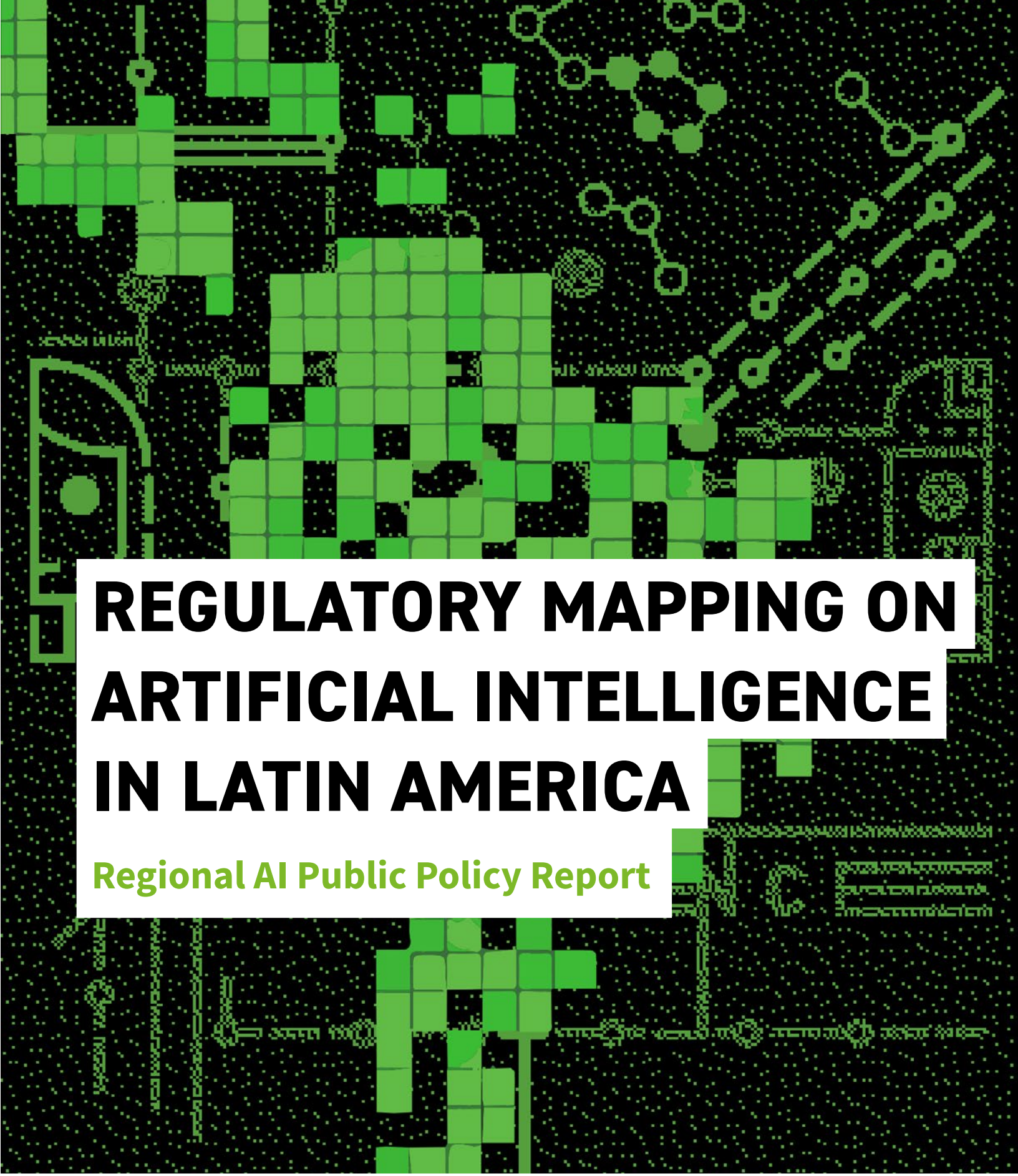

REGULATORY MAPPING ON ARTIFICIAL INTELLIGENCE IN LATIN AMERICA

Regional AI Public Policy Report

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Regional AI Public Policy Report

This report is an Access Now publication. It has been developed by Franco Giandana Gigena in collaboration with other Access Now team members, who provided their support: Gaspar Pisanu, Ángela Alarcón, Agneris Sampieri, Yamlek Mojica, Daniel Leufer and Willmary Escoto. The report is based on research made by law firms connected through TrustLaw, the global legal pro bono network of the Thomson Reuters Foundation, with support from the Patrick J. McGovern Foundation. Access Now is responsible for all content as well as any error, omission or misinterpretation.

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1 Universidad Adolfo Ibáñez. Available at https://www.uai.cl/

2 Data Privacy Brazil. Available at https://dataprivacy.com.br/

3 Thomson Reuters Foundation, TrustLaw. Available at https://www.trust.org/

INTRODUCTION

This report compiles various recommendations and examples of public policy on artificial intelligence (AI) technologies for the period up to 1 December 2023, and is intended to be a reference for Latin American public policy makers.

Discussion around AI is increasingly in the public eye in legislative and policy terms throughout the region. This has generated a growing number of strategies and bills that seek, in some way, to contain or channel AI development and harness its benefits while simultaneously avoiding the associated risks.

The information included in this publication is intended to guide those involved in these initiatives in understanding different regulatory and policy trends. Current best practices are highlighted with a view to helping the region progress towards human rights-focused regulatory models for AI that also incentivise the development of technical skills and competencies.

Narratives with equally intense utopian and dystopian scenarios have emerged in step with the development and use of AI.

Both positions agree on this type of system's unprecedented capacity and the huge impact it will have on our societies. Solutionist narratives place considerable confidence in the results obtained from AI systems, yet this is not supported by actual results; at the same time, narratives exist that argue that artificial intelligence is fundamentally risky and there are extreme discourses that claim that it may result in the "end of humanity"[4].

There are experts who caution about polarisation in one direction or the other and who urge us to ground ourselves in evidence and social need. This is a new challenge emerging from technological innovation, as has similarly frequently happened in the past. Therefore, regardless of any prospect that may be on the horizon from the massive introduction of AI systems, the intention to regulate this technology must take place in observance of international human rights principles.

4 BBC Mundo News. (30 May 2023). Artificial intelligence could lead to extinction, experts warn. Available at https://www.bbc.com/news/uk-65746524

Furthermore, any potential regulation of AI technologies must take account of the specificities of Latin American social contexts.

Latin America is an unequal region in socio-economic terms and still needs to generate policies and strategies for sustainable growth that could find a new impetus in the appropriate use of AI-based systems. It is also important to face the challenge of ensuring that the exercise of human rights in the digital environment is a matter of priority. For example, many countries need to progress their personal data protection regulation before moving on to that of artificial intelligence. Owing to the progress made in the AI regulatory agenda in the region, an analysis of different laws or bills and public policies that focus on these technologies is included.

METHODOLOGY

It is particularly difficult to review regulatory proposals in Latin America since governments in the region are continuously coming up with new initiatives. It is possible that many of the bills selected for this report will not be approved and will be discarded in the face of new initiatives. Nevertheless, they reflect the current state of the region's interest in regulating AI.

In order to embark on a regional study of AI public policy, it is first necessary to provide an overview of the concepts relevant to these processes, and some of the main soft law initiatives on algorithmic governance, algorithmic transparency, and ethical recommendations for regulatory frameworks in the region. These efforts by academia, civil society and international organisations provide clarity and guidance on issues related to the development of AI technologies, their regulation and self-regulation in the private sector.

Many countries in the region are similarly committed to the formulation of national strategies. Given that these policies are designed by the executive and do not go through the legislative process, they are easier to modify or update. These strategies are included because they allow us to identify interests and priorities in addressing AI related challenges, for example, the preference for primarily public sector investment in private sector research, development, and innovation (hereafter "R&D&I") or attempts to deploy these systems within the public sector as a mechanism to improve the delivery of public services.

Information on international regulatory trends is also included, which can be used as a comparison when considering different approaches to designing AI regulation. Specifically, this report focuses on the current EU bill and the regulatory mechanisms being explored in the United States.

Finally, a description is offered of the most important draft laws introduced in eight countries in the region: Argentina, Brazil, Chile, Colombia, Costa Rica, Peru, Mexico, and Uruguay. Their main provisions are analysed from a human rights perspective, explore the strengths and weaknesses of their articles, and offer observations and recommendations for improvement.

GLOSSARY

This section introduces concepts specific to the debate around AI regulation. While in many cases there is no absolute consensus on the definition of the selected terms, the most appropriate definition for a legislative or policy-making context is provided.

A. How is artificial intelligence defined?

When initiating a regulatory process, the subject matter to be regulated must be defined. By defining what is covered by regulation, it is easier to develop principles and standards, which is essential for the legal certainty required in a state governed by the rule of law. If there are two or more contradictory interpretations with a similar degree of acceptance or consensus, then authorities might make unfair or arbitrary decisions. It is therefore important to address the definition of AI, and the following concept can be a starting point:

> *"An engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy[5]."*

5 National Institute of Standards and Technology, of the US Department of Commerce. (January 2023) *Artificial Intelligence Risk Management Framework.* Available at https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf

However, it should not be forgotten that there is no single definition of AI. The discussion of its meaning first started in 1955 at a workshop at Dartmouth College in New Hampshire, USA, and was based on the premise that if every aspect of learning or any other characteristic of intelligence could, in principle, be described with sufficient precision, it would be possible to build a machine to simulate them. During this project, there was disagreement over two possible different names for this field of research: "artificial intelligence" on the one hand, and "complex information processing" on the other. Finally, the term "artificial intelligence" prevailed. Clearly, the goal of building a machine that replicates all aspects of learning or the characteristics of intelligence has not been achieved to date.

This event shows us that the discipline bringing together the technologies that allow the processing of data to enable machine learning is now 68 years old. This is why it is necessary to move towards a more modern definition of AI. It should therefore be noted that the current boom in these technologies is based on systems known as machine learning, and it is this technology that is usually the subject of AI.

Machine learning, like any other technology, has specific advantages and limitations. It is appropriate for analysing very large data sets and detecting patterns; however, it has limited scope for predicting social phenomena that are difficult to translate into quantitative data. In addition, these systems are generally extremely fragile, and any slight change in any of the elements that make them up can cause a disruption that requires the system to be retrained from scratch.

Given these limitations and weaknesses, machine learning systems understood as AI are incapable of solving complex social problems or making decisions any better than a person can.

Then there is the possibility of delegating decision-making to a machine learning system on the basis of its results, i.e. allowing it to take specific actions from its own data processing. These systems are used for different purposes, including the processing of personal data for, for example, the selection of candidates for a job or the granting of bank loans.

Other types of machine learning systems (or, for the purposes of this report, AI) can generate synthetic[6] content such as text, images, sound, from a prompt given to them as a command.

6 Real Academia Española: "*Refers to a product: Obtained by industrial processes and reproducing the composition and properties of a natural one*". https://dle.rae.es/sint%C3%A9tico

Commonly referred to as generative artificial intelligence (generative AI), they use training data to generate outputs from patterns and structures identified in the training data. These systems are seen as a new challenge in terms of achieving adequate control over their use.

This overview of the types of systems that fall under the AI umbrella demonstrates that they must be clearly defined, regardless of the type of regulatory process. This undertaking requires us to understand the potential and varied uses of these systems. This is all part of what is known as "narrow AI", i.e. it only carries out a specific task or set of closely related tasks. By contrast, general AI is the prospect of these systems being able to overcome this limitation and carry out multiple tasks of different natures and complexity.

B. Other definitions relevant to the design of AI public policies

» **Algorithmic bias:** refers to the systematic distortion or bias that may arise in the results of artificial intelligence algorithms due to inherent biases in the training data or in the algorithm design.

» **Algorithm (within computer science):** a sequence of instructions that can be used to carry out certain processes and meet certain requirements. These are ordered and finite sets of steps that a system takes in order to accomplish what it has been asked to do.

» **Biometric data:** personal data obtained through specific technical processing. The data relate to the physical, physiological, or behavioural characteristics of a natural person and enable or confirm the unique identification of that person, such as facial imaging or dactyloscopic (fingerprint) data.

» **Biometric categorisation system:** AI system that uses data relating to the physical, physiological or behavioural characteristics of a natural person for the purpose of assigning natural persons to specific categories which can be reasonably inferred from such data.

» **Deep learning:** a branch of machine learning which, based on a large amount of data and numerous layers of processing with algorithms, enables a computer to perform

certain tasks in a similar way to humans perform them, such as identifying objects or subjects in images, recognising the content or meaning of a spoken message, or making predictions.

» **Emotion recognition system:** AI system for the purpose of identifying or inferring emotions or intentions of individuals or groups on the basis of data relating to their physical, physiological or behavioural characteristics.

» **Machine learning:** a subset of artificial intelligence in which machines make use of statistical approaches to learn from historical data and make predictions in new situations.

» **Natural Language Processing (LLM or Predictive Language Systems):** branch of computer science (or more specifically artificial intelligence) responsible for giving computers the ability to understand text and words in a similar way to humans. It combines computational linguistics, based on human language rules, with statistical models.

» **Test data:** data used to provide an independent evaluation of the trained and validated AI system to confirm the intended performance of this system before being placed on the market or into service.

» **Training data:** data used to train an AI system by adjusting parameters to produce a model that can be processed by an algorithm. The quality of any AI model will be directly proportional to the quality of the data.

» **Validation data:** data used to provide an evaluation of the trained AI system and adapt its untrainable parameters and learning process, among other things, to avoid overfitting.[7] The validation dataset can be a stand-alone dataset or be part of the training dataset, either as a fixed or variable split.

7 For a thorough understanding of the concept of "overfitting", please refer to the definition provided by IBM. IBM. *What is overfitting?* Available at https://www.ibm.com/es-en/topics/overfitting.

SOFT LAW INSTRUMENTS

Soft law is understood as a set of regulatory instruments that do not emanate from a government. Soft law instruments can include private standards, professional guidelines, codes of conduct, best practices, principles, public-private partnerships, and certification programmes.

The regulation of AI technologies in terms of laws emanating from the legislative branches of states is perhaps the best known and most widely used alternative for those who want to contain the risks of AI technologies and channel their advances so that they are beneficial to society. However, there are other ways of achieving these objectives. Soft law instruments, as described in the introduction to this section, are effective regulations, whose main difference lies in the fact that they do not derive from an institutionalised legislative process in states governed by the rule of law. Even so, they can limit room for manoeuvre to the extent that they are respected and encouraged by a number of relevant stakeholders in their particular ecosystem.

Specifically, there is a large proliferation of these instruments in the field of AI, many of which come from relevant international bodies. As a common denominator, these sets of soft law instruments express a series of principles designed to ensure the development and control of AI systems from an ethical perspective. Some research finds common ground around certain basic principles contained in these instruments[8], such as accountability, privacy and safety, transparency and explicability, fairness and non-discrimination, human control, and the promotion of human values.

Essentially, there is concern about the potential impacts of AI on particularly sensitive aspects of society: potential downsizing of employment in the hands of automated systems, the generation of discriminatory outcomes to the detriment of specific demographic groups, surveillance in public spaces, and so on.

To paraphrase Gary Marchant, AI raises a wide range of issues and concerns that go beyond the traditional focus of regulatory agencies on health, safety, and environmental risks. Indeed, many risks created by AI are not within the jurisdiction of any existing regulatory agency, including

8 Harvard Library Office for Scholarly Communication. *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI*. Available at https://dash.harvard.edu/bitstream/handle/1/42160420/HLS%20White%20Paper%20Final_v3.pdf

concerns such as technological unemployment, human-machine relations, biased algorithms, and the existential risks of future superintelligence. Moreover, the speed of AI development far exceeds the ability of any traditional regulatory system to keep pace, a challenge known as the "pacing problem", which affects many emerging technologies[9].

Either way, it has been argued that the proliferation of AI ethical principles fuels a crisis of legitimacy, further complicating the already complex task of identifying and mitigating the risks of AI technologies[10]. In response, the international human rights framework appears to be a better mechanism for the formulation of coherent practices, as it is easier to harmoniously agree on practices around the development and implementation of AI systems, which in turn serves to reduce the level of uncertainty about which principles or standards to adopt. Many leading professional associations, consortia, intergovernmental organisations, governments, and companies would appear to agree on this[11]. Human rights require responsible design of AI systems, not as a desirable element from a commercial or ethical point of view, but for compliance with specific legal obligations, indicating the need to incorporate elements such as transparency, explicability and accountability.

In any case, given the influence that these instruments have on the development of public policies related to AI, it is advisable to focus on some of them. Those that are effectively used as a basis for public policy regulatory processes have been selected, as well as those whose backing comes from organisations that actively participate in the regulatory processes of the countries in the region, as referred to in the specific chapter on existing bills in Latin America. It is worth mentioning that there are more than 170 such initiatives, which can be found in the Ethical Guidelines Inventory managed by the civil society organisation Algorithm Watch[12].

9 Gary Marchant. *"Soft Law" Governance of Artificial Intelligence*. AI Pulse. Available at https://escholarship.org/content/qt0jq252ks/qt0jq252ks_noSplash_1ff6445b4d4efd438fd6e06cc2df4775.pdf?t=po1uh8#:~:text=These%20soft%20law%20instruments%20include,for%20the%20governance%20of%20AI

10 Mark Latonero. (30 September 2020). *AI Principle Proliferation as a Crisis of Legitimacy.* Carr Center Discussion Paper Series.

11 Mark Latonero. (2018). *Governing Artificial Intelligence: Upholding Human Rights & Dignity.* Data & Society. 1-37; Alessandro Mantelero and Samantha Esposito. (2021). *An evidence-based methodology for human rights impact assessment (HRIA) in the development of AI data-intensive systems.* Computer Law & Security Review.

12 Algorithm Watch. AI Ethics Guidelines Global Inventory, available at https://inventory.algorithmwatch.org/

A. OECD Council Recommendations on AI

The Organisation for Economic Co-operation and Development (OECD) has put forward a list of principles with recommendations[13] on AI, adopted by its Council. According to this organisation "*the Recommendation aims to foster innovation and trust in AI by promoting the responsible stewardship of trustworthy AI while ensuring respect for human rights and democratic values.*"[14].

To summarise the main aspects of the recommendations, seven aspects are focused on, presented below:

I. **Invest in research and development (R&D):** Governments should consider long-term public investment and encourage private investment in R&D, including interdisciplinary efforts, to stimulate reliable innovation that focuses on challenging technical issues and social, legal and ethical issues related to AI.
II. **Ethical implications and policy issues:** Governments should also consider public investment and encourage private investment in open datasets that are representative and respect privacy and personal data protection to support unbiased AI research and development and improve interoperability and the use of standards.
III. **Foster a digital ecosystem for AI:** Promote the development of and access to a digital ecosystem for trustworthy AI. An ecosystem of this nature would include digital technologies and infrastructures and mechanisms for sharing AI knowledge.
IV. **Create an enabling policy environment for AI:** Governments should review and adapt their policy and regulatory frameworks applicable to AI systems to foster innovation and competition, promoting an environment that supports an agile transition from the research and development stage to the deployment of reliable systems. To this end, they should provide a controlled environment in which AI systems can be tested and scaled up.
V. **Developing human capacity and preparing for the transformation of the labour market:** All stakeholders must prepare for the transformation of the world of work and society. This includes taking steps to ensure a just transition for the labour force, for example, through ongoing training programmes and support for those affected by job displacement. Governments should also work closely with stakeholders to promote the

13 OECD Legal Instruments. *Recommendation of the Council on Artificial Intelligence*. Available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449

14 OECD Legal Instruments. Ibid.

responsible use of AI at work, improve the safety of working conditions and the quality of jobs, foster entrepreneurship and productivity, and ensure that the benefits of AI are shared equitably.

VI. **Foster international cooperation for trustworthy AI:** Governments should work together in the OECD and other global and regional fora to foster knowledge sharing on AI. It is important to focus on the development of global technical standards driven by multi-stakeholder consensus and to collect evidence to assess progress in implementing these standards.

VII. **OECD framework for the classification of AI systems:** This aims to provide a framework for assessing and classifying AI systems according to their potential impact on public policy. It is developed by the OECD Network of Experts on AI (ONE AI) and classifies AI systems along four dimensions: 1. The context in which the system operates (e.g. application area, extent of implementation). 2. The data and inputs used by the system (e.g. quality, data privacy). 3. The AI model underpinning the system (e.g. generative or symbolic models); and 4. The task and the result the system produces (e.g. level of autonomy, nature of the result).

B. UNESCO Recommendation on the Ethics of AI

The "Recommendation on the Ethics of Artificial Intelligence[15] (hereinafter, "the Recommendation"), issued by the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference in November 2021, is one of the most widely consulted and disseminated soft law instruments on AI globally.

These ethical principles are developed through a "*global approach, based on international law, focusing on human dignity and human rights, as well as gender equality, social and economic justice and development, physical and mental well-being, diversity, interconnectedness, inclusiveness and environmental and ecosystem protection*"[16]. UNESCO's recommendations are within its mandate and constitution and addressed to Member States focusing on their own application domain, i.e. education, science, culture, information, and communication.

15 UNESCO. (23 November 2021). *Recommendation on the Ethics of AI* Available at https://unesdoc.unesco.org/ark:/48223/pf0000381137

16 UNESCO. (23 November 2021). Ibid.

In brief, the objectives of the recommendation are as follows[17]:

I. Provide a universal framework of values, principles, and actions to guide States in the formulation of their legislation, policies, or other instruments regarding AI.
II. Guide the actions of the private sector to ensure the embedding of ethics in all stages of the AI system life cycle.
III. Protect, promote and respect human rights and fundamental freedoms, human dignity and equality, including gender equality; to preserve the environment, biodiversity and ecosystems; and to respect cultural diversity in all stages of the AI system life cycle.
IV. Foster multidisciplinary dialogue and consensus building about ethical issues relating to AI systems.
V. Promote equitable access to developments and knowledge and the sharing of benefits, with particular attention to the needs and contributions of lower middle-income countries.

Then, 11 areas of policy action were identified to operationalise the principles. These areas are set out below, accompanied by a brief description, with greater detail available in the UNESCO publication:

I. **Ethical impact assessment:** Governments should adopt a regulatory framework that establishes a procedure for public authorities and the private sector to conduct ethical impact assessments of AI systems to anticipate impacts, mitigate risks, avoid harmful consequences, facilitate citizen participation, and address social challenges. The assessment should also establish appropriate monitoring measures to identify impacts on human rights, labour rights, the environment, and ecosystems.
II. **Ethical governance and stewardship:** This implies that governance mechanisms are inclusive, transparent, multidisciplinary, and multilateral. Member States should ensure that harms caused through AI systems are investigated and redressed, by enacting strong enforcement mechanisms and remedial actions, to make certain that human rights and fundamental freedoms and the rule of law are respected in both the digital and the physical world. Amendments to existing national legislation or the elaboration of new legislation should be in line with these aims. The capacity of the judiciary should be enhanced and, where these technologies are used in the administration of justice, sufficient safeguards are needed to guarantee the protection of human rights, the rule of law, judicial independence, and the principle of human oversight.

17 UNESCO. (23 November 2021). Ibid.

III. **Data policy:** Member States should guarantee an appropriate level of data protection. The Recommendation suggests developing data governance strategies that ensure the continual evaluation of the quality of training data, including addressing concerns such as that of vigilance. This could include, for example, appropriate assessments of the impact of AI systems on privacy as part of the aforementioned ethical impact assessments. Next, there is a need to promote open data policies and the use of quality and robust datasets for training, development, and use of these tools.

IV. **Development and international cooperation:** Member States should encourage international cooperation and collaboration to bridge the geotechnical divides (i.e. the gap between countries in technological development).

V. **Environment and ecosystems:** AI has the potential to cause great negative impacts on the environment. Member States and companies should assess the direct and indirect environmental impact, carbon footprint, energy consumption and the environmental impact of raw material extraction supporting the manufacturing of these technologies.

VI. **Gender:** The potential of AI systems must be harnessed to advance gender equality, and in no case exacerbate the already wide gender gaps existing in several fields in the analogue world. Member States should ensure that gender stereotyping and discriminatory biases are not translated into AI systems, and instead identify and proactively redress these.

VII. **Culture:** Awareness and evaluation of AI tools should be promoted among local cultural industries and small and medium enterprises working in the field of culture, to avoid the risk of concentration in the cultural market.

VIII. **Education and research:** Member States should promote the acquisition of "prerequisite skills" for AI education, such as basic literacy, numeracy, coding and digital skills, and media and information literacy, as well as critical and creative thinking. Initiatives for the responsible use of AI technologies in teaching, teacher training and e-learning should be encouraged.

IX. **Communication and information:** It should be ensured that AI actors respect and promote freedom of expression.

X. **Economy and labour:** Member States should work with private sector companies, civil society organisations and other stakeholders, including workers and unions to ensure a fair transition for at-risk employees.

XI. **Health and social well-being:** Improve human health and protect the right to life. The development and deployment of AI systems related to health in general and mental health in particular should be regulated so that they are safe, effective, efficient, scientifically and medically proven, and enable evidence-based innovation and medical progress.

For the purposes of this report, Access Now sent a series of queries to UNESCO to ascertain its position on some central issues arising from the impact of the Recommendation in the region. Mainly, Access Now sought to find out whether they identify the need to develop specific laws for AI, and if so, what actions are being actively taken to advance this agenda.

In response to these queries, UNESCO said that the diversity and specific needs of the region have been recognised. They highlight the importance of advancing a regulatory agenda focused on making the development and use of AI inclusive, equitable and sustainable in terms of recognised challenges. Due to the complexity involved in proposing AI regulations, UNESCO supports regulatory pilot initiatives such as sandboxes (a concept developed in the section dedicated to the EU, which is worth reading), a particularly interesting example of which is the regulatory sandbox on generative AI designed by Brazil and led by the *Autoridade Nacional de Proteção de Dados* (National Data Protection Authority), supported by the Development Bank of Latin America and the Caribbean (hereinafter, "CAF").

Secondly, Access Now asked which Latin American States UNESCO is advising on regulatory matters. In answer to this they said that they have been supporting more than ten countries in the region and the development of a comprehensive diagnosis through the Readiness Assessment Methodology (RAM[18]) as an input to identify the ethics and governance needs of each country for the development of public policies and implementation of the Recommendation. According to UNESCO, the RAM is a macrolevel instrument that will help countries understand where they stand on the scale of preparedness to implement AI ethically and responsibly for all citizens, and in doing so highlighting the institutional and regulatory changes that are needed. UNESCO will continue to offer technical assistance and support to develop the RAM as a tool for the design of AI strategies in countries that consider using it.

Regarding the level of application of the Recommendation in the region, UNESCO stated that the Ministerial and High Authorities Summit on Ethics of Artificial Intelligence in Latin America and the Caribbean[19] which took place in October 2023 in Santiago, Chile, was an extremely

18 UNESCO. (28 August 2023). *Readiness Assessment Methodology: a tool of the Recommendation on the ethics of Artificial Intelligence.* Available at https://www.unesco.org/en/articles/readiness-assessment-methodology-tool-recommendation-ethics-artificial-intelligence

19 UNESCO. *Chile will host the First Ministerial and High Authorities Summit on the Ethics of Artificial Intelligence in Latin America and the Caribbean*. Available at https://www.unesco.org/en/articles/chile-sera-sede-de-la-primera-cumbre-ministerial-y-de-altas-autoridades-sobre-la-etica-de-la

important event. The session, held at the *Palacio de la Moneda*, was attended by the President of the Republic of Chile, Gabriel Boric, and more than 20 high authorities from the region, who confirmed the region's commitment to the ethical and responsible use of AI. The summit culminated with the adoption of the Declaration of Santiago[20], which establishes a working group for the creation of an Intergovernmental Council on Artificial Intelligence for Latin America and the Caribbean, within the framework of the UNESCO Recommendation on the Ethics of AI.

C. Montevideo Declaration

In March 2023, during the Latin American Meeting on Artificial Intelligence[21], more than one hundred stakeholders met to share their views on the opportunities and challenges surrounding AI and then declared their adherence to the Montevideo Declaration on Artificial Intelligence and its Impact in Latin America[22] (hereinafter, the "Montevideo Declaration", or the "Declaration"). The Declaration seeks to take advantage of and channel the potential of these technologies from a regional perspective. The Declaration describes a series of principles which are outlined below:

I. Technologies in general and AI systems in particular must be put at the service of people. The priority must be to improve quality of life, working conditions, economic conditions, health and general well-being.
II. The implementation of AI must comply with the guiding principles of human rights, respect and represent cultural, geographical, economic, ideological, and religious differences, among others, and not reinforce stereotypes or increase inequality.
III. AI should not, by design, harm people and its environmental impact should be minimised. The evaluation and mitigation of risks and impacts must be part of the design process, which must include tools for the prevention and early detection of risk and even the suspension of the implementation of technologies whose risks are unacceptable.
IV. The issue of the impact of these technologies on employment is unavoidable. Any improvement in productivity should directly correlate with improvements in working

20 Ministerial and High Authorities Summit on the Ethics of Artificial Intelligence in Latin America and the Caribbean. (23-24 October 2023) *Santiago Declaration.* Available at https://urldefense.com/v3/__

21 Khipu. *Latin American Meeting in Artificial Intelligence.* Available at https://khipu.ai/

22 Sadosky Foundation. (10 March 2023). *Montevideo Declaration on Artificial Intelligence and its Impact* Available at https://fundacionsadosky.org.ar/declaracion-de-montevideo-fun/

conditions and the quality of employment, focusing particularly on the most vulnerable populations Any transformation of the labour market must prioritise the problem of unemployment and precariousness using proactive and effective measures.

V. Cultural diversity must be taken into account in the processes of design and training of AI models, since human behaviour is shaped by diverse contexts. Otherwise, there is the risk that our precious Latin American cultural heritage will be excluded and minimised.

VI. The specificities of Latin American cultures must urgently be fully integrated into the creation of AI technologies for the region; they should be designed for and with the Latin American people, valuing their participation in research and development, and not only as mere producers of raw data or handwritten notes with low added value.

VII. The sovereignty of Latin American countries must be enhanced in terms of strategic and regulatory AI issues. Initiatives involving training people at the highest level and developing critical thinking, such as Khipu[23], are crucial if we are to meet this objective.

According to Fundación Vía Libre [24], a pioneering civil society organisation defending human rights in the digital environment in Latin America, the Montevideo Declaration is relevant in the Latin American context in that it highlights "*the importance of advancing public policies that ensure a clear and transparent development of these technologies, without blocking their development but honestly communicating to the population the risks and limits of artificial intelligence*"[25]. The Declaration also adds that "*to advance public policies that protect the common good without obstructing the benefits of technological development, from the time when a technological solution based on AI has been conceived and not after it has been created, we must identify the social value it provides and the risks that it entails, on the basis of an informed view of the specificities of Latin America"*[26].

The Montevideo Declaration, which is relevant insofar as it offers a regional perspective on the regulatory challenge of AI, was developed and supported by leading actors in the field with a view to taking advantage of the potential benefits of these technologies and taking as a starting point the specific reality of Latin America.

23 Khipu. *Latin American Meeting in Artificial Intelligence.* Available at https://khipu.ai/

24 NGO Fundación Vía Libre. Available at https://www.vialibre.org.ar/

25 NGO Fundación Vía Libre (14 March 2023). L*atin American Artificial Intelligence at the service of people*. Available at https://www.vialibre.org.ar/una-inteligencia-artificial-latinoamericana-y-al-servicio-de-las-personas/

26 Sadosky Foundation. (10 March 2023). *Montevideo Declaration on Artificial Intelligence and its Impact in Latin America.* Available at https://fundacionsadosky.org.ar/declaracion-de-montevideo-fun/

D. Other relevant initiatives

The soft law instruments outlined above are those that have achieved greater visibility in the sectors in Latin America in which the impacts and possible regulatory approaches to AI technologies are discussed. However, there are also other relevant publications and consensuses including the following:

I. Asilomar AI Principles[27]: this set of ethical principles, developed in 2017 in the context of the Asilomar Conference and coordinated by the Future of Life Institute, brings together 23 sections classified into three different categories. Firstly, the principles are intended to promote or underpin research; that is, how it should be conducted to align with the objective of an AI that is beneficial to society (mainly, about international cooperation and financing of activities), and also how it should be linked to spaces for formulating public policies. This is followed by a list of values that should be present in all development, for example, safety and security, transparency, privacy, control, and human supervision of systems. Finally, the third category focuses on future challenges, especially those linked to AI systems that are more advanced than the current state of the art.

II. Ethically aligned design, by the Institute of Electronic and Electrical Engineers (IEEE)[28]: this is an extremely extensive document, published and available only in English, and aims to provide information designed to increase understanding of the importance of considering aspects of ethics in the design of AI systems; indeed, yet another instrument that has taken ethics as a starting point for its analysis. The IEEE's objectives in the development of its principles are to guide development in the direction of potential benefits to humanity and the environment. At the same time, it is keen to point out that these interests should not be at odds with each other or come into conflict, since the first depends on the second; prioritising human well-being is closely related to the care and development of the environment. The IEEE has adopted eight ethical principles which they describe in detail in their document.

    For the purposes of this report, they shall simply be mentioned: (a) Human Rights; (b) Wellbeing; (c) Data controllers must give individuals the ability to access and share their data securely and maintain the ability to have control over their identity; (d) Effectiveness:

27 Future of Life Institute. (11 August 2017). *AI Principles*. Available at https://futureoflife.org/open-letter/ai-principles/

28 IEEE. *Ethically Aligned Design.* Available at https://sagroups.ieee.org/global-initiative/wp-content/uploads/sites/542/2023/01/ead1e.pdf

developers must provide evidence of the effectiveness of the systems they make available; (e) Transparency: the basis of a decision reached by an autonomous system must always be identifiable; (f) Accountability: systems must be able to unambiguously provide a rationale for all decisions made; (g) Awareness of Misuse: Creators must protect themselves against all possible misuses and risks; (h) Competence: Developers must specify the knowledge necessary for operators to have the skill required to operate the system safely and effectively.

III. Partnership on AI[29]: This partnership of 114 organisations advances the values of equity and inclusion across the field of AI technologies. Its main work focuses on inclusive research and design, media, linking AI with work and the economy, transparency, accountability, and security around critical systems. It takes specific approaches to these aspects and provides a library of resources about each of these categories for consultation.

NATIONAL STRATEGIES IN LATIN AMERICA

Some Latin American countries have been developing their own national plans, guides and strategies where they lay out their expectations and priorities for the development and implementation of AI technologies.

According to a report entitled "Ethical and Responsible Use of Artificial Intelligence in the Public Sector in Latin America and the Caribbean", published by the OECD, "*these instruments present the possibility of focusing both on the impacts and considerations of AI to achieve broad economic and social objectives, as well as objectives that emphasize innovation and restructuring of the public sector itself*"[30].

A. General Aspects of National Strategies

Strategies are public policies that introduce guidelines, priorities or approaches that help

29 Partnership on AI. Available at https://partnershiponai.org/

30 OECD iLibrary. *Artificial Intelligence Strategies in Latin America and the Caribbean.* Available at https://www.oecd-ilibrary.org/sites/03c4e7eb-es/index.html?itemId=/content/component/03c4e7eb-es#section-d1e1791

fulfil one or more objectives on a specific topic. Publishing strategies allows these guidelines to be reviewed and modified periodically as new advances occur and new needs that must be addressed by Government are identified.

The OECD has noted at least 7 strategies available in Latin America that incorporate economic growth mechanisms "*through financing and incentives for research and development, transforming the labour market and strengthening talent pools through updating programmes, and promoting solid governance and data sharing*"[31]. These aspects of the strategies can be pursued in different ways, so there is no single recipe, but rather each country must identify the particular challenges, strengths and weaknesses of its territory, its available human resources and other characteristics that define its reality.

The strategies published in the region include the following common aspects:

I. From within the public sector, multisectoral and truly participatory spaces must be provided to give a voice to the relevant national ecosystem actors, to enable them to understand national and international contexts in the development of strategic plans and guidelines that make sense for the territory. There must also be governance strategies that keep these actors interested if a strategy is to be updated. This requires review of the progress of the plans and intersections between sectors, for example, in initiatives where "innovation laboratories" are put into operation with public financing for use by the private sector.

II. A technological infrastructure must be provided to ensure competitive capacity in the international context (e.g. having access to reliable public administration data, which is a key and fundamental input to harnessing the potential of AI technologies). Moreover, it is irrelevant how much data from the public administration is produced or published if there is no infrastructure capable of processing it. This is a key enabler for economic growth and the development of technical competitiveness.

III. National AI strategies should seek to incorporate prevention and remediation mechanisms for potential risks arising from the massive use of data and the way in which AI systems process it to generate results. These risks relate to human rights, privacy, fairness, algorithmic bias, discrimination, transparency and explicability, safety and security,

31 OECD iLibrary. *IA Strategies in Latin America and the Caribbean.* Available at https://www.oecd-ilibrary.org/sites/03c4e7eb-es/index.html?itemId=/content/component/03c4e7eb-es#section-d1e1791

and accountability, among others.

IV. Strategies should aim for the gradual implementation of AI technology-based solutions focusing on providing services to citizens and improving public administration. The human resources required to manage these processes must be made available, and this involves hiring new people while also training those already working in the public sector.

Although the process of strategy development in the region varies greatly from country to country, most countries already have a strategy in place, while others are in the process of building one, as will be seen in the cases of Costa Rica and Uruguay.

The existing strategies of the countries included in this report are outlined below. Since these strategies offer perspectives and objectives that are not mandatory and are under constant monitoring and review, we will describe them in overview only.

B. Argentine Strategy

Argentina has developed different strategies:

i. AI Plan

On December 6, 2019, the National Artificial Intelligence Plan[32] (hereinafter, the "Plan")[33] was proposed to act as a guideline for measures to maximise the use of the opportunities offered to the country by the development and implementation of AI[34].

The Plan's objectives can be summarised as follows:

I. Maximise the potential economic impact and growth of the country by generating the conditions for the development and adoption of AI.

32 IA Latam. *National Artificial Intelligence Plan*. Available at https://ia-latam.com/wp-content/uploads/2020/09/Plan-Nacional-de-Inteligencia-Artificial.pdf

33 Universidad Abierta Interamericana. *Artificial Intelligence Plan*. Available at https://uai.edu.ar/ciiti/2019/buenos-aires/downloads/b1/ja-plan-nacional-ia.pdf

34 Carolina Aguerre and Maia Levy Daniel. *Public Policy Reports*. Available at https://www.empatia.la/wp-content/uploads/2021/12/Policy-report-Argentina-version-final.pdf

II. Promote the development of inclusive and sustainable AI.
III. Minimise the potential risks posed by the development and implementation of AI in social terms and in terms of the protection of personal data and privacy.
IV. Encourage the development of AI-oriented talent.
V. Promote federal articulation and linkage around IA among governmental entities.

The Plan defines strategic axes in the pursuit of these objectives: 1. financing; 2. regulations and ethics; 3. communication and awareness; 4. international linkage; 5. innovation laboratory; 6. R&D&I (Research, development and innovation); 7. talent. 8. data; 9. infrastructure; 10. implementation in the public sector; 11. implementation in the private sector; 12. impact on labour; 13. public-private convergence.

ii. STI Plan 2030

On October 28, 2022, the "Science, Technology and Information Plan 2030"[35] (hereinafter, the "STI Plan") was approved, which identifies ten national challenges for the next decade, emphasising the importance of incorporating AI in various sectors, such as health, education, energy, and the environment, and envisaging the achievement of results in the short, medium and long terms.

Its objectives are to: 1. eradicate poverty and reduce inequality and socio-environmental vulnerability; 2. promote bioeconomy and biotechnology to enhance regional production and achieve food sovereignty; 3. contribute to the design of policies to strengthen democracy and expand citizens' rights; 4. promote the development of inclusive and quality education for national development; 5. achieve accessible, equitable and quality health; 6. develop the space, aeronautics, telecommunications and defence industry sectors; 7. strengthen maritime research, sovereignty and sustainable use of the resources of the Argentine Sea; 8. to promote the development of the IT industry and information technologies for productive innovation and digital inclusion; 9. to foster the transition to sustainable development; and 10. to promote and consolidate a path for energy transition.

35 Córdoba Conicet. *The National Science, Technology and Innovation Plan was approved by the Senate.* Available at https://cordoba.conicet.gov.ar/el-plan-nacional-de-ciencia-tecnologia-e-innovacion-203Conicet. 0-fue-aprobado-por-el-senado/

iii. Transparency and Personal Data Protection in the Use of Artificial Intelligence

Resolution 161/2023[36] of the Agency for Access to Public Information ("AAIP" in Spanish) provided for the creation of the "Transparency and Personal Data Protection Program in the use of Artificial Intelligence". Its objective is to "*promote the processes of analysis, regulation and strengthening of state capacities required to support the development and use of artificial intelligence, both in the public and private sectors, guaranteeing the effective exercise of citizens' rights in terms of transparency and personal data protection.*"

This programme includes research on regulatory progress in the region regarding the implementation of AI systems and on risk and vulnerability prevention practices to avoid biases and discriminatory practices. The institutionalisation of a Multidisciplinary Advisory Council with experts in the field has also been promoted to encourage social participation and governance through consensus and agreements on sectoral policies.

C. Brazilian Strategy

The two main strategies worth mentioning are:

i. Brazilian Digital Transformation Strategy (hereinafter, "E-Digital"), pursuant to Decree No. 9,319/2018[37], filed on March 22, 2018: E-Digital establishes objectives, actions, and projects to promote the digitalization of the economy. The E-Digital[38] 2022-2026 Period, which was approved by the Ministry of Science, Technology, and Innovation (MCTI, in Portuguese)[39] in November 2022, is based on "Enabling Axes" and "Digital Transformation Axes".

The Enabling Axes are the necessary foundations for digital transformation: Infrastructure and access to ICTs; research, development, and innovation; trust in the digital environment; education

36 InfoLEG. Access to public information agenda, Resolution 161/2023. 30/08/2023. Available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/385000-389999/389231/norma.htm

37 Planalto (21 March 2018). *Decree No. 9319.* Available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9319.htm.

38 Brazilian Digital Transformation Strategy (E-Digital) 2022 - 2026 Period: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosestrategiadigital/e-digital_ciclo_2022-2026.pdf

39 MCTI. Ministério da Ciência, Tecnologia e Inovações. *MCTI Ordinance No 6,543, of 16.11.2022.* Available at https://antigo.mctic.gov.br/mctic/opencms/legislacao/portarias/Portaria_MCT_n_6543_de_16112022.html

and vocational training; and the international dimension. Each of these has specific objectives, for example, to expand mobile and fixed broadband access networks in urban and rural areas.

The Digital Transformation Axes aim to promote the adoption of digital tools for government and economic activities through the following measures:

A. Promoting Research, Development, and Innovation (R&D&I) in topics deemed to be strategic for digital transformation, such as AI, Internet of Things (IoT), robotics, etc.
B. Promoting appropriate and proportionate regulation of the information security, cybersecurity, and privacy risks inherent in the processing of personal data potentially posed by disruptive digital technologies to data subjects (e.g., artificial intelligence, big data, data lake, IoT, quantum computing, virtual reality, etc.).

ii. Brazilian Strategy for Artificial Intelligence (EBIA, in Portuguese), launched on April 9, 2021, pursuant to Ordinance No. 4,617/2021 of the MCTI[40]: It aims to guide the Government's actions towards the development of R&D&I in AI-based solutions, as well as their conscious and ethical[41] use.
The MCTI identified nine thematic axes that make up the EBIA, which are divided into the following two groups:

I. Cross-cutting Axes, which are divided into (a) legislation, regulation, and ethical use; (b) AI governance; and (c) international aspects; and
II. Vertical Axes, which are divided into (a) education; (b) workforce and training; (c) R&D and entrepreneurship; (d) application in the productive sectors; (e) application in the public sector; and (f) public safety and security.

The strategy recognises that AI has the potential to transform various sectors and industries, and that Brazil must take the steps it needs to remain competitive in the global marketplace.

40 MCTI. Ministério da Ciência, Tecnologia e Inovações. *MCTI Ordinance No 4,617, of 06.04.2021.* Available at https://antigo.mctic.gov.br/mctic/opencms/legislacao/portarias/Portaria_MCTI_n_4617_de_06042021.html

41 MCTI. (2021) *Summary of the Brazilian Artificial Intelligence Strategy*. Available at https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-summary_brazilian_4-979_2021.pdf)

D. Chilean Strategy

There is a National Artificial Intelligence Policy[42] formalised through Decree 20 of the Ministry of Science, Technology, Knowledge, and Innovation, which was published in the Official Gazette on December 3, 2021. The instrument contains a series of AI guidelines, directives, and principles, described in 70 priority actions and 185 public service initiatives, mainly focused on social, economic, and educational aspects, for both the public and private sectors. These measures are structured based on an objective with four principles and three axes.

The objective of the Policy is "(...) to make Chile part of the global AI vanguard, developing a research and innovation ecosystem that enhances productive academic and public sectors. All of this based on principles of opportunity and responsibility to promote sustainable development and improve the quality of life[43]

These principles promote responsible use, contribution to sustainable development, inclusion of diverse groups and adaptation to an ever-changing global environment. They are:

I. **AI with a Focus on the Well-being of People, Respect for Human Rights and Safety:** This principle emphasizes the importance of respecting human rights and improving people's quality of life and highlights the need to ensure safety in the development and use of AI.
II. **AI for Sustainable Development:** AI has the potential to contribute to the sustainable development of countries like Chile, diversifying its economy and promoting research, technology, and innovation. The aim is to incorporate AI while considering social and environmental issues.
III. **Inclusive AI:** Emphasis is placed on the importance of eliminating bias and discrimination, promoting gender equality, sexual diversity and the inclusion of historically marginalised groups. It also covers the protection and participation of children and adults.
IV. **Globalised and evolving AI:** Chile must become part of the international context while taking account of the unique realities of the country.

42 BCN. (20 September 2021). *Approves the National Artificial Intelligence Policy.* Available at https://www.bcn.cl/leychile/navegar?idNorma=1169399

43 MinCiencia. *National Artificial Intelligence Policy.* Available at https://www.minciencia.gob.cl/uploads/filer_public/bc/38/bc389daf-4514-4306-867c-760ae7686e2c/documento_politica_ia_digital_.pdf

The National AI Policy is structured around three fundamental and interrelated axes:

I. **Enabling factors:** These focus on the essential elements that make AI development possible, such as human talent, technological infrastructure, and data.
II. **Development and adoption:** This axis focuses on the space where AI systems are developed and deployed, including research, technology transfer, innovation, and technology-based economic development.
III. **Ethics, regulatory aspects and socioeconomic effects:** These are the regulatory aspects related to privacy, intellectual property, cybersecurity and other social and economic issues linked to AI.

Although the National Policy is relatively recent, a plan is already underway to update it in the short term. During June 2023, a series of 7 participatory workshops were launched[44] bringing together more than 30 experts in AI-related matters from the public and private sectors, for this precise purpose.

44 UNESCO. *Chile's Ministry of Science, Technology and Innovation, with support from UNESCO, initiates Artificial Intelligence policy update.* Available at https://www.unesco.org/en/articles/chiles-ministry-science-technology-and-innovation-support-unesco-initiates-artificial-intelligence

E. Colombian Strategy

The National Policy for Digital Transformation and Artificial Intelligence[45] was tabled at the end of 2019.

In November 2020, the "Task Force for the Development and Implementation of Artificial Intelligence in Colombia"[46] was published, which establishes mechanisms for the implementation of emerging technologies in the public-private sector and pursues cooperation between these sectors both nationally and internationally. It proposes the creation of an Internal Working Group to meet the needs generated by AI systems effectively and efficiently, and thus disseminate projects and achieve an exchange of knowledge and experiences.

Subsequently, the Government of Colombia produced various publications, including (i) Sandbox on privacy by design and by default in AI projects; (ii) recommendations of the Expert Mission; (iii) strategic plan for knowledge transfer in AI; and (iv) infrastructure governance model for the development of emerging technologies[47].

In April 2021, the National Planning Department issued a "Monitoring Plan for the Implementation in Colombia of International AI Principles and Standards"[48], which consists of a guide for compliance with the recommendations of the OECD Artificial Intelligence Council.

45 National Planning Department. *National Policy for Digital Transformation and Artificial Intelligence.* Available at https://colaboracion.dnp.gov.co/CDT/Conpes/Econ%C3%B3micos/3975.pdf

46 Presidential Advisory Office for Economic Affairs and Digital Transformation. (November 2021). *Task Force for the development and implementation of artificial intelligence in Colombia.* Available at https://dapre.presidencia.gov.co/AtencionCiudadana/Documents/TASK-FORCE-para-desarrollo-implementacion-Colombia-propuesta-201120.pdf

47 Available at https://inteligenciaartificial.gov.co/politicas_y_publicaciones/

48 National Planning Department. (27 April 2021). *Administrative Department of the Presidency of the Republic.* Astrid Rocío Angarita Cruz, Elena Tamayo Uribe. Available at https://dapre.presidencia.gov.co/TD/plan-seguimiento-implementacion-colombia-estandares-internacionales-inteligencia-artificial-ocde.pdf?TSPD_101_R0=08394a21d4ab20003ce781987b45f801b436fefee21570395b2f0af80498840c752d7f9356e396f508f-3d002e214500049b04

Finally, in May 2021, the "Ethical Framework for Artificial Intelligence in Colombia" was issued[49] with the objective of presenting a "soft law guide" of recommendations and suggestions to Public Entities to address the formulation and management of projects that include the use of artificial intelligence.

F. Costa Rican Strategy

The most relevant instrument for this report is the National Science, Technology, and Innovation Plan 2022-2027[50], which came into effect in 2021, published by the Ministry of Science, Innovation, Technology and Telecommunications (MICITT, in Spanish). Although this is not a specific strategy in relation to artificial intelligence, it contains elements that are linked, as it indicates the need to narrow the so-called AI-related skills gap and encourage the education sector to develop related skills and competencies.

In turn, the Inter-American Development Bank's fAIr LAC initiative (explained in detail in the Governance Projects section of this report) seeks to make the country the Central American region's AI hub and encompasses the eventual creation of a specific National AI Policy.

G. Peruvian Strategy

In May 2021, the Secretariat of Government and Digital Transformation of the Presidency of the Council of Ministers presented the "National Strategy for Artificial Intelligence" (ENIA, in Spanish)[51] for the period 2021- 2026, which can be updated every 2 years in view of new technological advances and the situation of the country and the world.
The Strategy is structured around the following axes:

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49 Armando Guío Español, Elena Tamayo Uribe and Pablo Gómez Ayerbe (2021). *Ethical Framework for Artificial Intelligence in Colombia.* Government of Colombia. https://minciencias.gov.co/sites/default/files/marco-etico-ia-colombia-2021.pdf

50 Paolo Vega Castillo, Federico Torres Carballo (2021). *National Science, Technology and Innovation Plan 2022-2027*. Ministry of Science, Innovation, Technology and Telecommunications. https://cambioclimatico.go.cr/wp-content/uploads/2023/06/Plan-Nacional-Ciencia-Tecnologia-Innovacion-2022-2027.pdf

51 Single digital platform of the Peruvian State. *National Artificial Intelligence Policy (ENIA)*. 18 May 2021. Available at https://www.gob.pe/institucion/pcm/informes-publicaciones/1929011-estrategia-nacional-de-inteligencia-artificial

I. Training of professionals for AI research and development
II. Adoption of these technologies as key tools in driving progress, innovation, and well-being in the nation.
III. Creation and improvement of digital and telecommunications infrastructure
IV. Facilitation of the creation of a robust infrastructure making high quality data available to the public in an open, reusable, and accessible format.
V. Adoption of ethical guidelines for the sustainable, transparent, and replicable use of AI, with a clear definition of responsibilities and personal data protection measures.
VI. Collaboration at both national and international levels to promote knowledge exchange.

H. Mexican Strategy

The first strategy report to be presented in the region, in March 2018, was from Mexico, from the Federal Executive, which released: "Towards an AI Strategy in Mexico: Harnessing the AI Revolution"[52]. It can be summarised in 5 strategic areas:

i. Governance, government and public services

- Establish a clear strategic direction.
- Designate Emerging Technology Innovation teams in selected secretariats.
- The government should be the main promoter.
- Create guidelines for the acquisition of AI.
- Create a cross-sectoral steering group to develop and promote the Government of Mexico's AI Strategy.
- Create a network of AI practitioners from all sectors and disciplines, including national and local stakeholders, to develop a multi-sectoral AI 2030 agenda.
- Create an AI working group in Congress.
- Take a leadership role in the global debate.

ii. Research and Development

- Create a national centre for AI research.
- Strengthen the relationship between academia and industry.

52 IA Latam. *Towards an AI Strategy in Mexico: Harnessing the AI Revolution.* June 2018. Available at https://ia-lat-am.com/portfolio/hacia-una-estrategia-de-ia-en-mexico-aprovechando-la-revolucion-de-la-ia/

- Create a good environment for commercial research and applied AI in the private sector.
- Create a government AI fund.

iii. Capabilities, Skills, and Education

- Develop tools for continuing education in AI.
- Expand AI learning beyond computer science and mathematics students in public and private universities.
- Teach computational thinking in schools.
- Increase the number of master's and doctoral students in AI and data science.

iv. Data Infrastructure

- Maintain a resilient open data infrastructure.
- Create Mexican databases to serve as training for the development of AI applications.
- Protect personal privacy.

v. Ethics and Regulations

- Bring data assets within the reach of competition law.
- Create a Mexican Council of AI Ethics.

In parallel, in Personal Data Protection, the National Institute for Transparency, Access to Information and Personal Data Protection (INAI, in Spanish) published[53] recommendations for the processing of personal data derived from the use of AI systems to promote the secure treatment of personal data in accordance with international best practices.

53 INAI. (May 2022). *Recommendations for the Processing of Personal Data derived from the use of Artificial Intelligence.* Available at https://home.inai.org.mx/wp-content/documentos/DocumentosSectorPublico/RecomendacionesPDP-IA.pdf

I. Uruguayan Strategy

Uruguay is currently developing a new National Artificial Intelligence Strategy and is generating a National Data Strategy. Updating the National Artificial Intelligence Strategy[54] involves updating the National Strategy presented in 2020[55], as the exponential growth of this discipline, and the coming to market of generative AI technologies, has rendered much of this framework outdated or inaccurate.

Uruguay is the only country in the region that has a specific strategy for restructuring the public sector through AI. It has proposed four macro-objectives, with 7 secondary objectives:

1. **AI Governance in Public Administration**
    i. Identifying the AI ecosystem in Uruguay
    ii. Defining an AI governance model in the Public Administration
2. **Capacity building for AI**
    i. Capacity building for the development and use of AI in the Public Administration
    ii. Generating knowledge spaces
3. **AI Use and Application**
    i. Generating technical guidelines for the proper use of AI in the Public Administration.
    ii. Designing specific action plans in strategic sectors
4. **Citizenship and AI**
    i. Developing public awareness and trust

The process consists of five stages that began in June 2023 and will culminate in April 2024. They include the development of a diagnosis to assess the degree of readiness for the application of responsible artificial intelligence, the launching of a participatory process with roundtables for the survey of use cases in the State, the systematisation of these proposals, public consultation and finally, the approval and publication of the final version of the documents.

54 Digital Citizen Participation Platform. *Artificial Intelligence Strategy review process and creation of the National Data Strategy.* Available at https://plataformaparticipacionciudadana.gub.uy/processes/estrategia-ia-datos?locale=es

55 Electronic Government and Information and Knowledge Society Agency. (1 January 2020). *Artificial Intelligence Strategy for Digital Government.* Available at https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-conocimiento/comunicacion/publicaciones/estrategia-inteligencia-artificial-para-gobierno-digital/estrategia

Uruguay also adhered to the UNESCO Recommendation on the Ethics of Artificial Intelligence on June 8, 2023[56].

GOVERNANCE PROJECTS

The idea of governance is understood in different ways. For the purposes of this report, it refers to the processes by which the participation of different stakeholders in the design of regulations and public policies is enabled and encouraged.

Governance processes generally involve the participation of the public sector, the private sector, academia, the technical sector, and civil society. Each has unique knowledge and experience to contribute to the discussions and negotiations to achieve the objectives that each governance body has set for itself.

In this section, some of the most significant governance mechanisms in the region are explored, and in certain cases, testimonies and first-hand information from those participating in them are included.

A. BID: fAIr LAC

The Inter-American Development Bank[57] (IDB) is a regional institution founded in 1959. Its main objective is to improve the quality of life in Latin America and the Caribbean, focusing on health, education, and infrastructure through financial and technical support to countries which are working towards reducing poverty and inequality.

In response to the challenges posed by AI, the IDB has launched an initiative entitled "fAIr LAC"[58], comprising five tools for the application of ethical principles to the design, development, and necessary audits of AI-based solutions. Although many are aimed at the public sector, specific tools are also included for the private sector, particularly for the entrepreneurial sector. fAIR LAC

56 https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-conocimiento/comunicacion/noticias/uruguay-adhiere-recomendacion-etica-inteligencia-artificial-unesco

57 Inter-American Development Bank. Available at https://www.iadb.org/en

58 fAIr LAC+. Available at https://fairlac.iadb.org/en

has produced an introductory pamphlet on these tools[59], a summary of which is provided below:

II. Ethics self-assessment tool for the public sector[60]: This is a questionnaire designed to identify risks in the implementation of AI systems within the public sector.
III. Ethics self-assessment tool for the entrepreneurial sector[61]: To access the contents of this tool, interested persons should first contact the IDB's fAIr LAC. This tool focuses on six main dimensions: 1. Conceptualisation and design, 2. Governance, safety and security, 3. Human involvement in AI systems, 4. AI life cycle (data and algorithms), 5. Relevant stakeholders, and 6. Communications. The objective is to provide a diagnosis allowing entrepreneurs to identify the main challenges to be addressed to mitigate biases, discriminatory results and exclusions resulting from the potential deployment of the solution they develop.
IV. Responsible use of AI for public policy: Project Formulation Handbook. This tool is intended for those who are responsible for managing and coordinating AI-based system design and development processes, but who do not necessarily have expert knowledge in data science.
V. Responsible use of AI for public policy: Data Science Handbook. This identifies the most common technical problems (uses of data for training, for example). It offers practical ways of avoiding these problems using three specific tools.
VI. Audit of algorithms for decision making or decision support systems: It offers a guide with specific questions so that public officials can carry out an algorithmic audit process on tools they use to make decisions or recommendations and avoid errors or biased results. The audit is designed to avoid these errors and should be performed on a regular basis. It also provides updating mechanisms and consists of the four elements or stages required to carry out a proper audit.

For each of these tools, specific documents can be downloaded in PDF format, as well as explanatory videos by IDB staff offering a generic description of the background to each tool, in addition to a general overview of its contents.

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59 fAIr LAC. *fAIr LAC in a box. Ethical and Responsible Use of Artificial Intelligence Systems.* Available at https://fair-lac.iadb.org/sites/default/files/2022-09/Resumen.pdf

60 fAIr LAC. *Ethics self-assessment tool for the public sector.* Available at https://self-fairlac.iadb.org/en

61 César Said Rosales Torres, César Buenadicha Sánchez and Tetsuro Narita. (2021). *Ethical self-assessment of AI for stakeholders in the entrepreneurial ecosystem: Application guide.* Inter-American Development Bank. Available at https://publications.iadb.org/en/ethical-assessment-ai-actors-within-entrepreneurial-ecosystem-application-guide

Finally, it provides testimonies of stakeholders who have carried out the procedures proposed by fAIR LAC and the opportunity to hear the experiences of those in charge and of participants.

B. Adolfo Ibáñez University

Undoubtedly, one of the most outstanding and relevant initiatives in the region is "Ethical, Responsible and Transparent Algorithms"[62], an initiative of GobLab[63] at Adolfo Ibáñez University (UAI, in Spanish) of Chile, with the support of the Schools of Engineering and Sciences and Liberal Arts, and the Schools of Business and Communications and Journalism of the same university. This space, which has been financed by the IDB Group's innovation laboratory (IDB Lab) for its first three years, has hosted collaborative initiatives bringing together academia, the public sector and society, to develop policies and mechanisms to guide the deployment of automated decision systems, and to provide transparency on these systems when they are used in the State.

The project's different measures can be used to survey systems used by public agencies and understand their particular challenges. In addition, the UAI, through GobLab, collaborates in the design of public policies that address the need for public access to relevant information on systems based on automated algorithms in the public sector.

In conversation with María Paz Hermosilla[64], director of UAI's GobLab, we identified three of the main achievements of this space, namely:

UAI, IDB Lab[65] and Digital Government Division[66]: Jointly published in 2022 a guide entitled "Ethical Formulation of Data Science Projects"[67], a high-quality resource aimed at public sector stakeholders that seeks to identify and reduce ethical and legal risks in the development of data-

62 GobLab UAI. *Ethical Algorithms Projects*. Available at https://goblab.uai.cl/en/ethical-algorithms/

63 GobLab UAI. Available at https://goblab.uai.cl/

64 María Paz Hermosilla. Available at https://gobierno.uai.cl/profesor/maria-paz-hermosilla/

65 BID Lab. Available at https://bidlab.org/en

66 GobDigital Chile. *Digital Transformation of the State at the Service of People*. Available at https://digital.gob.cl/

67 GobDigital Chile. (August 2022). *Ethical formulation of data science projects.* Available at https://cms-dgd-prod.s3-us-west-2.amazonaws.com/uploads/pdf/Gu%C3%ADa_Formulacion_etica_proyectos_ciencia_datos_1.pdf?

science projects based on algorithmic models. This guide presents recommendations for models that process personal data that may have a significant impact on people's lives (for example, in health care), and models that seek to predict the behaviour or grouping of individuals and improve the internal management of institutions (for example, automated decision making that affects people receiving assistance from the State), among others. This instrument clearly represents a major step forward in the appropriate governance of the automated systems designed for public institutions, since it helps to reduce or eliminate obstacles to the fulfilment of the objectives for which they are used.

UAI, IDB Lab and ChileCompra: This collaboration designed and incorporated a standardised public policy for public sector procurement of AI-based systems, "Model Bases for bidding on algorithms and artificial intelligence projects with ethical requirements"[68], adopted by ChileCompra[69], the entity in charge of Chile's public procurement system under the Ministry of Finance. Its standard bidding conditions support the management of public purchasers in the procurement of technological solutions, incorporating such requirements as transparency, privacy, non-discrimination and explicability. This standard can be used by any agency or public agency that intends to incorporate systems based on AI algorithms to adapt to mechanisms that allow any pernicious impacts of the use of an automated system to be avoided by following, for example, guidelines for statistical fairness metrics, additional data protection measures or analysis of possible biases. This programme has allowed Chile to become *"the first country in Latin America to have data ethics requirements for the procurement of automated systems"*[70].

UAI, BID Lab and the Transparency Council[71]: Based on an interest in the need to provide active algorithmic transparency[72], the Transparency Council, an autonomous body of the State of Chile,

68 ChileCompra. *Standard Bidding Documents are now available for bidding on algorithms and artificial intelligence projects with ethical requirements.* Available at https://www.chilecompra.cl/2023/01/ya-se-encuentra-disponible-bases-tipo-para-licitar-proyectos-de-algoritmos-e-inteligencia-artificial-con-requisitos-eticos/

69 ChileCompra. https://www.chilecompra.cl/

70 ChileCompra. *Standard Bidding Documents are now available for bidding on algorithms and artificial intelligence projects with ethical requirements.* Available at https://www.chilecompra.cl/2023/01/ya-se-encuentra-disponible-bases-tipo-para-licitar-proyectos-de-algoritmos-e-inteligencia-artificial-con-requisitos-eticos/

71 Transparency Council. Available at https://www.consejotransparencia.cl/

72 Transparency Council. (2018) *Participative Process Glossary.* https://www.consejotransparencia.cl/glosario/#:~:text=Transparencia%20Activa%20(TA)%3A%20es,%2C%20Ley%20N%C2%B020.285).

and GobLab have been working for some years to introduce recommendations and binding public policies that increase the knowledge base regarding automated decision systems used within the public sector. In 2020, the Transparency Council published its "Workbook: Algorithmic Transparency, Best Practices and Transparency Standards in Automated Decision-Making"[73], a document that identifies elements of transparency and accountability in the construction and execution of algorithms, and in algorithmic decision-making, where transparency is an essential factor in explaining, justifying, and understanding their use. Following the publication of this workbook, GobLab designed and disseminated a series of requests for access to public information to identify the automated systems that the public sector was using at the time. It obtained, initially, seven responses which became the basis for a report which was published presenting its main findings[74]. Following these milestones, both GobLab and the Transparency Council set out to jointly make progress in creating an inventory of these automated decision-making systems in the Chilean State. This is available for consultation in the report on "Algorithmic Transparency in the Public Sector"[75]. This, in turn, became a new starting point and the Council joined the Ethical Algorithms project to collaborate with the UAI on the development of a general instruction on algorithmic transparency, i.e. a regulation within the framework of the access to public information law, which may soon become a binding rule with sanctions for non-compliance.

These three milestones describe a model of participation between different sectors in the development of public policies and increased technical and legal knowledge about the implications of automated decision-making systems and can be seen as a real achievement in the Latin American context.

C. UN Advisory Body on Artificial Intelligence

The Secretary-General of the United Nations (UN), António Guterres, announced the creation of a new advisory body on AI in October 2023. Guterres justified the creation of this Body as

73 Daniel Contreras Caballol, Daniel Pefaur Dendal. (October 2020). *Workbook N17: Algorithmic transparency: Good practices and standards of transparency in automated decision-making.* Transparency Council. Available at https://www.consejotransparencia.cl/wp-content/uploads/estudios/2020/10/Transparencia-Algoritmica.pdf

74 GobLab. (October 2021). *Algorithmic Transparency in the Public Sector.* Available at. https://goblab.uai.cl/transparencia-algoritmica-en-el-sector-publico-2/

75 Romina Garrido, José Pablo Lapostol and María Paz Hermosilla (2021). *Algorithmic Transparency in the Public Sector.* Transparency Council and GobLab UAI. Available at https://goblab.uai.cl/wp-content/uploads/2021/11/ESTUDIO-TRANSPARENCIA-ALGORITMICA-EN-EL-SECTOR-PUBLICO-GOBLAB-vf.pdf

follows: "*The transformative potential of AI for good is difficult even to grasp. And without entering into a host of doomsday scenarios, it is already clear that the malicious use of AI could undermine trust in institutions, weaken social cohesion and threaten democracy itself, For all these reasons, I have called for a global, multidisciplinary, multistakeholder conversation on the governance of AI so that its benefits to humanity – all of humanity – are maximized, and the risks contained and diminished.*".[76]

The objectives and reasons for the formation of the Body are summarised below[77]:

I. **The global AI imperative:** Globally coordinated AI governance is the only way to harness its benefits for humanity while addressing its risks and uncertainties.
II. **The UN's response:** To foster a globally inclusive approach, the UN Secretary-General is convening a multi-stakeholder High-level Advisory Body on AI to undertake analysis and advance recommendations for the international governance of AI.
III. **Calling for Interdisciplinary Expertise:** The Body will offer diverse perspectives and options on how AI can be governed for the common good, aligning internationally interoperable governance with human rights and the Sustainable Development Goals.
IV. **A Multistakeholder, Networked Approach:** The Body will engage and consult widely with existing and emerging initiatives and international organisations to bridge perspectives across stakeholder groups and networks.
V. **Supporting cooperation:** Through their support, the Body will strengthen stakeholder cooperation on governing AI, and thereby contribute to better-governed AI globally.

Approximately 40 specialists from different countries and sectors were selected to make up the first commission, with a view to achieving a group balanced in different areas, both geographically and interdisciplinary. However, civil society organisations, such as Algorithm Watch[78], have expressed concern about the poor representation of civil society[79], to which we could add, from Access Now's perspective, a poor representation of the Latin American region. It remains to be seen what effect this body will have on the ways that relevant stakeholders design their

76 United Nations. *UN Secretary-General launches AI Advisory Body on risks, opportunities, and international governance of artificial intelligences.* Available at https://www.un.org/sites/un2.un.org/files/231025_press-release-aiab.pdf

77 High Level Advisory Board. United Nations. Available at https://www.un.org/en/ai-advisory-body

78 Algorithm Watch. Available at https://algorithmwatch.org/en/

79 Algorithm Watch on "X". Available at https://x.com/algorithmwatch/status/1719268397643382815?s=20

decisions in the global context of AI technologies. In any case, we decided to include this in this report as an example of governance processes that currently seek to contain the risks of AI and reap its benefits in the service of societies.

REGULATORY PROCESS IN THE EU AND THE US

To ensure the development and implementation of trustworthy AI, governments are exploring a variety of regulatory approaches including amending existing laws; introducing requirements for mandatory bias testing of AI systems; prohibiting or restricting the use of AI systems in specific contexts; or establishing public registries to ensure that AI systems are efficient and accurate[80].

This chapter analyses several regulatory instruments discussed in the European Union (EU) and the United States.

A. European Union

On 14 June 2023, the European Parliament adopted the Artificial Intelligence Act, which provides "a comprehensive legislative framework for the governance and oversight of artificial intelligence technologies in the European Union"[81]. The draft law still needs to be reviewed and debated in the Council of the European Union (EU) and, if approved there, will become law. Due to the not always positive influence in the Latin American region of draft laws presented in the EU, this initiative will be analysed in more depth and observations will be provided from a human rights perspective.

Before analysing the draft approved by the European Parliament, we should review the European Union's regulatory development process, which describes the need for AI regulation:

80 OECD iLibrary. (18 June 2021). *State of Implementation of the OECD AI Principles*. Available at https://www.oecd-ilibrary.org/docserver/1cd40c44-en.pdf?expires=1684883594&id=id&accname=guest&checksum=5860F3B2B6A7FF5C6B565093357187B0

81 European Parliament News. (12 June 2023). *EU AI Act: First regulation on artificial intelligence* Available at https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/ley-de-ia-de-la-ue-primera-normativa-sobre-inteligencia-artificial

I. In April 2018, the EU's Artificial Intelligence[82] Strategy was presented, which introduces the challenges that AI poses to the labour market. It also describes the need to develop a data infrastructure and the global importance and relevance of the European Data Protection Regulation.

II. In February 2020, the European Commission (CC) published its "White Paper on AI"[83]. This document recognises the level of danger that some AI systems present to European societies: *"The use of AI can affect the values on which the EU is founded and lead to the breaches of fundamental rights"*[84]. The document introduces the need to move towards a risk-based regulatory approach and the identification of requirements for each level.

III. In July 2020, the EC published a preliminary impact assessment for the AI legislation and noted that the new legislation will focus on: I) protecting consumers from potential harms caused by AI; II) protecting fundamental rights, including those that threaten privacy and freedom of expression, such as facial recognition surveillance and similar monitoring systems; and III) unlawful discrimination that may be caused by AI tools that show bias against certain populations.

IV. In October 2020, the European Parliament adopted a series of AI-related resolutions on issues such as ethics[85] civil liability[86] and intellectual property rights[87]. In 2021, these were followed by resolutions on the use of AI in the criminal[88], educational, cultural and audiovisual sectors[89].

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82 European Commission. (7 December 2018). *Coordinated Plan on Artificial Intelligence* Available at https://digital-strategy.ec.europa.eu/en/policies/plan-ai

83 European Commission. (19 February 2019). *White Paper on Artificial Intelligence - A European approach to excellence and trust* Available at https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en

84 European Commission. (19 February 2019). *White Paper on Artificial Intelligence - A European approach to excellence and trust, p.13.*

85 European Parliament. (20 October 2020). *Framework of ethical aspects of artificial intelligence, robotics and related technologies* Available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html

86 European Parliament. (20 October 2020). *Civil liability regime for artificial intelligence.* Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0276

87 European Parliament. (2 October 2020). *Report on intellectual property rights for the development of artificial intelligence technologies.* Available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html

88 European Parliament. (6 October 2021). *Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters.* Available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0405_EN.html

89 European Parliament. (19 May 2021). *Artificial intelligence in education, culture and the audiovisual sector.* Available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0238_EN.html

We have selected for this report the main aspects of the draft European regulation[90]. Insofar as many of the initiatives presented in Latin America replicate the approach taken in the EU and thus incorporate some of the same challenges for the creation of regulation focused on fundamental rights, we would like to offer some analysis in this section in relation to these countries.

For a better understanding of the purpose of the regulation proposed by the European Union, the first Article is partially transcribed below:

> *"This Regulation lays down:*
>
> *a) harmonised rules for the placing on the market, the putting into service and the use of artificial intelligence systems ('AI systems') in the Union;*
> *b) prohibitions of certain artificial intelligence practices;*
> *c) specific requirements for high-risk AI systems and obligations for operators of such systems;*
> *d) harmonised transparency rules for AI systems intended to interact with natural persons, emotion recognition systems and biometric categorisation systems, and AI systems used to generate or manipulate image, audio or video content;*
> *e) rules on market monitoring and surveillance."*

The first article to be analysed is number 3, which presents definitions, of which we will mainly focus on two: "*emotion recognition system" and "biometric categorisation system*". In both cases, the use of the term "biometric data" is problematic.

The definition of "biometric data" provided for in Article 3 (33) of the proposal is identical to that found in Article 4 (14) of the General Data Protection Regulation[91].

90 European Commission. (21 April 2021). *Regulation of the European Parliament and Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts.* Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206

91 European Union General Data Protection Regulation. (27 April 2016). *Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.* Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX-:32016R0679

The two basic components of this definition are:
(i) Biometric data relate to the physical environment, physiological or behavioural characteristics of a person.
(ii) These data, to be considered biometric, must allow the unique identification of an individual.

Accordingly, personal data based on physical, physiological, or behavioural characteristics of an individual that do not allow for his or her unique identification shall not be considered as biometric data. Article 3 (34) defines emotion recognition systems as those designed for the purpose of *"identifying or inferring emotions or intentions of natural persons on the basis of their biometric data"*. Since gait, heart rate or galvanic skin response are not characteristics that allow unique identification of a person (unlike other physiological characteristics, such as face or iris), the draft law creates a loophole whereby emotion recognition and biometrics applications could operate using data that do not meet the unique identification requirement.

To avoid this loophole, Access Now offers an alternative definition: "*Emotion recognition system: an AI system for detecting or inferring the emotions or intentions of individuals or groups on the basis of data related to their physical, physiological, or behavioural characteristics*"[92].

Moreover, in Article 3 (35), the draft defines biometric categorisation systems as those *designed to "assign natural persons to specific categories, such as sex, age, hair colour, eye colour, tattoos, ethnic origin or sexual or political orientation, on the basis of their biometric data"*.

That is, these systems work by assigning categories on the basis of biometric data, which in some cases is technically possible. An artificial intelligence system could be used to analyse and group people according to their hair or eye colour. The definition in Article 3 (35), however, includes a number of personal characteristics which, by their nature, cannot be inferred from physical, physiological or behavioural data, such as sexual orientation or political ideology. The claim that machine learning systems can infer a person's sexual orientation or political ideology from physiological or behavioural data is extremely worrying. It is based on ideas of biological determinism and in direct contrast to the protection of fundamental rights. The very idea that

92 Daniel Leufer. (August 2021). *Access Now's submission to the European Commission's adoption consultation on the Artificial Intelligence Act.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2021/08/Submission-to-the-European-Commissions-Consultation-on-the-Artificial-Intelligence-Act.pdf

political preference can be inferred from physical or behavioural characteristics is a denial of the existence of freedom of thought and, ultimately, of human dignity.

With a view to avoiding serious infringements of fundamental rights, Access Now presents an alternative and wider definition: "*Biometric categorisation system:* AI system that uses data relating to the physical, physiological or behavioural characteristics of a natural person for the purpose of assigning natural persons to specific categories which can be reasonably inferred from such data."[93].

Moving on, Article 5 contains provisions aimed at prohibiting certain uses of AI on the grounds that they are considered unacceptable because they contravene EU values and contradict fundamental rights.

The following are some of the prohibitions provided for:

"a)...AI system that uses subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm.
b)...AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm...
c)…AI systems by public authorities or on their behalf for the evaluation or classification of the trustworthiness of natural persons... with the social score leading to... detrimental or unfavourable treatment of certain natural persons...
d) The use of 'real-time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, unless... such use is strictly necessary for [one] of the following objectives: the targeted search for specific potential victims of crime…, the prevention of a specific, substantial and imminent threat to the life or physical safety of natural person…".

93 Daniel Leufer. (August 2021). *Access Now's submission to the European Commission's adoption consultation on the Artificial Intelligence Act.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2021/08/Submission-to-the-European-Commissions-Consultation-on-the-Artificial-Intelligence-Act.pdf

The prohibitions in (a) and (b) are worrying. The bill should completely ban the use of artificial intelligence systems that "*use subliminal techniques beyond a person's consciousness*", regardless of whether they may cause physical or psychological harm. There is no way of going beyond a person's consciousness without this being a serious violation of his or her fundamental rights (including the right to freedom of thought, conscience and religion, and human dignity).

On the other hand, the additional condition that such distortion must be done in a way that causes or is likely to cause "physical or psychological harm" wrongly suggests that a person's behaviour could be distorted in a beneficial way, which is irrelevant in the face of the contradiction to the aforementioned fundamental rights. The same argument can be made against the current wording of section (c) on social scoring since the mere intention to rank the trustworthiness of individuals is contrary to fundamental rights.

On the other hand, section (d), which focuses on real-time biometric identification, is very limited in scope. It offers broad exceptions that render it almost ineffective in safeguarding fundamental rights from the serious threat posed by this application of AI. The exception enabling some police uses overlooks the fact that any use of such systems in publicly accessible spaces poses the same threat to fundamental rights from the "chilling effect" they create on freedom of expression, freedom of assembly and association.

In a letter recently sent[94] to representatives of the Council of the EU, Access Now, together with other civil society organisations, pointed out that insufficient and partial bans on some uses of AI, such as biometric identification for mass surveillance purposes, emotion recognition and predictive policing, legitimise, rather than limit, some of the most dystopian and human rights-violating surveillance practices. Moreover, the exceptions provided in the prohibitions could undermine the law, leaving an unjustifiably wide loophole whereby authorities could argue that AI in law enforcement, border management or national security should not be subject to restrictions imposed by law.

The use of AI in law enforcement in these areas puts fundamental rights at risk. Civil society[95],

94 Access Now. (28 November 2023). *Open letter: Council of the E.U. risks failing human rights in the AI Act.* Available at https://www.accessnow.org/press-release/eu-council-risks-failing-human-rights-in-ai-act/

95 EDRI. (20 September 2023). *EU lawmakers must regulate the harmful use of tech by law enforcement in the AI Act.* Available at https://edri.org/our-work/civil-society-statement-regulate-police-tech-ai-act/

the European Data Protection Board, the European Data Protection Supervisor[96] and the United Nations High Commissioner for Human Rights[97], have noted that the use of AI in these areas justifies a high level of regulation, supervision and protection.

Moreover, if citizens are aware that these surveillance systems are installed in public spaces and can be turned on in certain situations, it will not be possible to sustain a genuine expectation of anonymity. This creates an undeniably inhibiting effect on people's rights and their ability to protest and fully enjoy public space.

To address issues with the current wording of Article 5, Access Now presents the following proposal for improving the prohibitions contained within it:[98]

Article 5
The following artificial intelligence practices shall be prohibited;
"a)...AI system that deploys subliminal techniques beyond a person's consciousness including when such techniques may distort a person's behaviour.
b)...AI system that exploits, intentionally or not, any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, or on any other grounds on which discrimination is prohibited under Article 21 of the Charter of Fundamental Rights, or on the grounds of mental health, migration status or gender identity.
c)...AI systems for the calculation or establishment of a 'social score' resulting from the evaluation of classification of natural persons based on their physical attributes, social behaviour or known or predicted personal or personality characteristics.
d) any implementation or use of AI systems for an automated recognition of human features in publicly accessible spaces - such as of faces but also of gait, fingerprints, DNA, voice and other biometric physiological or behavioural signals- for any purposes.

96 European Data Protection Supervisor. (23 October 2023). *Opinion 44/2023 on the Proposal for Artificial Intelligence Act in the light of legislative developments.* Available at https://edps.europa.eu/data-protection/our-work/publications/opinions/2023-10-23-edps-opinion-442023-artificial-intelligence-act-light-legislative-developments_en

97 United Nations Human Rights, Office of the High Commissioner. (8 November 2023). *Türk's open letter to the European Union highlights issues with AI Act.* Available at https://www.ohchr.org/en/open-letters/2023/11/turk-open-letter-european-union-highlights-issues-ai-act

98 Daniel Leufer. (August 2021). *Access Now's submission to the European Commission's adoption consultation on the Artificial Intelligence Act.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2021/08/Submission-to-the-European-Commissions-Consultation-on-the-Artificial-Intelligence-Act.pdf

Note that in this proposal, subparagraphs 5(c)(i) and 5(c)(ii) are deleted in their entirety.

Continuing with the analysis of the articles, one of the defining characteristics of the EU draft is its risk-based approach, which is not immune to criticism[99]. As mentioned elsewhere in this report, the appropriate approach to regulating the use of these technologies must be one based on or focused on fundamental rights. When public policies are designed on the basis of risk-based approaches, human rights guarantees are negotiated on the premise that they must be balanced with other values such as innovation. It is possible indeed and necessary to foster a culture of innovation that has at its core not only the fundamental rights of individuals, but also a quest for a more harmonious and sustainable life in society. Further arguments in favour of fundamental rights-based regulation can be found in the section of this report entitled "Considerations for human rights-centred regulation".

In addition, Article 6 describes which systems will be considered high risk and then sets out the requirements to be observed for their deployment, such as:

I. Ongoing impact assessments to eliminate or reduce such risks (further elaborated in the section "Considerations for human rights-centred regulation".
II. The adoption of appropriate mitigation and control measures.
III. The use of quality data for training systems.
IV. The registration of systems (an issue that merits specific consideration, which is provided below).
V. The need for human oversight or supervision of high-risk systems, and for these to be designed with acceptable levels of foresight and safety.

An innovative aspect of the draft that deserves to be analysed is that foreseen in Articles 53 and 54, as it introduces controlled testing environments. These are covered by the "Innovation Support Measures". Controlled test spaces, also known as regulatory sandboxes, are contexts where innovative AI systems that use or make use of personal data can be developed, tested and validated, while the risks inherent in making them available and their mitigation measures are analysed. The aim is to support innovation processes while upholding the duties of supervision and personal data protection.

99 Daniel Leufer and Fanny Hidvegi (17 February 2021). *The EU should regulate AI on the basis of rights, not risks.* Access Now. Available at https://www.accessnow.org/eu-regulation-ai-risk-based-approach/

For these sandboxes to work, it is necessary to have constant supervision and intervention by national data protection authorities. They shall be responsible for making available to the pilot process personal data sets that have been lawfully collected for other purposes, to then be used by the controller of the AI system subject to development or validation.

For the operation of these sandboxes, Article 53 establishes a series of requirements, particularly the following[100]:

i. "*...that to the extent that the innovative AI systems involve the processing of personal data or otherwise fall under the supervisory remit of other national authorities or competent authorities providing or supporting access to data, the national data protection authorities and those other national authorities are associated to the operation of the AI regulatory sandbox*";
ii. "*...they shall not affect the supervisory and corrective powers of the competent authorities…*";
iii. "*participants in the AI regulatory sandbox shall remain liable under applicable Union and Member State liability legislation for any harm inflicted on third parties as a result from the experimentation taking place in the sandbox*".

Access Now supports the creation of regulatory sandboxes as long as they do not become free zones for experimentation outside the bounds of existing laws and ethical standards. For this reason, we believe that these Articles merit some observations. Specifically, Article 54 enables the "*further processing of personal data for developing certain AI systems in the public interest in the AI regulatory sandbox*". Under this provision, it will be possible to use an "innovative" AI system to process personal data collected for other purposes to "*safeguard substantial public interest*" for three purposes.

These are:

I. *The prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, under the control and responsibility of the competent authorities. The processing shall be based on Member State or Union law;*
II. *Public safety and public health, including disease prevention, control and treatment*;
III. *A high level of protection and improvement of the quality of the environment;*

100 Daniel Leufer. (August 2021). *Access Now's submission to the European Commission's adoption consultation on the Artificial Intelligence Act.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2021/08/Submission-to-the-European-Commissions-Consultation-on-the-Artificial-Intelligence-Act.pdf

We are particularly concerned about paragraph (i). Perhaps the most risky and problematic uses of AI are those aimed at the prevention, investigation, detection or prosecution of crime. Such uses should be subject to the utmost caution. Access Now recommends that the use cases in paragraph (i) be removed from Article 54, as well as the term "innovative", as AI systems, regardless of what they are deemed to be, must be under the control of the authorities.

The use of regulatory sandboxes should be subject to the highest level of public scrutiny and transparency. The public should be able to know exactly what types of systems are being developed in them; AI regulatory test environments should provide information on all applications filed to use the test environment, whether they are accepted or rejected, and information on the project under development.

Finally, Article 60 addresses the question of registration. Entitled "EU database for stand-alone high-risk AI systems", this Article indicates that the Commission, in collaboration with the Member States, will set up and maintain a database containing information concerning high-risk AI systems. This database shall contain information accessible to the public concerning stand-alone high-risk AI systems placed on the market or put into service in the EU. Such a database will be invaluable for all stakeholders in the AI ecosystem, as it will provide a clear and accessible overview of all high-risk systems marketed in the EU. However, to achieve these objectives, this transparency measure must also extend to information on the use made of these systems. The context of use of an AI system has a major impact on its potential impact on fundamental rights. This could be particularly relevant in regions such as Latin America, especially for those AI tools that are in the hands of the state.

B. United States

The United States does not have comprehensive Federal Government legislation dedicated exclusively to the regulation of AI. Existing AI regulation comes from federal agencies and state and local legislation, guided by non-binding roadmaps submitted by the executive branch. While Congress has passed some legislation on AI, it is mainly focused on research and development.

In this report, we divide the analysis of the US context into two parts: we list the most relevant public policies put forward by federal agencies and the federal executive branch, and we list the draft legislation that we deem relevant to the report.

As for the former, the most relevant are the following:

i. Plan for an AI Bill of Rights: Making automated systems work for the American people: In October 2022, the White House published its *Blueprint for an AI Bill of Rights*[101]. The blueprint outlines five core principles and practices to regulate the design, use and implementation of automated systems.

These principles include safe and effective systems; algorithmic discrimination protections; data privacy; notice and explanation; and human alternatives, consideration and fallback. At the same time, it recommends a proactive assessment of fairness in the design and implementation of AI systems throughout the life cycle of each AI system.

ii. National Artificial Intelligence Research and Development Plan: This plan identifies priority areas for federally funded research to *"prioritise investment in AI in areas of strong societal importance"*[102]. This plan was updated in 2019 and 2023.

The latest version sets out nine thematic strategies, including investment in understanding and addressing the ethical, legal and social implications of AI, and ensuring the security of AI systems[103].

iii. National Institute of Standards and Technology (NIST) Artificial Intelligence Risk Management Framework: NIST published an Artificial Intelligence Risk Management Framework in January 2023[104]. Among other things, the framework identifies three main categories of AI bias that need to be managed: systemic, computational and statistical, and human-cognitive. It also recognises that *"each of these can occur in the absence of prejudice, partiality, or discriminatory intent*", because *"systemic bias can be present in AI datasets, the organizational norms, practices, and processes across the AI lifecycle, and the broader society that uses AI systems*". The framework

101 The White House. (2022) *Blueprint for an AI Bill of Rights. Making automated systems work for the American People*. Available at https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

102 National Science and Technology Council. (October 2016). *The National Artificial Intelligence Research and Development Strategy.* Available at https://www.nitrd.gov/pubs/national_ai_rd_strategic_plan.pdf

103 Select Committee on Artificial Intelligence of the National Science and Technology Council. (May 2023). *The National Artificial Intelligence Research and Development Strategic Plan.* Available at https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf

104 National Institute of Standards and Technology. U.S. Department of Commerce. (January 2023). *Artificial Intelligence Risk Management Framework.* Available at https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf

establishes that *"privacy values such as anonymity, confidentiality, and control generally should guide choices for AI system design, development, and deployment".*

iv. Consumer Financial Protection Bureau[105]**:** The guide describes how lenders must present specific and accurate reasons when taking adverse decisions against consumers[106]. The bureau said that explaining the reasons helps to improve consumers' chances for future credit and protect them from discrimination.

v. Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence[107]**:** Published in October 2023, it is probably the most relevant public policy in the US context. It is based on the *Blueprint for an AI Bill of Rights* (presented in point "i" of this chapter) and reflects the current administration's approach to the challenges of AI technologies. The executive order has 13 sections, available in English only. Due to its length, and because this is a Latin America-focused report, the sections that are relevant for comparative analysis are listed below:

Section 1: Purpose: Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security.

Section 2: Principles: this policy seeks to promote and govern the development and use of AI in accordance with eight guiding principles and priorities. The most relevant are the following:

105 Consumer Financial Protection Bureau. (19 September 2023). *Consumer Financial Protection Circular 2023-03. Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B*. Available at: https://files.consumerfinance.gov/f/documents/cfpb_adverse_action_notice_circular_2023-09.pdf

106 Consumer Financial Protection Bureau. (19 September 2023). CFPB Issues Guidance on Credit Denials by Lenders Using Artificial Intelligence. Consumers must receive accurate and specific reasons for credit denials. Available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-on-credit-denials-by-lenders-using-artificial-intelligence/

107 The White House. (30 October 2023). *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.* Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

(a) Artificial Intelligence must be safe and secure. This requires robust, reliable, repeatable, and standardised evaluations of AI systems, as well as policies and other mechanisms to test, understand, and mitigate risks from these systems before they are put to use. Testing and evaluations, including post-deployment performance monitoring, will help ensure that AI systems function as intended, are resilient against misuse, are ethically developed and operated in a secure manner, and are compliant with applicable Federal laws and policies. Finally, this Administration will help develop effective labelling and content provenance mechanisms, so that Americans are able to determine when content is generated using AI. Access Now considers that the latter objective is problematic, as stated in the chapter on the draft law presented in Uruguay. In addition, on mandatory labelling and the challenges it presents for fundamental rights, we recommend consulting Access Now's publication entitled "Identifying Generative AI Content: When and How Watermarking can Help Uphold Human Rights"[108].
(b) Artificial Intelligence policies must be consistent with advancing equity and civil rights.
(c) The interests of Americans who increasingly use or interact with AI tools must be protected. The Federal Government will enforce existing consumer protection laws and principles and enact appropriate safeguards against fraud, unintended bias, discrimination, infringements on privacy, and other harms from AI.
(d) Americans' privacy and civil liberties must be protected as AI continues advancing. AI is making it easier to extract, re-identify, link, infer, and act on sensitive information about people's identities, locations, habits, and desires. The Federal Government will ensure that the collection, use, and retention of data is lawful, is secure, and mitigates privacy and confidentiality risks.

Section 3. Definitions: The term "artificial intelligence" or "AI" has the meaning set forth in 15 U.S.C. 9401(3)[109]: A machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action. Furthermore, the term "generative AI" means the class of AI models that emulate the structure and characteristics of

108 Gustaf Björksten. (September 2023). *Identifying generative Ai content: when and how watermarking can help uphold Human Rights: A discussion paper.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2023/09/Identifying-generative-AI-content-when-and-how-watermarking-can-help-uphold-human-rights.pdf

109 US Code. 15 USC 9401. Available at https://uscode.house.gov/view.xhtml?req=(title:15%20section:9401%20edition:prelim)

input data in order to generate derived synthetic content (namely an output created from one or several existing outputs). This may include images, videos, audios, texts and other digital content.

Section 4. Guaranteeing the security of AI technologies: Establishing guidelines and best practices, with the aim of promoting consensus industry standards, for developing and deploying safe, secure, and trustworthy AI systems. In turn, it seeks to reduce the risks posed by content produced by generative AI tools by fostering capabilities for identifying and labelling content to establish the authenticity and provenance of digital content produced by the Federal Government or in its name.

Section 6. Supporting workers: To evaluate necessary steps for the Federal Government to address AI-related workforce disruptions.

Section 7. Advancing equity and civil rights: Strengthening civil rights in the criminal justice system. We note the objectives of addressing unlawful discrimination and other harms that may be exacerbated by AI and promoting the equitable treatment of individuals and adhering to the fundamental obligation of ensuring fair and impartial justice for all. To this end, the attorney general shall submit to the president a report that addresses the use of AI in the criminal justice system, including any use in sentencing, crime prevention and crime forecasting and predictive policing.

Section 8. Protecting Consumers, Patients, Passengers and Students: Independent regulatory agencies are encouraged to protect American consumers from fraud, discrimination, and threats to privacy, and to address other risks that may arise from the use of AI.

Section 9. Protecting Privacy: To mitigate privacy risks potentially exacerbated by AI, including by AI's facilitation of the collection or use of information about individuals, or the making of inferences about them.

In terms of draft legislation, almost 40 initiatives have been introduced in Congress that focus on or contain provisions related to AI[110]. These draft laws address a variety of issues, including oversight of AI by the Federal Government; the creation of working groups and commissions on the use of AI; data protection in the context of AI; training of federal personnel; disclosure of AI use; and regulation of AI in particular sectors. The following is a proposal worth mentioning:

110 Brennan Center for Justice. (7 August 2023). *Artificial Intelligence Legislation Tracker*. Available at https://www.brennancenter.org/our-work/research-reports/artificial-intelligence-legislation-tracker.

i. Bipartisan Framework for US AI Act. It focuses on several objectives, including the following:

I. Establishing a licensing regime administered by an independent oversight body: Companies developing sophisticated general-purpose AI models or models used in high-risk situations (e.g. facial recognition) should be required to register with an independent oversight body.
II. Ensuring Legal Accountability for Harms: Companies can be held liable when their models and systems breach privacy or violate civil rights[111].
III. Promoting transparency: Developers should be required to disclose essential information about the training data, limitations, accuracy, and safety of AI models to users.
IV. Protecting Consumers and Kids: Consumers should have control over how their personal data is used in AI systems. Companies deploying AI in high-risk situations should be required to implement safety brakes.

DRAFT LEGISLATION IN LATIN AMERICA

The regulatory framework for AI in the region is in its infancy. None of the countries analysed has a specific law in place to regulate the use and development of this technology,[112] although all have introduced regulatory proposals in their respective parliaments or legislative bodies. Most Latin American countries propose regulations inspired by or with important similarities to the proposed EU Artificial Intelligence Act (AI Act). Some countries, such as Argentina or Brazil, have initiatives that propose regulations for AI in relation to certain subjects or contexts, in addition to ones that provide a general regulation of the discipline. Others, such as Chile, Costa Rica, and Colombia, have all proposed the creation of specialised authorities to oversee and supervise the implementation and development of these technologies. In this section, we provide an analysis of the main draft laws that have been presented in the eight countries selected in this report.

111 Section 230 of the Communications Decency Act generally provides immunity for online computer services with respect to third-party content generated by its users.

112 In Peru, although there is a recently approved AI law, it is a typical framework law, i.e. a general legislation with general principles and public policy objectives to be achieved.

A. Argentina

Throughout 2023, different legislative initiatives were presented to the National Congress seeking to regulate AI technologies. These draft laws have been referred to their respective committees in the National Congress. However, for the time being, they are not on the agenda for discussion.

i. Draft law 2505-D-2023: "Legal framework for the regulation of the development and use of Artificial Intelligence" which seeks to regulate *"an ethical development and use of AI that will benefit society as a whole"*[113]. Draft law 2505-D-2023 aims to establish the legal framework for the research, development, use and regulation of AI in the national territory with a view to protecting human rights, privacy and the security of citizens, and promoting transparency and accountability in its application. It also seeks to foster innovation and progress in the field of AI, promoting human benefit and international cooperation, while avoiding the risks and adverse consequences of its deployment.

Its articles focus on the protection of fundamental principles, such as respect for human dignity, privacy, transparency, accountability and fairness, prohibiting the use of AI for illegal, discriminatory, malicious or human rights infringement purposes.

The initiative seeks to ensure civil liability for damage caused and accountability obligations, and provide transparency and explicability, as well as security and robustness. It provides for the liability of system developers and providers for errors that cause harm, obliging them to have sufficient liability insurance. Responsibility also extends to the users for the use they make of it.

As regards privacy and the protection of personal data, the proposal introduces few safeguards, referring to the existing law, which, incidentally, already lags behind modern standards of protection. It specifically seeks to prohibit the unauthorised use of personal data collected by AI systems and reiterates the obligation to obtain the informed consent of personal data subjects. On transparency and explicability, minimal provisions are announced in Article 7. It states only that it is necessary for users to understand how the system works and makes decisions, and that they have the right to access explanations of decisions reached by these systems that affect them.

113 Chamber of Deputies of the Argentine Republic. *Legal Framework for the Regulation of the Development and Use of Artificial Intelligence.* Available at https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2023/PDF2023/TP2023/2505-D-2023.pdf

Another aspect is the creation of an "Artificial Intelligence Supervisory Authority", a body that is proposed to be independent and composed of experts in AI, law and other relevant fields. This authority would be in charge of administering a register where AI systems and their characteristics should be recorded. It would also have the power to impose administrative sanctions, ranging from financial penalties to the withdrawal of the system (without indicating amounts or infringements) and to request information from those responsible when deemed necessary. It also highlights the need to develop international cooperation mechanisms and to encourage the development of common standards and regulations in the field of AI and collaboration between governments, international organisations, industry, and civil society.

Probably among the most notable Articles of this draft law is the tenth, which introduces a risk-based classification that establishes different requirements to be implemented by responsible parties. This classification contains some elements like those proposed by the EU draft law. Therefore, the same comments on the risk-based approach as those made there apply to this chapter. Access No considers that this classification entails relativism around the protection of fundamental rights, as it offers the possibility of introducing mitigation measures according to the risk posed by each type of system. This classification is transcribed below:

I. **Unacceptable risks:** Those risks that are deemed to be unacceptable because of their seriousness or because of their impact on fundamental rights or the safety of individuals. The presence of an unacceptable risk in the artificial intelligence system will require the adoption of appropriate mitigation measures or the banning of the system.
II. **High risks:** Those risks that have a significant impact on fundamental rights or the safety of individuals. The presence of a high risk in the artificial intelligence system will require the adoption of appropriate mitigation measures.
III. **Limited risks:** Those risks that have a minor impact on fundamental rights or the safety of individuals, but still require mitigation measures. iv.
IV. **Negligible risks:** Those risks that have a minimal impact on fundamental rights or the safety of individuals.

Although the draft law establishes the need to carry out studies on the impact that potential systems would have on the enshrined rights, it has major inconsistencies, which are briefly analysed in this report. It literally states that *"the application of this law must not affect the fundamental rights and freedoms of individuals, including but not limited to privacy, equality and non-discrimination"*, but then goes on to state that *"in the event of conflicts between fundamental rights and the provisions of this law, appropriate balancing and proportionality must*

be undertaken, ensuring that rights are protected to the greatest extent possible". The draft law, however well-intentioned it may be, fails to establish prohibitions on certain uses, as it states that even in cases that are classified as unacceptable risks, appropriate mitigation measures may be developed to mitigate the risk. The mere fact of trying to identify a possible balance or adequate proportionality between the protection of human rights and other interests seriously compromises their respect, since accepting the lowering of the standard of guarantee that should exist for human rights would imply a weakening of the international legal framework and of the commitments assumed by Argentina.

ii. Draft law No. 1472-D-202: The proposed amendment to the Law on Science, Technology and Innovation No. 25.467 aims to promote the incorporation of AI systems and, to this end, proposes to promote their development, creation and application based on ethical principles and values[114]. The draft law proposes the following values and principles:

- **Diversity and inclusion**: The advancement of AI should ensure the participation of all persons or groups, regardless of race, colour, descent, gender, age, language, religion, political opinion, ethnic or social origin, economic status or any other form or condition that would disrupt respect for diversity and social inclusion.
- **Peace and justice**: Progress in AI should ensure peace and justice among nations and should not undermine human freedom or reduce human autonomy of choice. Nor should it jeopardise individual or collective security, divide or confront individuals and groups, or threaten coexistence between humans, other living beings and the environment. The draft law sets out principles and values regarding respect for diversity and the promotion of non-discrimination, as well as respect for human freedom and autonomy, but does not go into any great depth.

It is not clear how the systems would be assessed for their potential to affect peace and social justice, nor what mechanisms would be put in place to ensure the participation of all people in order to promote respect for diversity and social inclusion. The draft law gives the Scientific and Technological Cabinet (GACTEC, in Spanish) the power to *"halt the progress of AI research, development or application when it considers that principles and values are violated (...)"*. It will also be responsible for receiving complaints about threats or harm caused by these technologies.

114 Chamber of Deputies of the Argentine Republic. *Amendment to National Law 25.467.* Available at https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2023/PDF2023/TP2023/1472-D-2023.pdf

Other responsibilities of the GACTEC involve the creation of a registry for systems at any stage of the lifecycle (design, development, implementation). Due to the very general nature of the rule, it is not clear what types of systems need to be registered. It is also unclear, given the breadth of the concept, what is meant by "ethical operation", and Access Now therefore recommends focusing the control and supervision of implementation on the protection of fundamental rights.

Draft law No. 3161-D-2023: Through the creation of the "Federal Council of Artificial Intelligence", it proposes *"a hierarchical and democratic structure"* to guarantee, promote and strengthen Argentina's potential in the field of AI[115]. The main task of this body would be to encourage *"research, study, awareness, sensitisation and dissemination of information related to AI"* and to act as an interjurisdictional advisory body on these issues. Its main functions include the following:

I. Develop models and guidelines to promote best practices related to AI, with the main objective being transparency and free access to knowledge in all matters related to this topic.
II. Promote the dissemination of ethics in the field of AI, respecting human rights and its use for the common good.
III. Establish an office for permanent updating and advice to which any government agency can turn to resolve any question related to AI.
IV. Generate dissemination and awareness campaigns on the potential for and risks of inappropriate use of AI.
V. The striking issue in this initiative lies in the fact that the Federal Council of AI would be a consultative body, composed exclusively of public officials representing the provinces and the Autonomous City of Buenos Aires. This is in contradiction with the soft law recommendations that have become more relevant in the field of AI, which indicate the need for cross-sectoral collaboration that includes the private sector, academia, and civil society. At the same time, the draft law establishes the need to create an Ethics Committee with the same advisory purposes, although it is not clear what its purpose would be beyond issuing non-binding opinions in response to queries from individuals or government agencies.
VI. Draft law No. 1472-D-2023: "Regulation and Use of Artificial Intelligence in Education". It seeks to *"ensure that AI is a beneficial and safe tool in the educational setting"*.[116]

115 Chamber of Deputies of the Argentine Republic. *Draft Law.* Available at https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2023/PDF2023/TP2023/3161-D-2023.pdf

116 *Regulation and Use of Artificial Intelligence in Education.* Chamber of Deputies of the Argentine Republic. Available at https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2023/PDF2023/TP2023/2504-D-2023.pdf

It aims to establish regulations and guidelines for the development and use of AI in the educational field, which would be applicable to all educational institutions and organisations related to education, from elementary level to the higher level of public education, whether state or privately managed.

It establishes as its guiding principles the transparency and accountability both of responsible parties and the enforcement authority in relation to the rights and privacy of students with the aim of improving the quality of teaching and learning, and thus promoting equity and inclusion.

This draft law focuses on the protection of personal data and privacy in that it requires the informed consent of students or their legal guardians before collecting and using their personal data. Storage must be secure, and students must have the right to access, correct, or delete their personal data, as well as to request the discontinuation of the use of AI in their education. These rights are already enshrined in Argentina both by the law in force[117], and by international instruments ratified by the country, so it is not clear what the contribution of this initiative is from this perspective.

Finally, the Ministry of Education (the proposed application authority) is entrusted with drafting the relevant regulations for the use of AI in educational institutions under certain criteria, such as the identification, evaluation and monitoring, supervision and regulation of the applications used.

B. Brazil

The largest country in the region in territorial and economic terms is also the one that has submitted the most bills to Congress to regulate the development and use of AI systems. The main initiatives are being discussed jointly in the Brazilian Senate and the Temporary Committee on Artificial Intelligence (CTIA, in Portuguese), created especially for this purpose and composed solely of senators. Its initiatives include the following:

i. Draft law No. 5,691 of 2019[118]: It aims to establish a National AI Policy and promote a favourable

117 *Personal Data Protection.* InfoLEG. https://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/64790/texact.htm

118 *Draft Law 5691*. Federal Senate Available at https://www25.senado.leg.br/web/atividade/materias/-/materia/139586

environment for the development of these technologies in Brazil. It establishes principles and guidelines.

Its principles (Article 2) seek to ensure that development is carried out under criteria of inclusion and sustainability; respect for ethics, human rights and democratic values; protection of privacy and data protection; transparency; and reliability.

Its guidelines (Article 3) indicate that uses of AI systems should meet ethical standards, although they do not indicate what these standards entail or how they will be defined. They then establish that uses and developments should improve the services offered by the State to the population, and that public-private investment in research and development should be encouraged through tax incentives and national science and technology institutions. This Article allows us to identify the central objective of the draft law, which is to make Brazil a competitive country in the international context by integrating the capabilities of the public sector and the innovative power of the private sector.

Article 4 introduces a list that seems merely to add principles to the draft law, without specifying more robust or strict regulations for the stakeholders involved in the lifecycle of AI tools. Some of these are that AI tools respect the autonomy of individuals, preserve privacy, promote links of solidarity between different generations, are justifiable and accessible, are open to democratic scrutiny, and are compatible with the maintenance of national and cultural diversity. It also indicates that they must contain safety and security tools that allow human intervention, when necessary, provide traceability mechanisms on the results achieved and follow governance and risk mitigation standards.

In general, this initiative repeats without further elaboration the elements deemed necessary for a regulation based on ethical principles. As we have already mentioned in this report, this approach does not suffice to establish a regulation that guarantees fundamental rights.

ii. Draft law No. 5,051 of 2019[119]: Like the previous draft law, principles are established herein for the use of AI in Brazil based on the premise that AI must be at the service of the welfare of human beings.

119 National Congress. *Draft law 5051*. Available at https://www.congressonacional.leg.br/materias/materias-bi-camerais/-/ver/pl-5051-2019.

The Articles begin by establishing the duty to respect human dignity and rights, privacy, democracy, and equality before the law. They indicate that AI-based decision-making applications should always be subject to audit, although do not indicate who will be responsible for carrying out the audit, nor under what criteria. Article 4 states that AI tools that are ancillary to human decision making must be compatible with human supervision according to the type, severity and implications of the decision, so that, consequently, civil liability for harm resulting from the use of the system will be borne by the supervisor.

This draft law, unlike the previous one, introduces a series of considerations in Article 5 regarding the impact of AI on the labour market and labour. On the one hand, it states that the development of AI applications should be aimed at promoting education for the mental, emotional and economic development of the country. It is not clear how this development will be monitored nor what indicators are to be used for its evaluation. Finally, the brief draft law ends by indicating that those tools that are found to correspond to the public power will be used to improve the quality of public services offered to citizens.

In general terms, this draft law, like the previous one, is brief, and its articles are essentially a summary of ethical or desirable aspects rather than a specific regulation on the control or requirements that could be created around AI.

iii. Draft law No. 21 of 2020[120]: the first thing the text of this bill does is to provide a broad definition of artificial intelligence, referring to it as *"computational systems that, based on instructions given by natural persons, can carry out a list of actions, from predictions to recommendations or interpretations of a given context."* At the same time, it states that AI systems will be deemed to be those that have the capacity to learn to perceive and interpret the "external context" (without providing a clarification of what this concept entails), so that all those that lack this capacity are excluded from this initiative.

Article 3 defines the objective of the technical and scientific development of these applications in the country, which consists of sustainable economic development, the welfare of the population and an increase in competitiveness and research.

120 Federal Senate *Draft law 21/2020.* Available at https://www25.senado.leg.br/web/atividade/materias/-/materia/151547

The following principles govern the development and implementation of AI in Brazil, mainly the development of innovation and free competition, respect for human rights, freedom of expression and diversity, and non-discrimination. Paragraph VII of Article 4 establishes as a principle the encouragement of self-regulation based on codes of conduct and good practices that should be aligned with the provisions of Article 5 (principles for the development of AI-based applications). These codes of conduct will serve as elements of compliance with the potential law in the event that this bill is finally approved. In this case, Access Now takes into consideration the risk to fundamental rights posed by delegating regulation to the very stakeholders involved in the design, development and deployment of these technologies. In the first place, self-regulation must, in any case, be in accordance with the law and, specifically, with the international human rights framework. It should, in any case, increase the level of requirements and controls set out in the section of this report entitled "Considerations for human rights-centred regulation". Leaving the regulatory process in the hands of the AI ecosystem stakeholders is tantamount to delegating the trust needed to protect and grant guarantees of fundamental rights to those who should be the subject of such regulation.

The principles go on to list safety and access to information, and, briefly in an abstract manner, national defence (which is always perceived to be a challenging element for the control of State actions vis-à-vis fundamental guarantees). The Article does mention the need for the development of the discipline to be harmonious with the General Data Protection Law[121], the Brazilian national framework that functions as a reference point at a regional level.

Article 5 establishes the principles for the development of AI technologies, stipulated in a series of paragraphs that incorporate the centrality of respect for fundamental rights. It focuses on the principle of non-discrimination, with the eventual mitigation of discriminatory results, and the search for neutrality, which places the burden on the relevant stakeholders to identify and mitigate risks of results contrary to the law (without establishing the obligation to carry out impact studies on fundamental rights). Similarly, it indicates the scope of the transparency requirement to inform people clearly and precisely about the use of AI tools except for the following three exceptions: (i) uses of chatbots, (ii) when it concerns the identity of a natural or a legal person (it is not clear when such exceptions would be applied), and (iii) when the information concerns matters protected by commercial secrecy or general criteria that guide the

121 General Secretariat. Deputy Head of Legal Affairs. Law 13709 Presidency of the Republic. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm

operation of the system. These three exceptions are expressed in too general terms, and Access Now therefore recommends that their wording be improved or eliminated. Let us remember that no economic right (trade secret) can be above fundamental rights.

Another principle worthy of mention is that of designing systems that include safety elements, which would be achieved if reasonable and suitable means are used for this purpose, provided they are economically feasible. This is highly questionable, since economic considerations cannot render this principle meaningless on the assumption that it is unattainable for the responsible party. Under this criterion, it would be possible to avoid the deployment of the necessary prevention and safety measures, which would have a serious impact on fundamental rights.

The last two principles of Article 5 are (i) responsible innovation, which means keeping proper documentation on the operation of the system and liability for any results, and (ii) the principle of data availability, which introduces an exception to the legal regime of copyright to enable data and text mining for system training purposes, as long as it does not affect normal use of the work.

Article 6 introduces a series of specifications for the use of AI systems in the hands of the public sector that will be subject to increased requirements. In general terms, it is expected that these technologies will be managed in light of the risks posed by the deployed systems (again, with no obligation to carry out impact assessments on fundamental rights) in contrast to the supposed benefits of this deployment. The Article states there should be social and interdisciplinary participation and plans to impose principles of personal liability on those responsible for the deployed system.

iv. Draft law No. 872 of 2021[122]:The proposal is similar to previous draft laws, and even repetitive. It determines that AI systems should respect human rights, ethics, democratic values, diversity, privacy, personal data, as well as be transparent, reliable, and secure, and that they should ensure human intervention when necessary.

To that end, AI solutions must respect the autonomy of individuals; be compatible with maintaining social and cultural diversity, and not restrict personal lifestyle choices; preserve

122 National Congress. *Draft law 872/2021.* Available at https://www.congressonacional.leg.br/materias/materias-bicamerais/-/ver/pl-872-2021

the bonds of solidarity between peoples and different generations; be open to democratic scrutiny and allow for debate and control by the population; contain safety and security tools that allow for human intervention; provide traceable decisions without discriminatory or prejudicial bias; and follow governance standards that ensure continuous management and mitigation of potential technological risks.

v. Draft law No. 2,338 of 2023[123]: This draft law, the result of the work done by the Commission of Jurists on AI and created by the Brazilian Senate, is the most comprehensive proposal. It establishes general rules for the development, deployment, and responsible use of AI systems.

At the beginning of the Articles, principles similar to those analysed in previous bills are presented: effective human supervision; reliability and robustness of the systems; information security; the right to oppose AI system decisions; prevention, precaution, and mitigation of systemic risks, among others.

This first section incorporates Article 4 with definitions relevant to the interpretation of the standard. These include concepts such as artificial intelligence, provider, operator, competent authority, discrimination, and data and text mining.

Article 5 presents a list of rights for the benefit of affected persons. In short, they include the right to have access to adequate information, the right to access clear information on the mechanisms by which a system achieves results, and the consequent right to oppose these results (described in Articles 7 and 11). It also provides for the right to demand human participation in decision-making based on these tools and the rights not to be subjected to discrimination (developed in Article 12) and to privacy.

An interesting aspect of this draft, from a comparative perspective, is that, like the European Union's draft AI law, it defines a regulatory approach based on risk classification of AI systems and the creation of a public registry. Article 14 defines those uses classified as excessive risk, which would be prohibited. The cases introduced are the same as those analysed in the section on the EU initiative; please refer to that section. In any case, it is important to point out once again that risk-focused regulatory developments are not sufficient to guarantee the observance of fundamental rights. The search for a balance between risks and fundamental guarantees is

123 Federal Senate. *Draft law 2338/2023.* Available at https://www25.senado.leg.br/web/atividade/materias/-/materia/157233

not an adequate mechanism, and the legislative technique by which exceptions are introduced (e.g. for the deployment of surveillance techniques based on biometric data) is often too abstract and ends up offering meaningless prohibitions.

Article 17 classifies the uses deemed to be of high risk. In the list of uses, it is important to note the inclusion of those referring to the evaluation of people for the granting of public assistance or services, systems that assist the justice service, biometric identification systems and systems for criminal investigation, and those deployed for the management of migratory flow. It is also important to note that there are significant problems and challenges in the use of automated tools for the above-mentioned purposes. For example, as already mentioned, it is important for the administration of justice to always be mediated by human beings to guarantee the principles of due process and innocence. Similarly, biometric identification should only be deployed in contexts of private or restrictive access, and provided that adequate safeguards are in place. Finally, the management of migratory flows based on these tools has a serious risk of adversely affecting migratory outcomes for migrants, especially those who migrate irregularly.

Governance measures are established from Article 19 to *"ensure the security of these systems"*. These include the active duty to provide transparency, both in relation to the user and in the processing of the data used, and of the risk mitigation mechanisms adopted. It also establishes the obligation to generate adequate documentation and to carry out reliability assessments on these systems. These requirements are explained in greater detail in the specific proposal document, which we recommend reading, as it incorporates specifications and tasks for the protection and safety of users.

Section III introduces the previous systems impact studies (in this project, described as *"algorithmic systems impact assessment"*). Algorithmic impact assessment will be carried out on a regular basis throughout the life cycle of the tool and will be performed by professionals with technical, scientific and legal expertise with functional independence. In turn, the competent authority may regulate the cases in which this assessment is left to a team of professionals external to the supplier. Article 24 offers a detailed methodology for carrying out these assessments, which we recommend reading because it is a somewhat unusual addition to the comparative analysis of draft laws presented in the region and internationally.

Section IV refers to civil liability. Here, the person responsible for a system that causes property, moral, individual or collective damage is obliged to repair it, regardless of the system's degree

of autonomy. In the case of a high-risk or excessive-risk system, the responsible party is liable under strict liability principles. If it is not the case of a high-risk system, the culpability of the responsible party shall be presumed, and the burden of proof shall be reversed in favour of the victim.

The bill ends by defining the functions of the competent authority in the application of the law. It highlights the role of promoting and preparing studies on good practices in the development and use of the systems, and encouraging their adoption, including the development of codes of conduct. In turn, the authority must monitor and apply sanctions if there are developments or uses that do not comply with the legislation. The penalties for non-compliance with the regulations range from the imposition of financial fines, calculated based on a percentage of the responsible party's revenues, to the total or partial suspension of the system. The authority will take a variety of factors into account before determining the relevant penalty, and these are set forth in the draft. They include the existence of codes of good conduct, the conduct of algorithmic impact assessments and the benefit obtained from the infringement. In relation to tools in the hands of the public sector, the authority may request from them any information it deems relevant to such uses.

Finally, the draft law is also like that of the European Union in that it establishes the possibility of developing controlled regulatory spaces for experimentation (sandboxes). Although, in the section dedicated to the EU, the potential benefits that these might offer for the development of innovative solutions have already been addressed, it is extremely important that these do not become spaces where dangerous experiments are carried out, or without an adequate level of supervision. The draft law establishes that the competent authority will be responsible for establishing the procedures for the request and authorisation of these controlled environments, as well as for issuing recommendations, considering the preservation of fundamental rights and the protection of the personal data being processed. In any case, it is established that the participants in the test environment of the experiment will remain responsible for any harm to third parties as a result of the experimentation.

It can be stated that Draft law No. 2,338, which is the result of more in-depth discussions, is the most important and will probably be taken as the starting point for future discussions in this regard in Brazil.

C. Chile

There is a growing interest in regulating the field of AI in Chile. While some draft laws are being developed in Congress, others have been proposed by specific regulatory entities and respond to the needs and particularities of certain markets or economic sectors.

Currently, a total of 5 draft laws related to AI are being processed in the National Congress[124]. Most of the proposals refer to criminal matters and aggravate or penalise the misuse of these tools. Of these legislative initiatives, the draft law that seeks to regulate AI in a more general manner is the one that regulates *"Artificial intelligence systems, robotics and related technologies, in their different fields of application"*, identified in Bulletin 15869-19[125], which will be the main object of our analysis. We will not comment here on those draft laws that seek to promote amendments to the criminal code, as these warrant a different and independent approach.

The initiative in question seeks to regulate various activities relating to AI, establishing a legal framework for the development, commercialisation, distribution, and use of these systems in Chile, with a view to protecting the fundamental rights of citizens. It identifies the stakeholders involved in the AI cycle, from developers and vendors to users, and defines concepts essential to its interpretation, including biometric data and input data, and what is meant by a major incident. This concept refers to cases of death or serious harm to health, property or the environment, and disruption of critical infrastructure. This seems somewhat limited, since, by way of example, a serious incident could be caused by discriminatory results that affect the dignity of one or more persons.

124 Chamber of Deputies. *Bulletin 16112-07 amending the Penal Code regarding the crime of identity theft in the context of the use of artificial intelligence.* Available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=16659&prmBOLETIN=16112-07 *Bulletin 16021-07 amending the Penal Code to incorporate, as an aggravating circumstance of responsibility, the use of artificial intelligence in the commission of a crime.* Available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=16563&prmBOLETIN=16021-07 *Bulletin 15935-07 amending the Penal Code to punish the misuse of artificial intelligence.* Available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=16473&prmBOLETIN=15935-07 *Bulletin 12580-13 which incorporates technological changes in the company's production processes as a subject of collective bargaining.* Available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=13101&prmBOLETIN=12580-13

125 Chamber of Deputies. *Bill regulating artificial intelligence systems, robotics and related technologies, in their different fields of application.* Available at https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=16416&prmBOLETIN=15869-19

Evidencing some influence from the EU's draft Artificial Intelligence Act (AI Act), the bill classifies AI systems into two different levels of risk, which are transcribed almost verbatim below:

i. Unacceptable risk systems:

One that uses subliminal techniques beyond a person's consciousness to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm.
One that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, to materially distort their behaviour.
One used by or on behalf of public authorities for the purpose of classifying the reliability of natural persons over a given period of time on the basis of their social behaviour or known or predicted personal or personality characteristics, such that the social classification results in one or more of the following situations: prejudicial treatment of certain persons or groups in social contexts that are unrelated to the contexts in which the data were originally generated or collected, or, prejudicial treatment of certain persons or groups that is unjustified or disproportionate to their social behaviour or the severity of their social behaviour.
One of real-time or delayed remote biometric identification in publicly accessible spaces, unless and to the extent that such use is strictly necessary to achieve one or more of the following objectives:

a. *The targeted search for specific potential victims of a crime, including missing children.*
b. *The prevention of a specific, significant, and imminent threat to the life or physical safety of persons or of a terrorist attack.*
c. *The detection, location, identification, or prosecution of a person who has committed, or is suspected of having committed, any of the offenses included in the Penal Code.*

ii. High-risk systems:

a. *Real-time or delayed remote biometric identification of people in private spaces.*
b. *Use in the management of water, electricity, and gas supply.*
c. *The assignment and determination of access to educational establishments and the assessment of students.*
d. *The selection and hiring of people for jobs.*
e. *Assigning tasks and monitoring and assessing employee performance and behaviour.*
f. *The assessment of individuals for access to public assistance benefits and services.*
g. *Assessing the creditworthiness of individuals or establishing their credit rating.*
h. *Use in emergency and disaster situations, particularly in the dispatch or prioritisation of intervention services (e.g., firefighters or ambulances).*
i. *Use in determining the risk of individuals committing criminal offenses or reoffending, and the risk to potential victims of crime.*
j. *Use at any stage of the investigation and interpretation of facts that could constitute a crime in the context of a trial.*
k. *Use for migration management, asylum and border control.*
l. *Likewise, any AI systems that carry the risk of causing harm to health and safety, or the risk of having negative repercussions on fundamental rights, will be qualified as high-risk.*

This classification entails the same problems as identified in the chapter on the draft law presented in the European Union, so readers may wish to review the comments set out there.

Regarding unacceptable risk systems, the wording of the Articles is too vague and insufficiently precise to ensure adequate protection of the fundamental rights of Chilean individuals in the context of the deployment of AI-based systems. For example, the authorities are given considerable leeway in defining when the exceptions contained in the latter part of the Article will be applied, since they, and especially the last two, could serve to legitimise the use of technologies such as remote facial recognition in public spaces for prevention purposes, which has been identified as a disproportionate mechanism in relation to its ends and in terms of the infringement of basic citizens' rights in Latin American jurisdictions.

On the other hand, in relation to AI-based systems deemed to be high risk, there are types of use that pose serious risks to fundamental rights, for example, the use of systems designed to determine the level of danger posed by a person according to his or her likelihood of committing a crime or reoffending. This has been analysed on more than one occasion[126] and has been identified as contrary to the right to a defence at trial and as an element that weakens the presumption of innocence. Access Now recommends that, in any instance where the intention is to authorise specific processes in the judicial system, there should always be human supervision and that these systems should only be used in cases where automation is reasonable, which clearly does not apply to cases of a criminal nature where a sentence could involve the restriction of a person's freedom.

Finally, the draft bill proposes the creation of a National Commission on Artificial Intelligence, under the Ministry of Science, Technology, Knowledge and Innovation. This Commission will be responsible for reviewing and approving applications for the authorisation of AI systems, developing regulatory recommendations, maintaining a registry of AI systems and imposing sanctions on responsible parties for non-compliance. Developers, providers and users must obtain authorisation from the Commission before operating in Chile and may be required to carry out assessments of the potential impacts of their systems in order to identify mitigation mechanisms for identified risks. In turn, responsible parties must notify the Commission of any serious incidents or malfunctions. Penalties for non-compliance range from monetary fines to imprisonment for anyone who develops or uses unacceptably risky AI systems.

D. Colombia

Recently, Draft law 059 of 2023[127] was submitted to the Senate of the Republic, *"whereby public policy guidelines are established for the development, use and implementation of artificial intelligence and other provisions are enacted"*[128].

The first item of note is its flawed definition of AI, describing it as a discipline that *"is concerned*

126 SciELO Brazil. Use of the COMPAS algorithm in criminal proceedings and the risks to human rights. Available at https://www.scielo.br/j/rbdpp/a/6W9b8CHYbXcsc6qczDxCSfr/

127 Congress of the Republic of Colombia. *Draft law 059/2023.* Available at https://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2023-2024/2964-proyecto-de-ley-059-de-2023

128 Congress of the Republic of Colombia. Ibid.

with creating computer programmes that perform tasks comparable to those performed by the human mind, such as learning or logical reasoning". According to this, a computer program could emulate or be comparable with the abilities of a human mind. However, it is unaware that the neurological processes by which learning occurs in humans remain, to some extent, a mystery. In addition, it assumes that an artificial intelligence programme would be able to carry out logical reasoning, when it actually works based on predictive models previously established by the team of developers. It will be important to allow the technical sector, academia, and civil society to participate in developing and debating this initiative to correct and improve its current wording.

This bill incorporates the following principles in line with those set out by UNESCO and the Ethical Framework for AI issued by the Colombian Government in 2021[129]:

I. **Human authority:** It establishes that any AI decision is auditable and challengeable by human decision.
II. **Common good:** It states that the objective of AI shall exclusively be the common good.
III. **Cooperation:** It states that AI research will promote cooperation around risk prevention.
IV. **Safe design:** This means that, in the development of AI, provision should be made for the harmful effects that it may entail.
V. **Primacy of human intelligence:** It aims to ensure that human decision-making always prevails over AI.
VI. **Preventive research:** This states that risk prevention developments should be carried out in parallel to the development of AI.

The aim is to create a Commission for the Treatment of Data and Developments with Artificial Intelligence (CTDDIA, in Spanish), whose functions will include proposing new technological initiatives, endorsing institutional requests (these will presumably originate solely from public bodies) on AI developments and deployment, proposing initiatives in public management and advising the Colombian Congress (which would be limited to a consultative function).

129 Ministry of Sciences. Government of Colombia. Armando Guío Español, Elena Tamayo Uribe and Pablo Gómez Ayerbe (2021). *Ethical Framework for Artificial Intelligence in Colombia.* Available at https://minciencias.gov.co/sites/default/files/marco-etico-ia-colombia-2021.pdf

The draft law adds specifications geared towards the use of AI-based systems to mitigate and address the challenges posed by climate change, including in energy efficiency management, deforestation control and environmentally friendly mobility, citing these tools as parts of a strategic plan to be developed by the Ministry of Environment and Sustainable Development.

Then, in Chapter III of the draft law, there is an article that refers to the need for policies that place human intelligence over artificial intelligence, with the objective that these tools be used for the common good and the *"satisfaction of needs"*. If these articles refer to the need to have measures for control, supervision and opposition to both the operation of the tools and their results, they will require greater elaboration in order to have adequate mechanisms for this purpose.

This chapter includes specific efforts to avoid discriminatory results obtained using these systems, including in this case those that could harm free competition (and that would eventually be sanctioned). The section does not include any specific rights or actions available to citizens to claim and obtain redress in cases of discrimination and unfair competition, as other comparable draft laws might do, although perhaps these mechanisms will be incorporated into future regulation.

The draft goes on to introduce several other articles referring to the need for AI systems to be designed in a secure manner, not to be used for weapons purposes except for national security needs (this should be dealt with more comprehensively, as the "national security" exception could be interpreted very broadly), and to have adequate levels of information security. All these articles are presented in a limited, abstract language, with a style more typical of a declaration of objectives than of a specific regulation on the use of a set of technologies grouped under AI. Beyond this, there is a mention (albeit equally brief and vague) of the need for prior testing or evaluation to ensure that AI-based systems do not generate harm and that identified risks are prevented.

In the area of personal data protection and privacy, the bill establishes the need for the express consent of data subjects as a legitimate basis for authorising the use of their personal data, especially biometric data (establishing the principle of legal restriction, under which all public documents can be accessed except for those cases restricted by law), and that such consent must be renewed every three months (which is striking in a comparative analysis of bills of this nature). It is not entirely clear how the other bases of legitimacy under Colombian personal

data protection law would operate. Similarly, it provides for the right of data subjects to request the deletion of their personal data at any time and the obligation of those who have such responsibility to anonymise the information. On the other hand, it indicates the guidelines for the design of national policies, with a view to guaranteeing, on the one hand, that the data subjects understand how and for what purpose their data are used by data controllers, and on the other, how these systems have achieved the results, decisions or predictions that they actually produce on the basis of these data.

In general terms, the entire chapter referring to privacy and data protection seems to be a regulatory attempt to summarise in brief articles the battery of guarantees and rights that are recognised to benefit the holders of personal data at international level. While this may be an interesting venture, we believe that it should be addressed in the formulation of a special law on personal data protection. This subject is so complex and technically demanding that it cannot, at least without risk, be summarised in six articles in a draft that seeks to regulate a specific technical discipline. We must be able to differentiate between a bill with this objective, and one that regulates the exercise of a fundamental right, such as the protection of personal data.

Finally, the draft law concludes with a chapter on the liability regime provided for the person responsible for the use, operation and deployment of AI-based systems, both in contract and in tort. Strangely, in the latter articles, it establishes the obligation for those responsible to keep records of their systems, including the code of ethics that must be in place in each instance, without any further indication or classification of systems, or any other type of information. It does mention that, in any case, the requirements to be taken into consideration would be those foreseen by the CTDDIA.

In general terms, the draft law analysed presents a series of approaches that are common to many draft laws presented in the region, rather narrowly framed, perhaps with the intention of allowing the regulator to elaborate on technical aspects when developing the future regulation of the law. This being the case, we believe that the draft law can serve as a starting point for a serious multi-sectoral debate on the need for a specific law to regulate AI technologies and, in that case, for it to develop its provisions further to provide greater robustness.

E. Costa Rica

In Costa Rica, there are, as of the date of publication of this report, two draft laws aimed at regulating AI (which will be analysed in this report) and, incidentally, although we will not offer an analysis of its content here, a proposed Executive Decree to regulate the use of AI in the health sector:

I. Draft law number 23.771, Law on the Regulation of Artificial Intelligence.
II. Draft law number 23.919, Law for the Responsible Promotion of Artificial Intelligence in Costa Rica.
III. Proposal for an Executive Decree, Regulation for the control of clinical diagnosis in health by means of software with algorithms and artificial intelligence technologies.

All the above draft laws were submitted in 2023 and are in early stages of the legislative or regulatory process. Let us look at each of them:

First, an interesting case in the Costa Rican context is Draft Law No. 23.771, "Law on the Regulation of Artificial Intelligence"[130], which aims to regulate the development, implementation, and use of AI at national level, in accordance with the Political Constitution and international treaties. What is particularly remarkable about this bill is the fact that it was drafted entirely by the generative AI application ChatGPT[131], produced by Open AI, on the basis of a command given by the proposing Deputies. The command was as follows:

"Think like a lawyer and legislative advisor, use technical vocabulary and generate a proposal for a law to regulate artificial intelligence taking into account the 1949 Constitution of Costa Rica. Just ask whenever you have any questions".

As stated in the only section of the explanatory memorandum (which was not drafted by ChatGPT), the deputies explained:

130 Legislative Assembly of the Republic of Costa Rica. *Law on the Regulation of Artificial Intelligence in Costa Rica.* Available at https://d1qqtien6gys07.cloudfront.net/wp-content/uploads/2023/05/23771.pdf

131 ChatGPT. https://chat.openai.com/auth/login

"The points generated with the assistance of ChatGPT'4 were not altered, on the understanding that the deputies in the corresponding Commission will have the opportunity to bring in experts, consult and enrich the draft law with the few already existing international experiences".

The draft law is divided into 7 chapters. First, in its general provisions, it mentions the principles of fairness, accountability, transparency, privacy, data protection and security and safety. It includes human dignity, equality and non-discrimination, protection of privacy, freedom of expression, access to justice and data protection as fundamental rights. The draft law, with a few exceptions, does not regulate how these principles and rights will be guaranteed in practice.

It then sets out several requirements for developers. They must register the systems with a new AI authority envisaged in the same draft, called the "Artificial Intelligence Regulatory Authority" (ARIA, in Spanish), although no further details are given as to its constitution or institutional membership. Also, information must be provided on the purpose, functionalities, algorithms used and security measures built into the systems, which in turn must be monitored and audited by the aforementioned authority. Such a register does not distinguish between uses or risk levels of systems and therefore, given the breadth of the definition of AI used, any system based on machine learning algorithms should, in principle, be registered. It is also unclear how such monitoring and auditing obligations will be implemented in practice, under what methodologies, and whether the authority in question has the institutional capacity to carry them out, considering the massive number of applications and tools that would be subject to these provisions.

The draft law also seeks to guarantee the right of individuals to have access to effective complaint and redress mechanisms in cases of damage or harm caused by the malfunctioning or misuse of AI applications. In addition, in the field of labour, it prohibits discrimination and ensures that the rights of the workforce are protected from automation driven by these technologies, including relocation, training and fair compensation. Finally, the draft law states that proportionate and dissuasive sanctions should be established, but it does not establish a clear typology of infringements, nor the specific sanctions incurred by each infringement.

The draft law is an example of the poor results that can be obtained if AI is understood as a tool that can in all cases replace people. Therefore, without dialogue with relevant stakeholders who can give their recommendations and suggestions for improvement, this mechanism is insufficient to guarantee respect for fundamental rights.

More interesting for the purpose of this report is Draft Law No. 23.919, "Law for the Responsible Promotion of Artificial Intelligence in Costa Rica"[132]. This initiative aims to promote the use, research, design, development, deployment, use, implementation, and application of AI *"in accordance with the principles of ethics, responsibility, human dignity, equality, equity and transparency, in order to protect people's rights in the face of new technological change and contribute to the improvement of social, labour, economic, environmental, productive and human conditions in the country"*.

According to the Explanatory Memorandum, the draft law focuses on several *"main lines of action"*, including:

I. Ensuring that AI systems are safe and comply with existing legislation.
II. Ensuring legal certainty to facilitate investment and technological innovation and boosting development in all areas.
III. Facilitating the development of a robust and secure market for the legal and reliable use of AI applications, ensuring that all people have access to technological means, thereby overcoming the digital divide and technological lag.
IV. Establishing an effective and secure legal instrument for economic revitalisation through the use of AI in all public and private services.
V. Ensuring through transparency and ethical mechanisms the use, research, implementation, application and development of AI that avoids risk to users. Through the State, ensuring that the development of AI is approached within a general framework of respect for human dignity, the right to privacy and the private life of individuals, and the protection of personal and sensitive data, non-discrimination, and equality between individuals.

Compared to Draft Law No. 23.771 and others submitted in the region, this one is lengthy and detailed, but also repetitive and redundant in some respects.

The definition of AI used refers to the ability of systems to generate content, thus involving generative AI systems: *"Computer-based systems that have the ability to process data and information in ways that use or exhibit capabilities resembling intelligent behaviour, typically including aspects based on (or applied to) reasoning, learning, problem-solving, sensing, prediction,*

132 Legislative Assembly of the Republic of Costa Rica. *Law for the Responsible Promotion of Artificial Intelligence in Costa Rica.* Available at https://d1qqtien6gys07.cloudfront.net/wp-content/uploads/2023/09/23919.pdf

planning or control mechanisms, as well as the automatic generation of novel textual, graphical or auditory content or materials based on definitions or contextual information". It should be noted that the mention of "intelligent behaviour" is vague and lacks technical rigour, which could lead to legal uncertainty and even non-application of the rule in relation to systems that do not reflect "intelligent behaviour".

The draft law also contains several guiding principles. Some of the principles not contained in the previous draft law, but emphasised in this one, are human oversight; awareness and education; adaptive governance and collaboration; and "the decision to use the AI system, the essential conditions for its use and technological neutrality". In addition, the principles stipulate that the tools should not be used for the purposes of social labelling, inequality, exclusion, or mass surveillance.

It is characterised by the creation of an "Inter-Institutional Commission for the Development of Artificial Intelligence" within the Ministry of Science and Technology (hereinafter the "Commission") with the purpose of promoting, facilitating, and developing AI processes in the country and ensuring compliance with the law. The Commission would be composed of representatives from the public and private sectors, and its competencies are varied. Of interest to this report, are the following functions:

I. Maintaining a national register of AI projects that are deemed to be in the public interest.
II. Assessing and approving the high-risk certification of AI projects, activities, inventions or works deemed to be in the public interest
III. Developing and adopting a Code of Ethics
IV. Appointing a certification body to support AI processes
V. Creating or establishing controlled test spaces

The Commission will have an "Ethical, Technical and Scientific Advisory Committee", which would be the technical arm. Its role will be to examine and recommend programmes, projects or regulations to the Commission, and to determine and recommend which should be deemed to be in the public interest and which should be authorised if they are classified as high risk.

The Draft Law focuses much of its regulation on what it calls "public interest" or "high-risk" systems. Systems that fit into this category will have to meet certain pre-deployment requirements (for which the comments presented in this report in the chapter on the European Union and in

the chapter on considerations for human rights-centred regulation apply). These requirements notably include the submission to the Commission of a "risk assessment" certificate, the specifications of which regarding content, characteristics, procedures, and methodologies are left to potential future regulation, and which must be "in accordance with international standards".

Despite addressing a regulatory strategy based on risk levels, the draft does not define the parameters or uses that are deemed to be of high risk. Article 27 of the draft law, which refers to the necessary human oversight of AI systems, states that *"The type of risk of AI systems shall be defined in the regulation of this law"*, possibly delegating this classification to the executive branch. However, the law does not even stipulate the parameters or objective criteria to be used to classify a system as being of high risk, which leaves the government with considerable room to manoeuvre in defining it.

In terms of transparency in the use of AI systems in the public sector, it is noted that systems or projects that are declared to be of public interest must be registered with the Ministry of Science, Innovation, Technology and Telecommunications (MICITT, in Spanish) upon compliance with the requirements determined by the Commission. The question remains as to what happens to those AI projects and systems in the public sector that do not have a formal declaration of public interest. It also stipulates that public institutions have an obligation to communicate, inform and be accountable to the people *"about the design, development, use, implementation or operation of artificial intelligence technologies",* as well as the *"impact and decision that was made in this AI activity or process"*.

It is worth mentioning some innovative aspects of the bill. For example, two regulatory experimentation mechanisms are provided as alternatives to traditional regulation. On the one hand, it envisages controlled testing spaces (known as "regulatory sandboxes", which are described in the section on the European Union) to encourage innovation, so that AI developers can test and validate their AI systems in a safe and controlled environment before they are marketed or put into service. In addition, it promotes "regulatory prototypes", i.e. the possibility for regulators or other actors to propose potential AI regulations that are tested in practice to gather evidence on the actual impact of these regulations.

Finally, the draft law provides for administrative sanctions for those who do not have the high-risk certificate. It also specifies these sanctions for anyone who uses AI to misinform through social networks, television, radio, digital, electronic or information technology media by altering

or modifying ideas, phrases, words or linguistic content, creating false information for people; and for anyone who, through video, image or voice files, using AI systems, *"makes this content appear original, authentic or real, in order to deceive, manipulate or mislead"*. While these measures could be problematic from the perspective of the fundamental right to freedom of expression, they will not be addressed in this report, as this merits a separate analysis.

F. Peru

Peru is a unique case in the Latin American context, as it is the first country to effectively pass a law that seeks to regulate AI technologies in a general way. On 5 July 2023, Law No 31814 was passed, which *"promotes the use of artificial intelligence for the economic and social development of the country"*[133]. The objective is to promote the use of these tools within the framework of the national transformation process, prioritising respect for human rights and seeking the ethical, sustainable, transparent, and responsible use of AI, and the possibility of it being opposed.

Among the main provisions, and in line with the declaration of national interest, is the statement of guiding principles for the development and use of AI in all fields, defined as follows:

I. Risk-based security standards: A risk-based approach to the use and development of artificial intelligence is encouraged.
II. Plurality of participants approach: The participation of natural and legal persons, or public and private organisations and institutions in the debate on the development of policies aimed at regulating the use of artificial intelligence in the country is encouraged.
III. Internet governance: It promotes the development and application of principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of the internet by the state, private sector institutions and civil society in their respective roles.
IV. Digital society: Information and knowledge obtained through access, use and development of digital technologies in all their dimensions are valued, and security, trust, digital economy, digital connectivity, talent, innovation, education, and digital identity are fostered, as well as the use of emerging technologies for the social and economic well-being of citizens.

133 Congress of the Republic. *Law No 31814.* Available at https://www.gob.pe/institucion/congreso-de-la-republica/normas-legales/4565760-31814

V. Ethical development for responsible artificial intelligence: Ethics is deemed to be the fundamental basis for accurately identifying the framework of responsibilities in the use of these types of systems that make up Industry 4.0 technologies.

VI. Privacy of artificial intelligence: Artificial intelligence must not infringe on people's privacy and must operate in a safe manner to achieve a positive and beneficial impact on citizens.

As for the responsible authority, it is stated that the Secretariat of Government and Digital Transformation (SGTD, in Spanish) of the Presidency of the Council of Ministers will be the technical and regulatory authority responsible for supervising the use and development of AI with the task of promoting and fostering their adoption. In addition, it will be responsible for creating and strengthening the digital infrastructure, building a data infrastructure, adopting ethical guidelines and creating a collaborative ecosystem. While the scope of the law is limited, this may be because the country's legislative style is usually expressed in general rules that are then given greater depth and further guidelines, obligations, and procedures for their implementation through their regulation, which must be approved by the executive branch. Access Now has been invited to participate in the process of formulating recommendations for the development of the regulation, but no response or concrete feedback has been received to date.

Beyond this, the risk-based approach and ethical development of AI seeks to ensure that developments and implementation in both the public and private sectors follow international standards, for example in terms of information security, safety and privacy. Access Now must point out once again that the risk-based approach is not sufficient to ensure respect for fundamental rights, since, to argue that it is possible to identify mitigation measures that balance the risks to the protection of fundamental rights is alien to the international fundamental rights system. For more information on why Access Now argues that the appropriate approach should be a human rights-based one, please consult the section of this report entitled "Considerations for human rights-centred regulation" and the analysis in the section on the EU draft law.

It is important to note that on 28 July 2023, a few weeks after the AI Law, Supreme Decree No. 085-2023-PCM was published, which approved the National Policy for Digital Transformation to 2030 (PNTD, in Spanish)[134], applicable to all state entities and public companies, as well as to

134 *Supreme Decree N 085/2023.* Presidency of the Council of Ministers. https://www.gob.pe/institucion/pcm/normas-legales/4471543-085-2023-pcm

private companies, academia, civil society, and citizens insofar as it is applicable to them. The document is based on recommendations made in collaboration with the OECD and the 2030 Agenda for Sustainable Development adopted by the UN General Assembly. Among other things, it develops the Peruvian Digital Agenda and determines the provision of services that use AI for their deployment, and compliance standards, such as the execution of the Artificial Intelligence Programme on an ongoing basis for members of the National System of Digital Transformation, and the Artificial Intelligence Algorithm Service in open source, which is offered on an ongoing basis to members of the National System of Digital Transformation, with emphasis on the public entities of the three levels of government.

In addition to this regulation, other legislative initiatives have been submitted that seek to regulate the use of AI in specific sectors of the State's activities and other proposals that seek to introduce amendments to existing public regulations.

One of these initiatives is Draft Law No. 5763-2023-CR (dated August 25, 2023), which proposes a Constitutional Reform Law to establish AI as one of the principles of the administration of justice and seeks to have both the Judiciary and the Public Ministry adopt the use of AI-based technologies for the resolution of judicial proceedings and as a technical support tool in the procedures carried out by the parties during their trials. The draft law seeks to amend Article 139 of the Constitution which establishes the principles and rights of judicial duties by adding as a guiding principle of the administration of justice *"[t]he use of artificial intelligence for the resolution of judicial cases and for merely procedural matters"*. The purpose of the draft law, it is claimed, is to speed up the judicial processes for the benefit of litigants. However, this reform raises concerns, as it would be institutionalising the power to delegate the administration of justice to AI systems, which could severely compromise fundamental safeguards for those who access the justice system. As we have mentioned before, any use of AI-based systems in the judicial context should be addressed only to those aspects that are uniquely automatable and there should be sufficient human intervention and oversight. Consequently, uses intended for the generation of profiles of individuals subject to prosecution and the production of recommendations for the issuance of sentences in sensitive cases, such as those in the criminal sphere, should be excluded.

G. Mexico

On May 30, 2023, a draft law was filed[135] before the Chamber of Deputies, the purpose of which is to determine the basis for ethical regulation of the use of artificial intelligence technologies. The objectives of the initiative are as follows:

I. Establish public policy guidelines in the United Mexican States for the ethical regulation of the use of artificial intelligence and robotics within the national territory.
II. Promote the creation of official Mexican standards, based on ethical principles, for the proper use of artificial intelligence (AI) and robotics for the benefit of Mexican society, always respecting human rights, gender parity, without any discrimination based on race, ethnicity, religion, social class or economic position.
III. Regulate and govern the use of artificial intelligence (AI) and robotics for governmental, economic, commercial, administrative, communication and financial purposes so that they always comply with ethical and legal standards.
IV. Establish and regulate the Mexican Ethics Council for Artificial Intelligence and Robotics (hereinafter "CMETIAR"), a decentralised public body at the service of Mexicans.
V. Create the National Statistical Network for the use and monitoring of Artificial Intelligence and Robotics.
VI. Link autonomous agencies with the regulation of the use of artificial intelligence within the national territory, establishing the National Institute of Statistics, Geography and Informatics as the centre providing information on the use of AI within the United Mexican States.

The draft law focuses on the creation and operation of the CMETIAR, to be formed by Mexican citizens with ethical probity and technical expertise in the field, belonging to different areas of the public and private sectors, and civil society, with the aim of being a space for generating specific recommendations and regulations to align Mexican policies to uses of AI-based systems deemed to be ethical and responsible. Those responsible for the development or implementation of these tools must report, as indicated in Article 15, on issues related to the use of the technologies

135 Legislative Information System. *Initiative that enacts the Law for the Ethical Regulation of Artificial Intelligence for the United Mexican States, signed by Congressman Ignacio Loyola Vera and members of the PAN parliamentary group.* Available at http://sil.gobernacion.gob.mx/Archivos/Documentos/2023/04/asun_4543395_20230413_1680209417.pdf

and compliance with regulations. The CMETIAR is not a registry, nor is it constituted as an enforcement authority, nor would it have disciplinary powers.

In addition to this draft law, there are other initiatives that seek to reform existing laws that indirectly contain certain regulations or provisions relating to artificial intelligence. There are two initiatives in Mexico to reform the General Health Law for the deployment and regulation of artificial intelligence in the provision of health services. Both have been referred to the relevant Commission for review, but, as in other cases, they will not be examined here because they merit a separate approach.

H. Uruguay

A draft law called "Regulation on systems using artificial intelligence"[136] was introduced in 2023, pursuing an objective that is not without criticism. This draft law focuses on the mandatory digital labelling of systems and applications that use artificial intelligence, or the labelling or warning that should be in place when dealing with this type of technology. The main purpose of the draft law, as stated in the explanatory memorandum, is to provide users with the ability to know when content has been modified or created by means of artificial intelligence.

The intended standard would apply to:

I. Suppliers that place systems on the market or put them into service, regardless of whether said suppliers are located in the national territory.
II. Users of AI systems located in the national territory.
III. Providers and users of AI systems located in a third country, when the output information is generated by the system used in the national territory.

Access Now has published a document on how content generated by AI systems can be identified in a way that is effectively consistent and in line with the protection of fundamental rights in

136 Parliament of Uruguay. *Regulation on Systems using Artificial Intelligence.* Available at https://parlamento.gub.uy/documentosyleyes/ficha-asunto/160329

the digital environment[137]. Recommendations for the development of public policies include avoiding mandatory labelling of content generated by generative AI tools and retaining the possibility for the user to activate them, selecting the desired level of identification in each case. Reading this document is recommended for further information about how mandatory labelling puts fundamental rights at risk.

The draft law establishes a noteworthy exception stating that the labelling requirement shall not apply to *"AI systems authorised by law for purposes of detection, prevention, investigation or prosecution of criminal offences, unless these systems are available to the public to report a criminal offence"*. Beyond the statutory authorisation to which it refers, there is concern that AI-based systems are being considered for the detection, prevention, or prosecution of criminal offences. In particular, in terms of crime prevention, different jurisdictions in the region have noted the disproportionality that this entails between the end pursued and the infringement of fundamental rights. Further, in terms of prosecution, Access Now must once again highlight the crucial need for human supervision in the use of AI tools in processes that involve the administration of justice.

The draft law expressly envisages the possibility of deploying *"emotion recognition systems or a biometric categorization system"*, on which Access Now must expand. These uses present a risk to fundamental rights that cannot be mitigated or balanced in terms of the purposes pursued by their use. Therefore, beyond including a duty to notify users who are exposed to these systems, we must always sound caution about the risks presented by technologies that seek to identify emotions[138], among other reasons, for those set out in the report issued in 2021 by the United Nations High Commissioner for Human Rights, inasmuch as these systems pose a serious danger of undermining the right to privacy, freedom and a fair trial[139]. Moreover, it is simply not possible to identify emotions from data or variables that can be processed by an AI tool. We must once again differentiate personal qualities that can be classified or identified,

137 Access Now. Gustaf Björksten. (September 2023). *Identifying generative AI content: when and how watermarking can help uphold Human Rights: A discussion paper.* Available at https://www.accessnow.org/wp-content/uploads/2023/09/Identifying-generative-AI-content-when-and-how-watermarking-can-help-uphold-human-rights.pdf

138 ARTICLE 19 end IT-Pol. Access Now, European Digital Rights (EDRi), Bits of Freedom. *Prohibit emotion recognition in the Artificial Intelligence Act (2021).* Available at https://www.accessnow.org/wp-content/uploads/2022/05/Prohibit-emotion-recognition-in-the-Artificial-Intelligence-Act.pdf

139 United Nations Human Rights. Office of the High Commissioner. *OHCHR and privacy in the digital age.* Available at https://www.ohchr.org/en/privacy-in-the-digital-age/reports

such as those referring to the physical characteristics of a person, like their iris colour or facial map, from those that technically go beyond any attempt at identification, such as emotions. Further arguments on the impossibility of identifying emotions from AI tools can be found in the section of this report dedicated to the analysis of the EU draft law.

CONSIDERATIONS FOR HUMAN RIGHTS-CENTRED REGULATION

While it is true that some countries in the global north have shown an undeniable leadership in regulatory developments in recent times (which has led to this influence being known as the "Brussels effect", especially in the case of the impact of the European Union in specific areas such as personal data protection), the region need not wait for the results of legislative processes in other latitudes before embarking on its own path of reflection on the relevance of regulating AI, and in particular, how to do so from a perspective cantered on human rights and the region's own specific socioeconomic reality.

Any attempt to regulate a technology must focus on the protection of human rights as the main and indisputable objective, with consideration for the current social reality in the country where the regulation will have an impact, and at the same time and equally importantly, consider the mechanisms required to promote innovation and the development of technical competencies in the country. The quest to regulate AI often contains a premise that does not correspond to reality, namely the idea that AI technologies are not regulated in our societies because, as a relatively new discipline, public policy makers have not yet been able to address them. On the contrary, there are multiple regulations available to guide all AI system development processes (no matter what function is assigned to them) and regulations applicable in the event of harmful outcomes produced by a product or service. Personal data protection laws are an example of this, and they must be reviewed and updated to offer a safeguarding approach in line with the highest international standards, a task that is still pending in the region and that should be a priority when considering a specific regulation on AI.

The constitutional systems and rule of law prevailing in the region recognise that fundamental rights are placed on top in the hierarchy of norms, rights which are systematised in international

instruments, such as the Universal Declaration of Human Rights[140], the International Covenant on Civil and Political Rights[141] and the International Covenant on Economic, Social and Cultural Rights[142]. They introduce aspects of particular importance for considering the impact of any technological solution based on AI systems, for example, the principle of non-discrimination[143].

Faced with the challenge of regulating AI using a human rights-based approach, Access Now suggests considering five aspects. It should be noted that the mere enunciation of these aspects does not guarantee the quality of a legislative development, since they are minimum standards and their mere inclusion in the text of a bill may not be sufficient to guarantee respect for fundamental rights.

I. **Regulation focused on human rights:** As Access Now advocates[144], a regulatory approach focusing on the protection of human rights, as this leads to the enhancement of basic rights for potentially affected parties. In contrast, the risk-based approach involves determining the scale or scope of potential risks in relation to the operation of AI systems under specific conditions. This is an erroneous approach that runs counter to the system of human rights, which are non-negotiable and must be respected regardless of the level of risk associated with given external factors.

   Certain AI tools should not be deployed. For example, AI applications that carry out remote biometric identification, automated gender "detection" and behavioural prediction are fundamentally incompatible with the exercise and protection of fundamental rights. Framing the problem in terms of risks encourages the idea that we could mitigate them by introducing safeguards or ethical guidelines, which is simply not possible since these systems inherently undermine our rights and dignity.

140 United Nations General Assembly. *Universal Declaration of Human Rights.* Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights

141 United Nations General Assembly. *International Covenant on Civil and Political Rights.* Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

142 United Nations General Assembly. *International Covenant on Economic, Social and Cultural Rights.* Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

143 Anne F. Bayefsky. (1990). The Principle of Equality or Non-Discrimination in International Law. Human Rights Law Journal. Available at https://www.corteidh.or.cr/tablas/r31086spa.pdf

144 Daniel Leufer and Fanny Hidvegi (17 February 2021). *The EU should regulate AI on the basis of rights, not risks.* Access Now. Available at https://www.accessnow.org/eu-regulation-ai-risk-based-approach/

II. **Transparency:** A regulation on high-risk AI systems should incorporate requirements for their transparency before they are made available. The elements of transparency should include, among others, information regarding the quality of the data sets used, the technical documentation of the system, the communication of information to users, who should be able to interpret the system's output information, regardless of whether it affects them adversely, as well as information regarding the context in which such systems are deployed or used. These systems must also be designed in such a way that their operation can be monitored by natural persons, operate consistently throughout their life cycle, and exhibit levels of accuracy, robustness, and cybersecurity in accordance with the generally recognised state of the art. To ensure such transparency, an appropriate mechanism involves creating a public registry that contains all this information, in addition to information on the relevant supplier, which must be managed and updated throughout the entire life cycle.

III. **Efficient monitoring processes, in particular impact studies on fundamental rights:** It is important for any future law to provide tools to develop effective governance mechanisms for the protection of fundamental rights, in particular impact studies on fundamental rights, which should be carried out before and during the implementation of any AI system, i.e. throughout its life cycle. In turn, periodic reviews of these studies will be required as the setup and scope of the system evolves. To generate optimal mechanisms for these reviews, there should be broad and inclusive social participation so that the identification and mitigation of risks considers the different perspectives of the people who will be affected by the systems, including those whose voices are not normally heard. Typical risks include the presence of biases in the data sets used to train an AI system, as well as the fairness and explicability of the model. The identification of impacts may include aspects related to justice, and the economic interests, health and welfare of the populations potentially affected by a proposed system.

Still, Access Now cautions against adopting a simplistic high-risk-low-risk binary approach and encourages the development of clear and consistent criteria for determining when an AI system has a significant effect on individuals, specific groups or society as a whole.

Further guidance on strategies and standards for conducting these impact assessments can be found in the Access Now document entitled "Human Rights Impact Assessment for AI: Analysis and Recommendations"[145].

IV. **Enforcement and capacity to apply sanctions:** There is no point in defining rights and duties if there is no structure to ensure that the regulation "has teeth", i.e. that the necessary mechanisms are in place to oversee the development and deployment of the systems in an effective manner. Therefore, in a regulation on AI technologies, adequate control mechanisms should be provided with the participation of civil society organisations, the private sector and academia with proven technical knowledge and experience, as well as people from different disciplines, such as computer science, administrative law, and philosophy.

V. **Localised analysis:** An AI system that does not have a detrimental impact in one territory could have a negative impact in another, depending on its particular structure of social life, economic conditions and the challenges presented by each scenario. In our region this is particularly relevant, especially in view of the history of structural inequalities or deeply rooted discriminatory practices in many countries. Therefore, any analysis of an AI application must consider the particular context in which it will be deployed. This is why Access Now reiterates the need to include people from different backgrounds, including local civil society and from different specialisations, including the social sciences.

145 Brandie Nonnecke and Philip Dawson (2022). *Human Rights Impact Assessments for AI: Analysis and Recommendations.* Access Now. Available at https://www.accessnow.org/wp-content/uploads/2022/11/Access-Now-Version-Human-Rights-Implications-of-Algorithmic-Impact-Assessments_-Priority-Recommendations-to-Guide-Effective-Development-and-Use.pdf

CONCLUDING REMARKS

The drive towards AI regulation in Latin America is underway. This is evidenced by the existence of multiple draft laws, national strategies, and the prolific production of soft law documents and governance projects. It is foreseeable that in the coming years these efforts will be stepped up, so it will be necessary to sustain the focus on human rights in the development of public policy in AI. To this end, decision-makers in different spheres, both public and private, must adopt a perspective focused on compliance with the international, regional, and local human rights framework. The benefits that AI technologies can offer society are no justification for disregarding this set of fundamental rules or for legitimising harm to individuals.

Access Now hopes that the arguments presented in this report, on upholding the protection of fundamental rights in the face of technological innovation processes, are valuable contributions to the processes of debate and development of AI public policies in the region.