Guatemala, Art. 183(s).

⁶⁸ Constitución Política de la República de Guatemala, Art. 30.

⁶⁹ Corte de Constitucionalidad de Guatemala, Expediente 1822-2011, 17 July 2012; Expediente 56-2012, 3 May 2012; Expediente 2201-2018, 29 May 2018 (concurring opinion of Justice Dina Ochoa). See also Guatemala's reservation to Article 27 of the Vienna Convention on the Law of Treaties, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en (last accessed 25 March 2025).

⁷⁰ *Ley Constitutiva de la República de Guatemala*, decretada por la Asamblea Nacional Constituyente el 11 de diciembre de 1879, Art. 59(9).

⁷¹ *Constitución de la República de Guatemala*, decretada por la Asamblea Constituyente el 11 de marzo de 1945, Art. 119(9).

⁷² *Constitución de la República de Guatemala*, decretada por la Asamblea Constituyente el 15 de septiembre de 1965, Art. 149. (2-3)

⁷³ *Constitución de la República de Guatemala*, decretada por la Asamblea Constituyente el 15 de septiembre de 1965, Art. 170(14).

and balances for foreign affairs and trade. The drafters of the 1986 constitution followed this precedent intentionally so as to avoid competing voices in foreign relations.⁷⁴ The drafters argued that the counterbalance to the President in foreign relations should be the Vice-president, and Congress should have a limited role in this area of governance.⁷⁵ The Guatemalan Constitutional Court has taken a literalist approach to the interpretation of the executive's powers over foreign affairs, saying that Congress should only serve as an accountability control in foreign affairs and only when the Constitution allows it.⁷⁶ Although the Constitutional Court has over time defined other constraints on the exercise of these powers by the executive, these constraints are applied by the Constitution and not by other state powers, such as Congress.⁷⁷

Under the current Constitution, Congress merely acts as the ex-post approver for the negotiation and adoption of foreign instruments by the executive.⁷⁸ Only in very few instances do instruments negotiated, signed or adopted by the executive need congressional approval. These include foreign loans and treaties that modify domestic laws, delegate governance powers to supranational bodies, require submission to the jurisdiction of an international tribunal or dispute settlement system, or create any investigative commission on topics of national interest.⁷⁹ Congress can only approve the entirety of the text of international instruments in an ex-post fashion. Unlike other countries in the region, this procedure is not regulated.⁸⁰ This makes Congress vulnerable to pressure from local actors as well as other states and international actors. This is particularly true in the case of free-trade agreements, investment treaties and major foreign loans for public infrastructure.

Congress also lacks scrutiny over the administrative and regulatory bodies created under free trade agreements or under the Central American economic integration regime. These international and regional administrative bodies are composed mainly of representatives of the executive branches of the member states. These bodies adopt most (if not all) of the regulations that continue liberalization processes, lower tariffs or introduce new products into free trade among the signatory parties.⁸¹ These bodies have a direct impact on many of the market and

⁷⁴ J.P. Gramajo Castro, *La Constitución de los Constituyentes: Constitución Política de la República de Guatemala. Anotada con los Diarios de Sesiones de la Asamblea Nacional Constituyente y Comisión de los Treinta* (Guatemala: Hermopolis Editorial, 2024), Vol. III, at 426.

⁷⁵ Ibid., at 428

⁷⁶ Corte de Constitucionalidad de Guatemala, Expds. Acumulados 290 y 292-91, 3 November 1992, at 15.

⁷⁷ Corte de Constitucionalidad de Guatemala, Exp. 452-2018, 29 January 2021, at 19–20.

⁷⁸ Constitución Política de la República de Guatemala, Art. 171.

⁷⁹ Ibid.

⁸⁰ See, for example, *Ley sobre la Celebración de Tratados* (México, 1992); *Ley sobre la Aprobación de Tratados Internacionales en Materia Económica* (México, 2004); and *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales* (España)

⁸¹ See, for example, Art. 19.1 of the *Dominican Republic–Central America–United States Free Trade Agreement (US–DR–CAFTA)*; Ch. 17 of the *Free Trade Agreement between Colombia and El Salvador, Guatemala and Honduras*; and Arts. 36–54 of the *Protocol of Guatemala to the General Treaty on Central American Economic Integration*.

social conditions of states and their people, and act without congressional scrutiny.⁸² Nonetheless, there is no regulation of or prescribed procedures for decision-making by these entities.⁸³ Neither the discussions nor negotiations surrounding their decisions are fully recorded, published or disseminated to the public. This leaves Congress and domestic groups largely unaware of regulatory activity at the international and regional levels of governance.

B. The bylaws for trade negotiation

The Guatemalan Constitution grants the executive a monopoly on foreign affairs, with very few accountability processes. This is a historical feature of over 200 years of existence. As mentioned above, in the mid-20th century, industrial conglomerates began to organize and gain a strong role in politics in Guatemala. Their impact on politics was such that they were granted direct participation in many areas of governance and on state boards, including those related to economic foreign relations. An example of this is the National Council for the Promotion of Exports (*Consejo Nacional para la Promoción de las Exportaciones*, CONAPEX).⁸⁴ This body was created in 1986 with the aim of establishing a national trade policy and agenda for the export of local products. It also has a voice in defining which industries international investment should focus on and how the Ministry of Economy should act in engaging with foreign markets.⁸⁵

CONAPEX has been determinant in defining foreign economic policy in a manner sheltered from politics and other social groups (such as indigenous peoples). This entity has designed the country's trade liberalization policies regarding textiles (for the sweatshop industry), free tax zones, subsidies and other policies to benefit the export industry. This can be observed in its latest policy guidelines, of 2012.⁸⁶ This policy is aimed at expanding production in Guatemala for trade purposes, and seeks to enhance gains from trade agreements already signed by Guatemala.⁸⁷ The guidelines also mention the need to protect certain national products from the international market and call for the creation of offices to facilitate private sector participation at regional integration and multilateral economic forums.⁸⁸ One result of this policy is the creation of specific commercial posts at the country's foreign embassies that are essentially recruited by the private sector.⁸⁹ These officers are part of the Guatemalan Foreign

⁸²For the Central American Economic Integration regime, see Art. 55 of the *Protocol of Guatemala to the General Treaty on Central American Economic Integration*. For the US–DR–CAFTA, see Arts. 19.1.3 and 19.1.4 of the *Dominican Republic–Central America–United States Free Trade Agreement (US–DR–CAFTA)*.

⁸³ See Art. 19.4.5 of the *Dominican Republic–Central America–United States Free Trade Agreement (US–DR–CAFTA)*; and *Reglamento de los Actos Normativos del Sistema de la Integración Centroamericana*, signed in Managua, 1 December 2005.

⁸⁴ *Acuerdo Gubernativo Número 367-86, Creación del Consejo Nacional de Promoción de Exportaciones (CONAPEX)*; and *Acuerdo Gubernativo Número 399-906, Modificación de la integración del Consejo Nacional de Promoción de Exportaciones*.

⁸⁵ Consejo Nacional de Promoción de Exportaciones, *Política Integrada de Comercio Exterior, Competitividad y Inversiones de Guatemala* (February 2012).

⁸⁶ *Ibid.*, at 7.

⁸⁷ *Ibid.*, at 16–17.

⁸⁸ *Ibid.*

⁸⁹ Ministerio de Relaciones Exteriores de la República de Guatemala, *Guatemala presenta estrategia para la promoción de país a nivel internacional*, 2 September 2020, available at <https://www.minex.gob.gt/noticias/Noticia.aspx?id=28807> (last accessed 25 March 2025).

Service, have as their objective attracting foreign investment and promoting national exports and have direct links to the private sector.⁹⁰

The Ministry of Economy is the arm of the executive in charge of trade, both foreign and national.⁹¹ This institution is responsible for negotiating and implementing any free trade agreement (such as the *United States–Dominican Republic–Central America Free Trade Agreement*, US-DR-CAFTA) and, bilateral and multilateral investment treaties, as well as representing Guatemala at the World Trade Organization and other regional and international economic forums (such as the World Intellectual Property Organization and the United Nations Conference on Trade and Development and Commission on International Trade).⁹² The Ministry of Economy also deals with any legal suits brought against Guatemala by foreign companies under international dispute settlement systems (such as ICSID or the Permanent Court of Arbitration).⁹³ Trade is separate from foreign affairs, which is dealt by the Ministry of Foreign Affairs. This separation is entrenched by the Law of the Executive (*Ley del Organismo Ejecutivo*). This statute determines that the Ministry of Foreign Affairs merely acts as an aid to the Ministry of Economy in certain circumstances.⁹⁴ These may include defining legal interpretation of international law, acting as a communication channel between the Ministry of Economy and foreign countries or international actors, or publishing the decisions made or signed under economic agreements.⁹⁵

The Ministry of Economy has elaborated its own rules of procedure for negotiating and decision-making in the area of foreign economic relations. These are laid out in the Rules on the Creation, Integration and Functioning of National Technical Committees in the Framework of International Economic-Commercial Instruments (*Reglamento de creacion, integracion y funcionamiento de los comites tecnicos nacionales, en el marco de los instrumentos economico-comerciales internacionales*). These rules of procedure organize the various committees in charge of negotiating the many chapters or subjects of free trade rules.⁹⁶ Each committee or chapter is made up of representatives of the government, the National Business Commission on International Trade Negotiation (*Comision Empresarial de Negociaciones Comerciales Internacionales*, CENCIT in Spanish) and the Guatemalan conglomerates of industry (CACIF) and commerce.⁹⁷ CENCIT was created in 1994 by the various business conglomerates in an effort to secure their participation in the negotiation of bilateral, regional

⁹⁰ Ministerio de Relaciones Exteriores de la República de Guatemala, *Consejeros Comerciales*, available at https://www.minex.gob.gt/Visor_Pagina.aspx?PaginaID=2251 (last accessed 25 March 2025); and Ministerio de Economía, *Promueven la Estrategia de Atracción de Inversión Extranjera con Consejeros Comerciales*, 15 November 2024, available at <https://mineco.gob.gt/guatemala-fortalece-sus-capacidades-tecnicas-en-comercio-internacional-con-taller-nacional-de-la-omc?view=article&id=117:promueven-la-estrategia-de-atraccion-de-inversion-extranjera-con-consejeros-comerciales&catid=15> (last accessed 25 March 2025).

⁹¹ Congreso de la República de Guatemala, *Decreto Número 114-97, Ley del Organismo Ejecutivo*, Art. 32.

⁹² Ministerio de Economía de Guatemala, *Acuerdo Gubernativo Número 211-2019, Reglamento Orgánico Interno del Ministerio de Economía*, Art. 31.

⁹³ *Ibid.*, Art. 36(d).

⁹⁴ *supra* note 92, Art. 38(e).

⁹⁵ *Ley del Organismo Ejecutivo supra* note 90, Art. 38(i).

⁹⁶ Ministerio de Economía de la República de Guatemala, *Acuerdo Ministerial Número 493-2009*, 26 June 2009.

⁹⁷ *Ibid.*, Art. 23.

and multilateral trade agreements.⁹⁸ Through CENCIT, the private conglomerates have secured their voice and position at such fora as the WTO.⁹⁹ This relationship with government has protected elites' control over industry. An example of this is the measures adopted under *US-DR-CAFTA* to protect certain Guatemalan products, including sugar¹⁰⁰, coffee¹⁰¹ and poultry,¹⁰² as well as the promotion of the sweatshop industry.¹⁰³ It is noteworthy that this involved no consultation with indigenous peoples.¹⁰⁴ Moreover, no indigenous community is represented at CONAPEX or CENCIT, integrated to any committee of the Ministry of Economy's rule procedure for negotiation, nor mentioned at the state's integrated trade policies.

The lack of consultation has impacted directly in the regulation of plant varieties in Guatemala. For example, in June 2014, the Congress of Guatemala approved the Decree No. 19-2014, or "Law for the protection of Plant Variety" -*Ley para la protección de obtenciones vegetales*.¹⁰⁵ This law was promoted by the country's Executive with the support of the United States to implement *US-DR-CAFTA* obligations negotiated by that country and Central America. It regulated the recognition and protection for any existing and new plant variety in the country.¹⁰⁶ The protection was given by granting concession rights over any plant variety to any individual or private company.¹⁰⁷ This concession regime would be implemented and administered by the Guatemalan Executive. The law presumed the right to concessions in favor of those individuals or companies who have obtained the plant variety, whether by research, purchase or any other form of right transmission or private transaction.¹⁰⁸ This concession right awards the owner any commercial rights over the plant variety and judicial and administrative protection¹⁰⁹ from the state and any third parties.¹¹⁰ In other words, this legal regime implements the privatization of intellectual property and commercial laws unto plant varieties in Guatemala.¹¹¹

The enactment of this law sparked backlash from indigenous groups. These groups feared that the new law would lead to the privatization of their traditional crops by local and multinational companies. They feared that through this new legal scheme their traditional means of sustenance and food sovereignty would be compromised. Indigenous peoples also feared that through privatization they would lose access to their traditional means of living and restrain

⁹⁸ Comisión Empresarial de Negociaciones Comerciales Internacionales (CENCIT), available at <https://cencit.net/> (last accessed 25 March 2025).

⁹⁹ World Trade Organization, *Secretariat Report: Trade Policy Review – Guatemala*, WT/TPR/S/348, 28 September 2016.

¹⁰⁰ Art. 3.16 of the *Dominican Republic–Central America–United States Free Trade Agreement (US–DR–CAFTA)*.

¹⁰¹ *Ibid.*, Annex 3.2, Section D.

¹⁰² *Ibid.*, Art. 3.17.

¹⁰³ *Ibid.*, Arts. 3.23–3.25.

¹⁰⁴ L. Rodríguez Vargas and A. Solano Murillo, *La Negociación del CAFTA: Principales dificultades, principales resultados y lecciones para futuras negociaciones* (Guatemala: ASIES, 2004), Ch. II.

¹⁰⁵ Congreso de la República de Guatemala, Decreto Número 19-2014, Ley para la Protección de Obtenciones Vegetales, Art. 9.

¹⁰⁶ *Ibid.*, Art. 1.

¹⁰⁷ *Ibid.*, Art. 3.

¹⁰⁸ *Ibid.*, Art. 13.

¹⁰⁹ *Ibid.*, Art. 15.

¹¹⁰ *Ibid.*, Art. 18.

¹¹¹ *Ibid.*, Art. 43.

their collective governance and decision-making. Congress passed this law swiftly and under the discussion of another bill related to a loan from the World Bank. In reaction, indigenous groups rallied Congress to derogate the newly enacted law and exerted pressure through judicial means with a challenge to the bill under the jurisdiction of the Constitutional Court. The result came swiftly; the Guatemalan Constitutional Court halted the implementation of the new law and in September 2014 Congress derogated it under its “national urgency” powers.¹¹² Pressure from the United States and private companies increased after the derogation of *Law for the protection of Plant Variety*. Countries across Central America were reminded of their obligation under international law to comply with the *US-DR-CAFTA*. In 2019, the Governments of Guatemala and Honduras implemented a new legal regime for the free trade of plant varieties under the newly created Custom’s Union between the countries.¹¹³ This new regime was created as a product of the Central American Integration System (SICA). SICA’s objective is to create a single market among Central American countries to promote social justice and political and economic equality between and within states through integration. However, under the *US-DR-CAFTA*, Central American states adopted the obligation to not enact any SICA regulation that would contradict the free trade agreement.¹¹⁴ Under the Custom’s Union, the Meeting of Ministers -*Instancia Ministerial*- is the only source of law and regulation for the common market between Honduras and Guatemala.¹¹⁵ It is composed solely of the Ministers of Economy of each country. The regulations enacted by the Meeting of Minister have direct effect on the countries, need of no congressional approval and come into force by executive decree.¹¹⁶ It was under this legal regime that the countries enacted and implemented the “Regulation for Biosecurity of Modified Living Organisms for Agricultural Use” -*Reglamento Técnico de Bioseguridad de Organismos Vivos modificados para uso agropecuario*-. This regulation uses international trade norms and the World Trade Organization’s vocabulary to regulate the privatization and trade of plant varieties. Under this new name and without any social scrutiny or publicity, there has been no local backlash by indigenous groups. It is to be noted that most of the regulations adopted by the Meeting of Ministers are published only online and without major public divulgation. Under SICA, regional integration norms have supremacy and direct effect in national law. To date, there has been no plan of action by the Executive to implement new national regulation on plant varieties. However, after the 2014 attempt, the Guatemalan Congress has continued to push for the regulation of plant varieties. The initiative 6283 of 2023 leaves the regulation and registry of plant varieties solely to the executive. This initiative in many ways replicates the 2014 law, which was pushed by foreign transnationals. The 2023 bill makes no mention of indigenous groups and their historical role in the preservation of plant varieties. Rather it places

¹¹² Congreso de la República de Guatemala, *Decreto Número 19-2014, Ley para la Protección de Obtenciones Vegetales*; y *Decreto Número 21-2014, Derogación de la Ley para la Protección de Obtenciones Vegetales*.

¹¹³ Resolución de Instancia Ministerial UA 60-2019.

¹¹⁴ Art. 1.3.2 of the *Dominican Republic–Central America–United States Free Trade Agreement (US–DR–CAFTA)*, titled *Relation to Other Agreements*.

¹¹⁵ *Protocolo Habilitante para el Proceso de Integración Profunda hacia el Libre Tránsito de Mercancías y de Personas Naturales entre las Repúblicas de Guatemala y Honduras*, signed 10 April 2015, Arts. 3–4.

¹¹⁶ *Protocolo de Tegucigalpa a la Carta de la Organización de Estados Centroamericanos* [Tegucigalpa Protocol of the Central American Organisation Charter], opened for signature 13 December 1991, 1695 UNTS 382, entered into force 1 February 1993, Art. 34.

strong emphasis to the *US-DR-CAFTA*, with the aim of granting more access and strengthening Guatemala's place at the international market by protecting IP rights for new plant varieties and their developers. This initiative continues to develop a broad scheme for the protection of IP for developers, their extraction, reproduction and multiplication of plant varieties without many legal constraints or any legal recognition of indigenous heritage, knowledge and connection to their land.

C. An aligned judicial culture

As noted previously, elites have historically had influence in defining the procedures for judicial appointments and elections in Guatemala. This influence has led to the creation of case law that is reflective of their interests. In the case of economic foreign affairs, this is observable in the case law regarding the implementation of trade tariffs and quotas. Through this case law, the Constitutional Court has overturned decisions and changed its interpretations in favor of private in various contexts.

Between 2000 and 2004, for example, under the center-left presidency of Alfonso Portillo, a new policy on trade quotas and tariffs was implemented. These changes were in response to new policies adopted under SICA. The elite conglomerates challenged these policies judicially.¹¹⁷ In a series of judgments, the Constitutional Court resolved the following: international law is subject to constitutional review and must conform to the Constitution;¹¹⁸ tariffs are taxes and therefore can be regulated only by Congress;¹¹⁹ trade quotas cannot be implemented in violation of other regulations of Central American law;¹²⁰ the delegation of powers to regulate tariffs to institutions of Central American integration is unconstitutional, as that power belongs solely to Congress;¹²¹ and tariffs are harmful to national industry.¹²² However, in 2004, a new rightwing pro-business president, Oscar Berger, was sworn into office. Under his presidency, and with a selection of new members, the Constitutional Court changed its interpretation on tariffs and trade quotas. Under this new interpretation, the executive has the discretion to determine quotas as far as international law permits, without any congressional scrutiny or approval.¹²³ This interpretation has remained in effect, and no subsequent government has changed the policy of quotas and tariffs back in favor of elites.¹²⁴ Another significant trade case to highlight is related to the 2009 border closure between Guatemala and Honduras.¹²⁵ The closure was a response to the 2009 *coup d'état* against President Zelaya of Honduras. The coup was condemned by member states of the Organization of American States, who quickly passed a series of resolutions against Honduras, including its suspension from the organization. This also led to a trade blockade against Honduras implemented by other Latin American states. However, Guatemala's closure of the border as part of the blockade was challenged before the Constitutional Court, on the grounds that it

¹¹⁷ Corte de Constitucionalidad de Guatemala, Expds. Acumulados 44-2004 y 61-2004, 20 June 2006; Exp. 1589-2002, 23 October 2003; and Exp. 184-2004, 20 March 2006.

¹¹⁸ Corte de Constitucionalidad de Guatemala, *supra* note 111, at 6.

¹¹⁹ Corte de Constitucionalidad de Guatemala, *supra* note 118, Exp. 1589-2002, at 6.

¹²⁰ Corte de Constitucionalidad de Guatemala, Exp. 162-2004, at 4.

¹²¹ *Ibid.*

¹²² Corte de Constitucionalidad de Guatemala, *supra* note 118, at 10.

¹²³ Corte de Constitucionalidad de Guatemala, Exp. 249-2004, at 6.

¹²⁴ Corte de Constitucionalidad de Guatemala, Exp. 84-2012, at 11–12.

¹²⁵ Corte de Constitucionalidad de la República de Guatemala, Exp. 2409-2009, 25 November 2009.

affected Guatemalan companies and their exports to Honduras. The Court held that the closure was unconstitutional and contrary to the subregion's economic integration efforts.¹²⁶

When it comes to judicial review of treaties, the Constitutional Court has generated very little jurisprudence, as its positions have changed throughout history depending on context. In 2004, for example, the Court held that it had the authority to review and declare unconstitutional certain provisions of treaties. This was so in the case of Portillo's vice-president, who was automatically granted immunity after leaving office under the Central American Parliament Constitutive Treaty. The Court declared this provision, which also applied to former presidents, without effect.¹²⁷ That position was reversed in 2012, when the Court reviewed the legality of the ratification of the statute of the Central American Court of Justice. In this case, the court held that it could not review or declare unconstitutional provisions of international treaties.¹²⁸ The court has followed this latter interpretation since then, and in 2020 expanded its interpretation regarding the legality of the ratification of an international instrument, the *Nagoya Protocol on Access to Genetic Resources*, adopted under the *Convention on Biological Diversity* in 2020.¹²⁹ The judicial challenge was brought forward by indigenous groups claiming that they were not consulted in this process. The Constitutional Court resolved that it could not review the legality of treaties post ratification, because doing so would violate international law.¹³⁰ The Court proceeded to determine that if a treaty were found to be contrary to the Constitution, it would be up to the executive to denounce the treaty.¹³¹

More recently, the Constitutional Court has reviewed a series of cases regarding Guatemalan foreign policy. These cases dealt with the signature of "safe third country" agreements with the US¹³² and the transfer of Guatemala's embassy in Israel from Tel Aviv to Jerusalem.¹³³ There are not many cases in which the Constitutional Court has gone into much detail when defining the accountability of the executive in foreign economic relations. Yet, these few cases all have in common the near absence of checks and balances on the executive when it comes to foreign relations. They all show that the executive is bound solely by the provisions and limitations set out in the Guatemalan Constitution as interpreted with typical deference by the Court at a given time.¹³⁴

¹²⁶ Ibid., Considerando III.

¹²⁷ Corte de Constitucionalidad de Guatemala, Expds. 12-2004 y 213-2004, 20 July 2004.

¹²⁸ Corte de Constitucionalidad de Guatemala, Exp. 4371-2011, 9 October 2012.

¹²⁹ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, signed 29 October 2010, entered into force 12 October 2014.

¹³⁰ Corte de Constitucionalidad de Guatemala, Expds. Acumulados 2606-2016 y 2607-2016, 16 June 2020, at 4.

¹³¹ Ibid.

¹³² Corte de Constitucionalidad de Guatemala, Expds. Acumulados 3829-2019, 3849-2019, 3881-2019, 4113-2019, 4116-2019 y 4129-2019, 31 August 2021.

¹³³ C.A. Villagrán Sandoval, *Fighting the Good Fight: Litigating Foreign Relations, International Law and Corruption at the Constitutional Level in Guatemala*, Opinio Juris, 11 February 2019, available at <http://opiniojuris.org/2019/02/11/fighting-the-good-fight-litigating-foreign-relations-international-law-and-corruption-at-the-constitutional-level-in-guatemala/> (last accessed 25 March 2025).

¹³⁴ Corte de Constitucionalidad de Guatemala, *supra* note 127, Considerando III.

3. Part III. Uncovering the pathologies in Guatemalan democracy and how international law entrenches them

As detailed previously, the constitutional drafting, institutional setup and case law in Guatemala all respond to the interests of elites. This is a consequence of over 200 years of state building under an extractivist vision of trade. Nevertheless, the analysis of the law of foreign relations of Guatemala reveals a series of governance pathologies present in liberal democracies more generally: namely the use of international law to entrench the separation of trade from democracy in a fashion that creates a loophole for avoiding political accountability for foreign relations. The next section of this article provides a diagnosis of these governance pathologies, which are shared beyond Guatemala.

A. Inward-facing challenge: the transformation of legal transplants to bypass political accountability

International and regional governance in Central America has fueled executive rule and the influence of elites in a top-down fashion. At the regional level, this has been done through the transplant of many European principles into the subregion's economic integration regime. Under the Central American Integration System, European principles such as direct effect and supremacy have been transplanted and applied in a manner opposite to their original intent. Rather than constraining the state in favor of individual rights, preventing abuse of power, and promoting the harmonization of goods and services across Central America, they have been used to expand executive power and bypass congressional and political accountability, while also restricting individual rights in the process. This phenomenon is observed not only in Central America but elsewhere in Latin America.

The principles of direct effect and supremacy were cornerstones in the consolidation of Europe's single market. They are concepts associated with supranationalism and constitutionalism.¹³⁵ Supremacy refers to the hierarchical status of European integration norms as superior to domestic or national laws.¹³⁶ Direct effect obviates the need for legislation by local authorities to implement European market norms.¹³⁷ These principles, together with the recognition of fundamental market rights for individuals and proportionality, have become the cornerstone of EU law through the second half of the 20th century. Early case law such as *Van Gend de Loos*,¹³⁸ *Costa/ENEL*,¹³⁹ followed by *Simmenthal*,¹⁴⁰ *Dassonville*,¹⁴¹ *Cassis de Dijon*,¹⁴² *Casagrande*¹⁴³ and other judgments, have defined the nature, contours, relationship and effects of EU law over national law in a fashion that restricts the public power of states and

¹³⁵ T. Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016), at 77.

¹³⁶ B. de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011), at 323.

¹³⁷ Ibid.

¹³⁸ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (C-26/62) [1962] ECR 2.

¹³⁹ *Flaminio Costa v ENEL* (C-6/64) [1964] ECR 587.

¹⁴⁰ *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (C-106/77) [1978] ECR 629.

¹⁴¹ *Procureur du Roi v Benoît and Gustave Dassonville* (C-8/74) [1974] ECR 837, at 664.

¹⁴² *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (C-120/78) [1979] ECR 649.

¹⁴³ *Donato Casagrande v Landeshauptstadt München* (C-9/74) [1974] ECR 773.

allows the consolidation of the single market.¹⁴⁴ It is through the use of these legal principles along with the recognition of individual rights—and their effects in limiting the power of states in favor of individuals within a market across Europe—that the European integration system has been categorized as a constitutional regime.¹⁴⁵ This has led to the situation where national legislation cannot be opposed to regional integration norms.¹⁴⁶ This has allowed EU regulation to extend to any area of national governance in order to assure the implementation of the single market across the European continent.¹⁴⁷ An example was the ECJ’s judgment on the Italian prohibition of certain vehicles for road safety.¹⁴⁸ In this case the ECJ developed a “market access test”, which has as purpose to examine if national legislation or regulation may limit the single market.¹⁴⁹

In Latin America, the principles of direct effect and supremacy have been used by dictatorial regimes to bypass national congresses and judiciaries. In South America during the 1970s, the introduction of supremacy and direct effect was reengineered by military *juntas* to avoid national scrutiny by congress and domestic courts.¹⁵⁰ Economic integration regimes, such as the Andean Community, became vehicles by which regional military executives enforced their grip on all levels of governance. In the case of Central America, these principles have been adopted through their transplant by the Central American Court of Justice and various economic arbitral awards within the subregion. The case law of the court and the arbitral decisions suffer from the same comparative defect: they transplant the doctrines in abstract terms but without any due consideration of democratic precepts, constitutional thought, or the institutional structure of states.¹⁵¹ The Central American Court of Justice and the many arbitral panels pair the use of these principles with Article 27 of the *Vienna Convention on the Law of*

¹⁴⁴ A. von Bogdandy, ‘Founding Principles’ in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing and Verlag C.H. Beck, 2010), at 16; M. Cahill, ‘European Integration and European Constitutionalism: Consonances and Dissonances’ in D. Augenstein (ed), *Integration Through Law’ Revisited: The Making of the European Polity* (Ashgate, 2012), at 15.

¹⁴⁵ M. Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, 1998), at 25–26; J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” And Other Essays on European Integration* (Cambridge University Press, 1999), at 19–25.

¹⁴⁶ M. Poiares Maduro, ‘How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union’, *Jean Monnet Working Paper* 5/04 (NYU School of Law and Woodrow Wilson School of Public and International Affairs, 2004), at 12.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Commission v Italy (Trailers)* (C-110/05) [2009] ECR I-519.

¹⁴⁹ *Ibid.*, paras 56, 59 and 61.

¹⁵⁰ K.J. Alter and L.R. Helfer, *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press, 2017), at 38–40; K.J. Alter, L.R. Helfer and O. Saldías, ‘Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice’ (2012) 60 *American Journal of Comparative Law* 629, at 645.

¹⁵¹ R. Dixon and D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021), at 11–16, 132–136; C.A. Villagrán Sandoval, *Decodificación del SICA: Una crítica a la integración centroamericana a través del derecho regional comparado* (Cara Parens, 2021), Ch. 5; Central American Court of Justice, File 9-04-08-1996 (Advisory Opinion), 13 December 1996 (unreported); A.F. Tatham, ‘In the Judicial Steps of Bolívar and Morazán? Supranational Court Conversations Between Europe and Latin America’ (2011) 13 *European Journal of Law Reform* 157, at 165.

Treaties.¹⁵² The result is a system of law where the Councils of Ministers, and specifically the Economic Council, create norms and regulations without political or social accountability and bypass national institutions.

This same pathological lack of democratic accountability at the regional integration level is observed at the international level. Many free-trade agreements contemplate the creation of administrative bodies. These bodies are intergovernmental in nature, with ministers of foreign affairs or trade, or other representatives of the state, serving as members. The objective of these bodies is to oversee the implementation of free trade agreements and further the liberalization process of goods and services. They also harmonize regulation by adopting resolutions and introducing new norms and standards. As noted, Congress approves the signature of free-trade agreements. Yet the scrutiny stops there. Congress has no oversight over these new regulating bodies. The activities cannot be judicially challenged, as interpreted by the Constitutional Court. Moreover, very few of these bodies have any formal procedures for negotiation or making policy decisions. This renders their activities non-accountable to national democracies and, insulated from legislatures and other groups or individuals who wish their claims to be heard and considered.

B. External-facing challenge: the untouched realms of democracy and accountability -free trade agreements and integration

Guatemala's executive has few limitations when exercising its powers in foreign relations. Elites have influenced this unchecked power to their benefit through both formal and informal means: formally, through the legal incorporation of their participation in the decision-making and negotiation processes of trade regulation, and informally, through the appointment of judges and bureaucrats within the executive. In Guatemala, the ministries of economy and foreign affairs have historically been led by members of individuals close to elites.¹⁵³ Similarly, the processes for selecting judges have led to a judicial culture and jurisprudence aligned with elites' interests,¹⁵⁴ while the precedents established by previous courts guide the actions and reasoning of these new judges.¹⁵⁵

A central feature of this governance model is corporativism. Corporativism (or corporatism) is a charged concept, with many meanings in scholarship. In Latin America, and taking from Carlos Nino, it refers to the control exerted by influential groups over state decision makers.¹⁵⁶ This concept is therefore closer to the idea of capture. This control is exercised through pressure on legislative and administrative bodies to obtain privileges and favors.¹⁵⁷ As political scientist Guillermo O'Donnell also discusses, corporativism in Latin America has both state (public)

¹⁵² *President of Nicaragua v. National Assembly of Nicaragua* (Unreported, Central American Court of Justice, 29 March 2005), paras 35–36; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980, Art. 27.

¹⁵³ C. Arrazola, "El Ministerio de Economía siempre ha estado en manos del sector privado", *Plaza Pública*, 30 August 2016, available at <https://www.plazapublica.com.gt/content/el-ministerio-de-economia-siempre-ha-estado-en-manos-del-sector-privado> (last accessed 26 March 2025).

¹⁵⁴ D. Kosar, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press, 2016), at 40–58.

¹⁵⁵ S. Larios, 'El precedente judicial y su aplicación en el sistema guatemalteco' in C.A. Villagrán Sandoval (ed), *Derecho Guatemalteco en Contexto* (Cara Parens, 2023).

¹⁵⁶ Nino, *supra* note 24, at 131.

¹⁵⁷ *Ibid.*, at 132.

and private aspects.¹⁵⁸ The former refers to the state's becoming the vehicle for subordinating other groups of society. The latter refers to public institutions' being captured by private groups and interests through various means.¹⁵⁹ In the case of Guatemala, corporativism has been legalized through legislation and judicial decisions. Institutions are the mechanisms in which elites transformed public goods into schemes to protect private interests. This model has led to the creation of governance institutions that allow private groups to engage directly in the creation of laws and regulations. Elites, through their lawyers, participate in governance activities ranging from the drafting of constitutions to negotiation and decision-making at international and regional forums.¹⁶⁰ In this way, the participation of lawyers becomes highly significant in the decision-making and accountability processes of economic foreign affairs.¹⁶¹ Study of the activities and influence of lawyers in policymaking is limited.¹⁶² Lawyers have been critical not only in designing foreign economic relations processes and institutions, but also in challenging these processes in court when they run contrary to private interests.¹⁶³ The law thus becomes the tool for both construction and contestation under a system that is politically tilted towards preserving privileges.¹⁶⁴ This scenario underlies the weakness of Guatemalan democracy and produces the political inequality in policymaking, negotiation and implementation of international and regional regulation, with far-reaching effects on the population at large.

4. Part IV. Governance challenges for accountability in economic foreign relations: a two-axis analysis

International law is not concerned with how states negotiate or implement international rules and regulations. Rather, international law is focused on the maintenance of the international and multilateral system regardless of how states comply. This shows the reductionist—and even colonialist—nature of trade regulations as they intersect with local and democratic governance. Nor is international law concerned with dualist or monist approximations between the international and national spheres of law. This is evidenced by the vocabulary of international law, which reflects concerns not with the democratic domestic accountability of states but rather with states' international responsibility when they infringe international norms.¹⁶⁵

¹⁵⁸ G. O'Donnell, 'Corporatism and the Question of the State' in J. Malloy (ed), *Authoritarianism and Corporatism in Latin America* (University of Pittsburgh Press, 1977), at 47.

¹⁵⁹ Ibid., at 79.

¹⁶⁰ Instituto Centroamericano de Estudios Fiscales (ICEFI), *Historia de la tributación en Guatemala: Desde los mayas hasta la actualidad* (documento preparado para la Superintendencia de Administración Tributaria, 2007).

¹⁶¹ In Guatemala, to challenge the constitutional legality of any law, a person needs the aid of 3 lawyers. See: Asamblea Nacional Constituyente, *Decreto Número 1-86, Ley de Amparo, Exhibición Personal y de Constitucionalidad*, Art. 134(d).

¹⁶² Morales, *supra* note 62.

¹⁶³ Instituto Centroamericano de Estudios Fiscales (ICEFI), *Política Fiscal: Expresión del poder de las élites centroamericanas* (F&G Editores, 2015), at 9, 45.

¹⁶⁴ Ibid., at 45.

¹⁶⁵ L. Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (Routledge, 2011).

As shown in the case of Guatemala, political inequality begins at the first stages of decision-making. CONAPEX is a legal forum where no indigenous or minority groups are represented, in removing a significant social group from decision making about Guatemala's import and export policies. More broadly, in most Central American countries, key ministries such as economy and foreign trade have informal but significant ties with private groups. This has resulted in governments' promoting temporary tariff barriers against foreign products to aid specific groups and families. It has also allowed privatization schemes to be implemented at the regional level with no congressional scrutiny. This exclusionary process has constructed a regime of trade, both inward- and external-looking, that marginalizes other groups (minorities, indigenous groups, trade unions, and others) from the decision-making, negotiation and implementation of market rules and related matters.¹⁶⁶ This regime prevents these societal groups from playing any role in either the creation or the implementation of market regulation. Foreign economic relations and international law generally disregard principles such as the division of powers and democratic representation, principles that are essential when dealing with accountability of the Executive and other actors (regional, international and non-state private).¹⁶⁷ Nor are they concerned with the agency of indigenous and minority groups at the international and regional levels of market governance. Traditional monist and dualist theories of interaction do not fully explain the implementation of regional and international norms and regulations. Constitutions are mostly silent on the conduct of the executive when dealing externally (doctrine of political questions¹⁶⁸) and on the relationship between private actors and the state (e.g., the impact of lobbying and other pressures that may affect decision-making at the many stages of governance).¹⁶⁹ This being the case, it is proposed that accountability should be proportionate to the degree of inclusive participation in decision making. That is, decision-makers, negotiators and other officials should be subject to greater public scrutiny and accountability whenever citizens and marginalized groups are excluded from their deliberations.

A comprehensive theory of accountability would need to identify each stage of the process for the adoption of international and regional norms as well as to specify how the various actors and stakeholders (international, regional, national, local and nongovernmental) must act and interact to minimize political inequality and achieve the fairest outcomes, that is, to ensure that each decision-making process is a representation of the will of the people. Therefore, accountability needs to be analyzed along two axes. A first axis would be measured through the levels or tiers of governance (local, national, regional, and international law). This axis

¹⁶⁶ R. Sieder, 'Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala' in J. Couso et al. (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, 2010).

¹⁶⁷ P.-H. Verdier and M. Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey' in C.A. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019), at 136–156.

¹⁶⁸ However, the topic of political questions has been long covered by US scholarship. See: The American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States* (American Law Institute Publishers, 1987), § 14–13; T.M. Franck, *Political Questions, Judicial Answers* (Princeton University Press, 1992), at 18.

¹⁶⁹ T. Ginsburg, 'Comparative Foreign Relations Law: A National Constitutions Perspective' in C.A. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019), at 67–68.

shows the level at which the decision is taking place and what applicable laws need to be taken into consideration that effectively exclude the participation of groups not aligned to traditional elites. The second axis would show the many stages of the decision-making process of market rules (policy drafting, negotiation, signature, and implementation, among others). This axis would determine which actors should be involved in the decision-making process and identify the duties, prerogatives and tools available for democratic accountability.

A practical framework for accountability could take the form of a series of positive and negative duties for actors, both public and private, at different stages and layers of decision-making.¹⁷⁰ This would provide the basis for reviewing the actions of public and private (non-state) actors at various levels of governance. States and their governments would be responsible for providing these individuals and groups with the tools and capacities needed to participate or to be considered (through other means) in political decision-making and construction of the market.¹⁷¹

Conclusion

The contextual analysis of the institutional design and legal regime of foreign economic affairs of a country reveals its democratic pedigree. One of the aims of this articles is to pinpoint the legal structures, institutions and actors involved in the formulation and implementation of economic policy and the drivers that underpin defining features and social imbalances within the legal construction of the state and market. It is through this approach that this article draws attention to the role of economic elites in defining foreign policy.

Guatemala's engagement with foreign trade is currently designed to maintain a patrimonial system of governance. Foreign relations reflect this system. This article shows how the corporativist institutional design of the decision-making processes for foreign economic relations perpetuate deep structural political inequality. Moreover, it shows how elites use international law and regional doctrines to further entrench a patrimonial system of governance and extractivism. This is achieved through the work of lawyers working for private businesses and through close relations with the Executive. Through this activity, elites continue to have a direct impact on the constitutional design, statute drafting and judicial outcomes in the country.

¹⁷⁰ A. Przeworski et al., *Democracy, Accountability, and Representation* (Cambridge University Press, 1999); T. Pogge, *World Poverty and Human Rights* (Polity Press, 2002); T. Pogge, *Hacer Justicia a la Humanidad* (Universidad Autónoma de México, 2009); T. Pogge (ed), *Freedom from Poverty as a Human Right* (Oxford University Press/UNESCO, 2007).

¹⁷¹ P. Pettit, 'The Control Theory of Legitimacy' in W. Sadurski et al. (eds), *Legitimacy: The State and Beyond* (Oxford University Press, 2019), at 18–21; P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999), at 92–97; C.S. Nino, *Ética y Derechos Humanos: Un ensayo de fundamentación* (Editorial Astra de Alfredo y Ricardo Depalma, 1989).