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INTER-AMERICAN JURIDICAL COMMITTEE

OEA/Sec.General
DDI/doc. 4/2017
May 15, 2017
Original: English/Spanish

ANNOTATED AGENDA OF THE

INTER-AMERICAN JURIDICAL COMMITTEE

91st REGULAR SESSION
Rio de Janeiro, Brazil
August 7 to 16, 2017

(Document prepared by the Department of International Law)

General Secretariat
Organization of the American States

EXPLANATORY NOTE

The Department of International Law of the OAS Secretariat for Legal Affairs of the General Secretariat has prepared this document, which includes background information to facilitate consideration of the various topics on the agenda that the Inter-American Juridical Committee will take up at its 91st Regular Session, in light of the agenda adopted in March 2017, document CJI/RES. 231 (XCI-O/17).

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I. TOPICS ON THE AGENDA

1. Binding and non-binding agreements

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Duncan B. Hollis expressed his willingness to work on the issue of agreements and the process by which decisions are taken at the domestic level by a state on a binding *vs*. non-binding instrument.

The plenary agreed with the proposal, the topic was added to the agenda, and Dr. Hollis was designated as the Rapporteur.

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2. Validity of foreign judicial decisions in light of the Inter-American Convention

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Ruth Stella Correa Palacio proposed the addition of a new topic titled: "Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards."

The plenary accepted the proposal which was added to the agenda, and Dr. Correa, the Rapporteur designated, pledged to provide a report for the next session.

* * *

3. Immunity of international organizations

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed to the plenary that the Committee work on an instrument addressing the immunity of states in transnational litigation. He reported that in 1986 the Committee had presented a draft convention on the immunity of States that did not prosper. Additionally, he noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property has still not entered into force. He also stressed that States do not have adequate laws on the topic. In his explanation, Dr. Stewart described the positive effects that an instrument on this subject could have in the field of trade, in addition to serving as a guide for government officials. Dr. Fernando Gómez Mont Urueta proposed that the plenary agree to designate Dr. Carlos Mata Prates as Rapporteur for the subject: the proposal met with the plenary's approval. [For the work of the Rapporteur and discussion by the Committee on the subject of immunity of States during its sessions for the period 2012-2017, see the separate section].

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the plenary Committee decided to divide the treatment of the subject of immunities and to appoint another Rapporteur to be in charge of immunity of international organizations. Dr. Hernández García was appointed to the position and undertook to submit a preliminary report at the next regular session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2015), Dr. Hernández García, Rapporteur for the topic, submitted his report, document CJI/doc.486/15 and thanked the Secretariat, particularly Dr. Christian Perrone, for his assistance in drafting the preliminary document to serve as the basis for the actual report (DDI/doc. 5/15).

He explained the development of the topic in the Committee and what he had accomplished as Rapporteur since his appointment in March of the current year. He was pleased at the decision to separate the subject of immunities into two sub-topics to be addressed by the Committee: immunities of States and of international organizations. He noted that 12 responses to the questionnaire that had

been circulated in 2013 had been received from the following States: Bolivia, Brazil, Colombia, Costa Rica, El Salvador, United States, Jamaica, Mexico, Panama, Paraguay, Dominican Republic and Uruguay. Based on the responses provided to the Committee, he was able to establish that only the United States and Jamaica have a national law. The majority of these States address this issue through international instruments, mainly through headquarters agreements.

As for exceptions to immunity for acts of commerce, he remarked that his study also helped him to ascertain the use of international agreements or treaties to serve as guidelines. He also established inconsistencies among the legal precedents of the countries.

Next, he made reference to the last question on the *questionnaire* regarding provisions of law applied by the judiciary, with most States alluding to international custom, though he did not mention what he considered to be the normative content of the customary law.

He outlined as a first conclusion that it is the practice of States to deal with immunities of international organizations on a case-by-case basis.

He also commented on the European Court of Human Rights case establishing a limitation on immunity of international organizations, clearly indicating that immunity cannot impede access to justice in light of respect for the right to due process, and the possibility of providing for reparation for damages. In the view of the Rapporteur, this decision shows that immunities of international organizations is following a parallel path to the concept of functional immunities (*rationae materiae)* immunity of States, inasmuch as it is prohibited to leave persons defenseless.

As a product of his study, the Rapporteur proposed the creation of guiding principles on the application of immunities of international organizations. He cited three possible sources of law to establish general principles: 1) national laws; 2) headquarters agreements; and 3) national legal precedents. Additionally, his study included developments on the extension of immunities in general; exceptions granted by treaty, law and jurisprudence; the scope of the limitations on commercial matters; respect for national legal order; and, remedies to cure violations.

Dr. Salinas noted that the instruments adopted by most important organizations, such as the UN or the OAS, refer to common principles; while other organizations lay out distinctions, which would require verification on a case-by-case basis. As for progressive development, he called for examining the issue of the limitations stemming from human rights, which would help to generate a new perspective on the subject matter.

Dr. Correa Palacio noted that in labor matters, the applicable judicial norm must be verified and identified. She claimed that often when damages occur, there is no person responsible against whom a case can be adjudicated and, therefore, there has to be a way to protect fundamental rights.

Dr. Villalta established that, in Central America, headquarters agreements are usually used as relevant guidance on immunities. She mentioned that in the absence of agreements, the situation is handled mostly on a case-by-case basis and that guiding principles could be useful in the practices of States.

The Rapporteur concurred with many of the comments of the other Members and he proposed to submit a report at the next Committee meeting.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April, 2016), the Rapporteur explained that his report CJI/doc.499/16 was the result of an analysis of 15 international conventions and took into consideration, *inter alia*, the constitutions of international organizations, headquarters agreements and specific immunity-related treaties. In addition, he commented that the *rationale* underlying the report was to look for general principles to guide international organizations and States in respect of the former's international immunities.

He said that the purpose of the study was to analyze the scope and limits of the immunities, in addition to the weight of exceptions (commercial activities), access to justice and the resources of injured third parties.

The study enabled him to note the following common features relating to immunity in the cases reviewed: jurisdictional immunity, immunity from execution, personal inviolability, inviolability of archives, communication facility, tax exemption, migration facilities, monetary and exchange facilities, customs facilities, occupational liability in local recruitment, and waivers of immunity.

With respect to legal capacity, what the treaties had in common was reference to capacity to hire/enter into contracts, acquire real estate, and initiate judicial proceedings.

As regards immunity to jurisdiction, there were various degrees depending on the recipients. Generally speaking, there was immunity to any kind of judicial proceeding. A different instrument was the Agreement Establishing the Inter-American Development Bank which extends that immunity to the territory of all the member States.

Representatives of international organizations were on par with diplomats when it comes to immunities depending on their rank. Higher-ranking officials, such as Secretaries General and Directors General were guaranteed equivalent immunity as diplomats, whereas other staffs of international organizations were granted only functional immunity.

The inviolability of offices, archives and communication facilities was considered absolute. There were also tax exemptions and customs facilities.

In conclusion, immunities are absolute, with restrictions in only very exceptional cases. One example was payment for public utilities, although there were tax exemptions.

All the treaties provided for the option to waive immunities. One recurrent exception involved restrictions with respect to the immunities of nationals of the territory in which the Headquarters is located; they may not enjoy the same immunities are foreign nationals.

Another important point was that waiving jurisdictional immunity does not *ipso facto* imply waiving immunity from execution. Some treaties explicitly required a specific waiver with respect to execution.

Finally, some agreements contained provisions guaranteeing access to justice. Here there were two approaches. In one of them, there were rules requiring in-house procedures within the organization that enable someone who feels wronged to defend himself/herself. In the other, there were provisions that allow for resort to domestic laws.

The Rapporteur said that the next step would be to analyze additional treaties and jurisprudence regarding this subject in the countries of the region.

Dr. Salinas urged the Rapporteur to focus his study on practical aspects of limiting the immunities of international organizations. He explained that as a legal advisor to the Ministry of Foreign Affairs of Chile, the most common problem he encountered was related to labor rights and mechanisms for settlement of disputes. He pointed out that various national courts have developed case law on the subject and suggested that national jurisprudence on the subject be studied. He also noted that there are differences in immunities of States related to the nature of commercial transactions. In some cases, certain commercial transactions are recognized as intrinsic to the functions of international organizations and so would be considered as administrative operations and not commercial transactions. In this area, the traditional limitations on States' immunities are not equally applicable.

Dr. Correa noted how complex the issue was. She also commented on the existence of a certain consensus among States on extending facilities and immunities on fiscal aspects. She pointed out the example of Colombia where the courts have limited immunity in areas of both tax and labor matters.

Dr. Pichardo underlined that this is a topic of interest to everyone working in the foreign ministries of governments. He recalled that the greatest problem occurred in labor matters. He suggested that the Rapporteur take into account the UN Draft Articles on the Responsibility of International Organizations.

Dr. Collot expressed doubts regarding the nature of some of the organizations referred to in the report.

The Rapporteur thanked the members for their comments, and especially Dr. Pichardo, for bringing up a subject that was not included in his report. Although he was of the opinion that the issue of responsibility was not part of the mandate, it is an aspect that could be taken into account, because it can give rise to use of immunity in legal claims.

He added that the treaties analyzed did not leave room to consider extracontractual responsibility of international organizations. The analysis would consist in review of the regulations of selected organizations in the region, with a view to continuing the study of national jurisprudence. He also agreed with Dr. Correa that disputes today are not confined to labor issues and with Dr. Salinas regarding the distinction drawn between internal administrative operations and commercial acts.

He mentioned the difficulties many countries have in striking a balance between the immunities of international organizations and the rights of victims to have access to justice and reparations.

In response, Dr. Collot explained that he selected international organizations that are important in the region.

The Vice-Chairman observed that in matters related to the immunities of international organizations, unlike immunities of States, there is usually an objective element in the form of the headquarters agreement that indicates the scope of said immunities.

He mentioned two national judgments in which jurisdiction was assumed. The first had to do with a case in Brazil on labor issues, in which the country's Supreme Court assumed jurisdiction to avoid denial of justice. The second one was a case in Uruguay in which national legal actions against an international organization were allowed in order to avoid denial of justice, as in the Brazilian case. In this regard, he asked the Rapporteur if there were mechanisms in the United Nations to enable possible victims to file claims for reparations.

Dr. Salinas explained that in the case of the alleged cholera victims in Haiti, they were not covered by the United Nations tribunal, which deals specifically with labor matters. Going back to the issue of international organizations analyzed by the Rapporteur, he supported his explanation related to the group of organizations selected for the study, since they were all international by nature.

In concluding the discussion on the issue, the Rapporteur was asked to pursue his study of the immunities of international organizations, with an emphasis on jurisprudence in the OAS Member States.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October, 2016), the topic was not discussed.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur made his presentation to the Committee based on his third report (CJI/doc.528/17). He recalled that his first report had outlined three main reasons for addressing immunity of international organizations separately from immunity of States and that he had proposed that the Committee draft "General Principles of International Law in the Americas with respect to the Jurisdictional Immunities of International Organizations." In order to do so, he had suggested an examination of relevant treaties and host agreements, which he had presented in his second report, and a review of case law, which was what he was about to present in this third report.

The Rapporteur then turned to the Annex to his report to explain the methodology behind the preparation of the table of cases. He had found the case law to be abundant and the judicial decisions had been drawn from 18 OAS Member States. He explained that this represented a collection of the raw material from which one could develop the principles. From the first group of decisions that had been analyzed, two common elements had already emerged: immunity from suit and exceptions or limits to immunity. He then reviewed the first group of cases elaborated in the Annex. He concluded his report by inviting other members of the Committee to submit to him any additional cases that should be included in this collection.

The Chair noted this exhaustive research and pointed out that to collect jurisprudence from so many countries was not easy. He noted that the Committee had taken the decision to separate the topic of immunity into that of States and that of international organizations, because the scope was very different in international law, at least in theory. However, the jurisprudence has shown that this distinction was not very clear, especially with regard to *juri gestionis*. Immunity for international organizations was found to be necessary to enable these entities to comply with the objectives for which they have been created. The Chair also noted the emerging trend with respect to the settlement of disputes.

Dr. Mata pointed out that one of the key differences between the two – immunity of States and of IOs - was that international organizations would have entered into a headquarters agreement with the host state in which immunities would have been established.

Dr. Correa offered a perspective with an example from Colombia that she concluded was common to most States. Although the judge would speak in favour of the jurisdictional immunity of a state or an international organization, where public assets have been damaged by an international organization, the local court will limit or suspend the immunity. This is also the case regarding fundamental rights, such as the right to petition, and in labor law issues.

The Rapporteur noted that the decision to distinguish the two - immunity of States and of international organizations – had originally been considered necessary to maintain the methodology, but it could be discarded. The importance of this exercise, he said, would be to extract principles and find solutions. He explained that as it was impossible to do an exhaustive study, he had concentrated on decisions from superior courts. Thus far, it would appear that:

1) jurisdiction is restricted by fundamental rights of persons and by labor laws, and;
2) immunity will be recognized provided there is an alternative way to resolve the dispute.It was his hope this would have a practical application.

* * *

4. Law applicable to international contracts

At the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2014), Dr. Elizabeth Villalta introduced a new topic, which had not been on the agenda established in August 2013. In that connection, she presented a document entitled "Private International Law" (CJI/doc.446/14) aimed at promoting certain conferences held under the purview of the CIDIP, in particular the Convention of Mexico on the Law Applicable to International Contracts, ratified by two OAS Member States.

Among reasons for such few ratifications she cited the lack of promotion and awareness about it and the fact that back then (1994) these solutions would have been too novel; the provision for autonomous free will; and the reference to *Lex Mercatoria*. Her conclusion was that the Mexico Convention could settle many international contracts problems with the Hemisphere's own solutions.

Dr. Negro reported that both (the Rapporteur and himself) had participated in the ASIDIP meetings and noted that there was consensus that certain Conventions adopted by the CIDIPs, particularly the 1994 Convention of Mexico, needed reviewing. He noted the interest that had been expressed in having support from the Inter-American Juridical Committee to disseminate those conventions. Dr. Dante Negro also spoke about the last CIDIP and the impasse about consumer protection, as well as the States' lack of agreement on holding another CIDIP. He said no specific new resolution on CIDIP had been adopted, in terms of new topics or finding a solution to the consumer issue. He said the Department of International Law had informally approached States to promote ratification of the conventions on private international law.

Meanwhile, Dr. Arrighi, who has also taken part in ASADIP meetings, noted that some members of ASADIP held senior positions with their governments and had never suggested ratification of the conventions was a priority. He added that undertaking protocols or amendments to conventions already

signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only States to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

Dr. Salinas said that what Dr. Arrighi had spoken about was important to understanding why the Convention had not been ratified by a significant number of States. He pointed out further that if consultations were to be held, they should include experts and practitioners in this field.

The Chairman said that some consensus was already developing: Firstly, on keeping the issue on the agenda for August; secondly, that a study of the Convention would be useful; and thirdly, that consultations should be held with the States and experts and practitioners as well.

Dr. Collot hailed Dr. Villalta for proposing this topic. He said Dr. Villalta had touched on several concepts that were important to private international law, particularly the concept of *Lex Mercatoria*.

Dr. Villalta said that the position of the members of the ASIDIP was that the Committee could play a key role in the promotion of private international law.Consequently, the members of the Committee decided to change the title of the topic to "Law applicable to international contracts" instead of "Private International Law."

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Elizabeth Villalta presented another report, entitled "Law Applicable to International Contracts," document CJI/doc.464/14, which referred to all the conventions on private international law adopted at the Inter-American Specialized Conferences on Private International Law (CIDIPs).

She explained that some States had indicated that the translations of the Mexico Convention were not particularly felicitous, and that that was an obstacle to its ratification. However, she mentioned that there were ways of correcting those deficiencies, so she suggested that the Committee bring these mistakes to the attention of States.

She said the Convention needed to be more widely disseminated, especially considering the current importance of international contracts and international arbitration. The conventions on this subject could resolve many of today's legal issues, such as the free will (contractual freedom) principle. This principle had been incorporated into Venezuelan legislation and in a bill (draft law) in Paraguay. Thus, material incorporation could, she said, be the path to reception of the principles enshrined in the Convention.

Finally, she said that the benefits of the Convention included receptivity to the principles of *lex mercatoria* and various other principles developed in international forums and trade customs and practices.

The Co-Rapporteur on the subject, Dr. Collot, gave an oral presentation of his report, called "Inter-American Convention on Law Applicable to International Contracts," document CJI/doc.466/14 rev.1. He highlighted the applicable legal instruments and broadly compared the Inter-American instrument with the European Treaty. He also expounded the principles regarding determination of the consent of the parties and the equivalence or near-equivalence of the considerations. He noted that the Convention on the Law Applicable to International Contracts does not cover extra-contractual obligations derived from the performance of contracts. Accordingly, he proposed directing the discussion toward the possibility of expanding the domain of applicable law under the Convention.

Regarding the translations, Dr. Arrighi said there had been no clear indication of where errors had been committed. In his view, the problem had to do with the difficulty of reconciling the vehicles used for solutions: uniform laws and uniform conventions.

The Chairman pointed out that silence with respect to ratifying was in itself a form of political response. Dr. Salinas said that some instruments adopted in The Hague suffered the same fate as some

of the Inter-American conventions, in the sense of being ratified by only a handful of States. Dr. Elizabeth Villalta pointed out that her report mentions the possibility of incorporating solutions (developed in the Convention) into domestic law, as Venezuela had done and Paraguay was in the process of doing.

The Chairman then proposed, as a way of concluding this discussion, that the Rapporteurs consult the States, including practitioners and academics, and that they come up with pertinent questions for the Secretariat to distribute in the form of a *questionnaire*. This proposal was adopted by the plenary.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2015), one of the Co-Rapporteurs for the topic, Dr. Elizabeth Villalta submitted a new version of the report, document CJI/doc.464/14 rev.1, which incorporated actions taken in the subject matter by other international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT). Additionally, the document explains the implementation process of the principles of the Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention), as conducted by some States in their domestic legislation, using as examples the laws of Venezuela, Dominican Republic, Panama and Paraguay.

Lastly, she released the *questionnaire* written for the States and academic experts and said that the first version of the *questionnaire* had been forwarded by the Secretariat to the Permanent OAS Missions in the second week of March and that, thus far, no State has responded.

The Chairman proposed shortening the list of questions posed to the States on the *questionnaire.*

Dr. Negro noted that this meeting provided a good opportunity to revise the *questionnaire*. He suggested a return to the original purpose of the study, which was to understand why the Mexico Convention was not ratified by more States. As for the experts, he suggested to call on the American Association of Private International Law (ASADIP) to collaborate, inasmuch as it is the ideal forum to deal with topics of private international law and it has offered its good offices to support the work of the Committee.

Dr. Hernández García commented that the *questionnair*e would seem to be aimed at academicians or operators of justice as opposed to States. He suggested that the Committee identify gaps in conflicts of law in order to take steps to fill them.

Dr. Stewart suggested tailoring the questions in the *questionnaire* to the relevant audience (academia, operators and States). States should be asked to give their reason for failing to ratify. Additionally, he believed it would be useful to check into the work of other organizations on the subject matter, given that other important instruments dealing with the subject of private international law have emerged since the time the Mexico Convention was written. It would also be useful to check into issues currently being addressed by other international organizations in order to identify new projects for the Committee to undertake without duplicating efforts.

Dr. Arrighi recalled that the process of drafting the Mexico Convention began in the Committee.In his view, no distinction should be drawn between representatives of government, academicians and experts. He also suggested focusing on a new process. He noted that the CIDIP was an eminently Latin American process. The current challenge is to bring every State of the OAS into the fold in an attempt to promote relations between private parties in the system.

Dr. Villalta explained that the *questionnaire* would be a useful way to learn the opinions of States on the subject of international contracts. She proposed forwarding the questionnaire to the ASADIP and the Mexican Academy of Private International Law (AMEDIP).

The Chairman noticed that the Members were in agreement in shortening the *questionnaire* and, particularly, in learning the reasons for States not ratifying the Mexico Convention. Therefore, he requested the rapporteurs to shorten the *questionnaire* and that Dr. Stewart would take part in drafting

a revised version. He also requested Drs. Villalta and Stewart to provide a list of topics of private international law on which the Committee could focus.

Dr. Hernández García supported the Chair's suggestion and added that the questions must be aimed at learning how provisions of international law currently in force help or hinder relations between private parties.

Dr. Negro proposed to the plenary submitting a list of topics that are under analysis by other international forums, including the status of these studies, connections with topics previously discussed in the OAS and existing sticking points in dealing with these topics in the aforementioned forums.

The Chairman suggested that two *questionnaires* be drawn up: one on international contracts and the other on the challenges faced by the region in the field of private international law. He also requested Co-Rapporteur Dr. Villalta to disseminate the questions to the other Members prior to submitting them to the States and experts, leaving the decision on formatting and content up to them.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2015), Co-Rapporteur Dr. Villalta, introduced the document "Law applicable to international contracts" (CJI/doc.487/15), which reviewed the first four responses to the questionnaire sent to the States that had been received as of then (Bolivia, Brazil, Jamaica and Paraguay). Additionally, she mentioned and thanked academicians who responded to the questionnaire: Mercedes Albornoz, Nuria Gonzales, Nadia de Araújo, Carmen Tiburcio, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Didier Opertti, José Martín Fuentes, Alejandro Garro and Peter Winship.

Dr. Stewart mentioned that academia's support of the Mexico Convention appeared to be weaker than was anticipated and he added he felt there was more of a consensus on drafting a Model Law or Guiding Principles on the subject.

Dr. Villalta proposed sending a reminder to the States that have not responded, because no time limits for responses had been established. She stressed that the responses submitted by most of the experts revealed that the Mexico Convention was very forward thinking at the time it was approved, but in current times, the consensus seemed to support a soft law solution.

The Chairman noted that the consensus of the Committee would be to keep the topic on the agenda and he requested the Secretariat to send out a reminder to the States, reflecting the importance the Committee attaches to private international law.

At the request of Dr. Correa, the Chairman requested the Secretariat to incorporate in the multiyear agenda the topics that arose during the Meeting on Private International Law between the Inter-American Juridical Committee and ASADIP that took place on Friday August 7, 2015 and was attended by accomplished professors and experts.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), one of the Co-Rapporteurs, Dr. Villalta, reminded members that at the 86th session a *questionnaire* was approved and sent out to member States and experts on the subject; and that to date replies had been received from the following ten States: Bolivia, Brazil, Jamaica, Paraguay, Argentina, Uruguay, Mexico, Panama, Canada, and the United States. Additionally, a total of fifteen experts responded to the questions: Professors Mercedes Albornoz, Nuria González, Nadia de Araujo, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Carmen Tiburcio, Didier Opertti Badán, José Martín Fuentes, Alejandro Garro, Peter Winship, Diego Fernández Arroyo, Aníbal Mauricio, Dale Furnish, and Carlos Berraz. Most States were in favor of the principle of freedom of choice. Additionally, a majority supported the choice of the place with which the contract had the closest ties, in the event that the parties themselves had not determined the applicable law or that their choice was ineffective.

In response to the question on the need for an amendment to the Mexico Convention, most States indicated that the political context should be taken into account.

Finally, in relation to the development of the CIDIPs, most considered that more promotional work should be done. Interest was also expressed in holding a general conference to discuss the virtues of updating inter-American conventions, if necessary.

Dr. Villalta also drew attention to the response of Paraguay, which described the influence of the Mexican Convention in adopting the recent law on private international law.

In her analysis of the replies of academicians, the Rapporteur verified that the vast majority noted the advanced nature of the Mexican Convention for its time and the fact that its principles were consistent with the current commercial context. She also noted that some professors indicated a certain apprehension regarding the scope of the principle of freedom of choice. With regard to the Mexican Convention, some experts expressed favorable opinions, others proposed a model law, or that the Convention be used as a reference for drawing up a guide on principles of private international law. On this point, some academicians suggested that a conference be held using the principles in CIDIPs to develop model laws. In addition, the Rapporteur noted that there was no participation from Central American experts.

In concluding her presentation, the Rapporteur expressed support for the initiatives and suggestions of experts in favor of disseminating and promoting the development of private international law in the region.

Dr. Pichardo reported that the Government of the Dominican Republic had answered the *questionnaire* and that he would check to see why the Rapporteur had not received it.

Dr. Stewart mentioned that it was his understanding that there was substantive support for the Mexican Convention, but there was no interest in developing a model law or proposing amendments to the Convention. Thus, in his opinion, the next step in this case should be a meeting of experts to work on preparing a guide of principles on the subject.

Dr. Salinas, in light of the explanations given, noted that there was not a great deal of interest in ratifying the Convention. He then stated his agreement with Dr. Stewart's proposal to hold a meeting of experts with broad representation to prepare a guide on principles.

Dr. Hernández García noted that what had happened with the Mexico Convention exemplified a pattern with international organizations, in which a theme is developed and an instrument designed, in the hope of having an impact on development of the theme domestically. In this context, he pointed out that the Mexico Convention had attained its objective and that it had affected and influenced internal systems in a variety of ways, as stated by the Rapporteur. He proposed that consideration be given to working on an interpretative guide, and suggested that the Rapporteur, with the support of the Secretariat, prepare a draft guide for evaluation by the members.

Dr. Moreno remarked on how this topic had evolved since the 1990's, with the development of arbitration as a means for settlement of disputes, and the influence of the basic principles of the Mexican Convention, which are already part of the domestic legal systems in a number of countries in the Americas. In this regard, he advocated accepting the same principles of arbitration in areas of natural justice. He pointed out that some of the States of the region were already in the process of amending their laws in the field of private international law, and so he considered that it would be highly relevant to prepare a guide to benefit many.

Dr. Correa expressed her agreement with the suggestion of preparing a guide.

Dr. Villalta said that in beginning her work as Rapporteur, she had not given thought to the objective of influencing ratification of the Mexican Convention, but had been focused instead on promoting the pool of inter-American conventions in private international law. Thus, she suggested that in addition to preparing a guide, this space should be used to promote the entire system of norms governing private international law.

Dr. Negro indicated that the technical secretariat was available to support the work of the Committee in preparing a guide. He said that this is an ideal example of a case where the success of a

Convention is not reflected in the number of ratifications. Conventions can be influential in other ways, such as by ensuring that their principles are incorporated into domestic legal systems. He further noted that many of the obstacles to ratification possibly did not have to do with the content of the Convention and that it may ultimately be possible to use its principles, together with the principles derived from the Hague Conference on the subject.

In concluding this discussion, both Dr. Villalta and Dr. Moreno referred to problems in the translation of the Mexico Convention that affected its ratification.

Members agreed that the next step would be to have the Rapporteurs draft a guide on principles, to be presented at the next session, with the support of the Department of International Law as the technical secretariat of the Committee. It was also agreed to designate Dr. Moreno as Co-rapporteur on this topic.

It should be noted that in the afternoon of Monday April 4, 2016, the Inter-American Juridical Committee organized a "Round Table on Private International Law" that was held with the attendance of the following accomplished professors and practitioners in the field, among others: Cristián Giménez Corte, Boris Kozolchyk, Timothy Lemay, Kathryn Sabo, S.I. (Stacie) Strong, Peter D. Trooboff, and John Kim. Additionally, two former members of the Inter-American Juridical Committee were also present: Drs. Antonio Fidel Pérez and Carlos M. Vázquez.

The meeting focused on the future of private international law and specific issues in this field of law. The invited guests voiced their vision of how the Committee could react to the new challenges of private international law, particularly the need for more flexible laws and greater implementation of existing laws. As for specific issues, they proposed several different topics for the Committee, including consumer protection and use and custom in private international law. The written report of the roundtable is registered as document DDI/doc. 3/16.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Villalta recalled the background of discussions on the issue of international contracts and informed the Committee on progress towards a guide on international contracts that was being drafted with Dr. Moreno. This guide was to be based on the main principles of the Mexico Convention on the Law Applicable to International Contracts, on the Hague Principles on the Choice of Law in International Commercial Contracts and the most important international instruments in this field. She also reported that the responses to the *questionnaire* sent to the States were also used for the drafting of the Guide. In addition, there had been surveys carried out with professors and jurists of the Hemisphere who were pleased to support the initiative of the Committee. Dr. Moreno, for his part, stated that he could affirm the merits of the Mexico Convention, despite its low number of ratifications. The lack of ratification of the Convention was due, in his opinion, to three causes:

- The juridical community in the year 1994 was not prepared to receive a document of that nature.
- Certain formulations were a compromise text that had resulted from diplomatic discussions, such as, for example, articles 9 and 10.
- Some of the terms had not been effectively translated into English.

In this context, the Rapporteurs proposed that the Committee adopt a set of guiding principles whose purpose would be similar to that of the Convention, considering that the guide could be used as a model for domestic legislation and an academic reference regarding the solutions proposed in the Mexico Convention, among others. In addition, the guide would facilitate interpretation and understanding of complex concepts such as party autonomy and therefore would be useful for judges and arbitrators to use in their decision-making processes. This could have an impact and lead to the ratification of the Convention and serve as a model to facilitate the amendment of national laws and expand the scope of possible solutions, including the proposals of the Hague principles.

The Chairman congratulated the Rapporteurs for the explanation on the reasons for the lack of success of the Mexico Convention. Similarly, he expressed his support for their perspectives on the proposed guide.

Dr. Salinas questioned the added value and relevance of a guide in the light of the principles of The Hague, which is considered to be an authority on the subject, and for that reason he considered that a model law would be more advisable.

Dr. Villalta said that the added value of the guide would be to enhance the inter-American legal system by incorporation of more modern solutions into national systems. She recalled that during the 88th Session, in Washington, the Plenary had decided to support the Rapporteurs in the preparation of a guide, which was the reason why they did not consider it reasonable to suggest a model law.

Dr. Moreno referred to his experience in UNCITRAL where he had worked on a legislative guide, a forum in which there were also doubts about the nature of such an instrument. However, there is agreement that those solutions must be useful for individuals and do not bind States to specific systems established in treaties, therefore, participants should have access to them.

The proposed guide would contain the most modern solutions worldwide for international contracts, in light of the various international instruments, including the Mexico Convention and is expected to serve the legislator, the judge, and even the arbitrator.

Dr. Mata Prates noted there was a norm inflation in the Americas, particularly in Latin America. Therefore, he considered of great value a "soft law" proposal by the Committee to be used by jurists to help interpret and apply existing norms. In his view, drafting a guide seemed to be a good methodology.

The Chairman recalled that among the documents distributed there was one on the progress of the Rapporteurs that included a selection of the norms that would be useful for the proposed guide. Rapporteurs would also need members to analyze the possible solutions presented. As no member had objected to the solutions offered, he asked the Rapporteurs about the elements that would be needed to transform the project into a guide.

Dr. Moreno said that it would be important to ensure that the material presented is the best that the Committee can draft.

The Chairman asked the Rapporteurs if they had received Dr. Stewart´s remarks on the document and Dr. Moreno explained that Dr. Stewart had contributed to it.

Dr. Salinas required time to discuss the topic with specialists in private international law in his country before sending his comments.

Dr. Hernández García proposed the theme be examined together with the legal counsels in order to have their opinions and direct feedback.

The Chairman agreed with Dr. Hernández Garcia’s proposal and suggested distributing a copy of the draft presented by the Rapporteurs to the legal advisors of the Ministries of Foreign Affairs.

At the end of the discussion, the plenary agreed that the Rapporteurs would submit a document at the next meeting.

On October 7, 2016, the Inter-American Juridical Committee in cooperation with the Department of International Law, the American Association of Private International Law (ASADIP in its Spanish Acronym) and the University of the State of Rio de Janeiro (UERJ in its Portuguese Acronym) organized a round table on private international law which gave rise to an examination of three major topics: the work of the OAS in codifying and promoting private international law; international consumer protection; and international contracts.

The plenary of the Committee participated in this event, which featured presentations by accomplished national and foreign professors, members of the Committee and officials from the Department of International Law, who were joined by about one hundred students. Among the invited

Professors were included the following: Mercedes Albornoz (Center for Economic Research and Teaching - CIDE); Claudia Lima Marques (Federal University of Rio Grande do Sul - UFRGS); Juan José Cerdeira (University of Buenos Aires); Verónica Sandler (University of Buenos Aires); Marilda Rosado (UERJ); Raphael Vasconcelos (UERJ); Nádia de Araújo (Pontifical Catholic University of Rio de Janeiro). Lauro Gama (Pontifical Catholic University of Rio de Janeiro); and Luciana Klein (Pontifical Catholic University of Campinas).

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), both Rapporteurs, Drs. Villalta and Moreno, shared their views on the issue. Dr. Moreno began with a brief introductory background in which he explained that in the latter half of the last century, European States had started to regulate for the first time the matter of contract law, which led to the 1980 Rome Convention. In the Americas, efforts had been underway starting with the Bustamante Code and the Montevideo Code and codification in the field of private international law (PIL) was possible on many aspects but there were still serious differences. In the Americas, the Mexico Convention (MC) of 1994 had a similar importance as the Rome Convention had had earlier in Europe. It had solutions that were better in some aspects than the Rome Convention. However, the MC has had only 2 ratifications – Mexico and Venezuela. More recently, Paraguay had incorporated it into its domestic law, so in a way, that was the 3rd state to have "adopted" the MC.Although the MC is a high quality instrument, it has been the subject of intense debates. Since its adoption in1994, there have been significant and dramatic developments, especially as the arbitration field developed and with growth of international trade. As of 2004, The Hague Conference on PIL had begun preparations for a universal document on contracts. In doing so, the Hague highlighted two areas: some areas of Africa and the Americas. We had counted on the MC, but remained stuck with civil law codes, etcThe Hague concluded that development of (another) convention would be impossible so it adapted a methodology from UNIDROIT to prepare a set of "draft principles" that dealt with applicable law. The purpose of The Hague Principles (HP) is to drive legislators in their efforts to modernize the rules of contract. These inspired Paraguay to modify its law, which used not only the MC but also the advances of HP to gain the best of both. Dr. Moreno continued on how it came to be that, 22 years after the MC, the Committee decided to draft a guide on the law applicable to international contracts. He explained that, Dr. Villalta, concerned with the low level of ratifications and that the region had not been advancing in this matter, prepared a questionnaire on the topic that was distributed to States and academics. A rich set of responses was received, to which was added opinions that had been requested from select expert members of ASADIP. One of the problems of MC was the weak translation into English; however, as it is a convention, to re-open the document would have been problematic and thus a new treaty would not be feasible. The Committee had also evaluated the possibility of a model law and finally settled on a guide. This would be modern legislation inspired by the MC, but that would include the advances of the last 20 years. Last year, the decision was taken to develop a guide that would not be merely legislative, but also available to a wide body of users, including students, arbitrators, etc.

Dr. Moreno then provided an update of the status of the project. He said that the Department of International Law had prepared an outline of the guide that incorporated the rich responses that had been received from throughout the region. The Rapporteurs have prepared a draft guide that currently numbered 150 pages and even at that length it has tried to summarize in order to be simple and yet complete. He said that guidelines frequently were too complex and understood only by a few experts. His intention is that this guide should be very simple, contain examples, comparisons, and that it could assist in each one of our States. He proposed to finalize a draft first in-house prior to distribution to the Committee. He concluded by expressing the hope that the final work product, after considerable fine tuning, would become what was intended in 1994 but never achieved.

Dr. Villalta elaborated on how the matter had first come to her attention and how the name of the topic was changed to "the law applicable to international contracts." She emphasized that the questionnaires had been forwarded to all OAS member States and she noted that several PIL experts had congratulated the Committee for taking up the topic. She stressed that such a guide was needed for our own region, one that includes the MC, the HP and our own codes, such as those recently adopted,

for example, Argentina in 2015, among others. Many of these recognize the principle of party autonomy.

Dr. Villalta then turned to her report (CJI/doc.525/17) and reviewed the list of aspects common to both the MC and the HP. She explained that these were the elements that would be used in the guide.

Dr. Moreno added that he had worked on the Hague Principles (HP) in the Hague Conference Working Group and then later served as a representative in the political organ that approved the document. In all of these meetings, it was recognized that the MC had been the source.

The Chair opened the floor for discussion.

Dr. Mata acknowledged the purpose was to create a guide of these principles. He concurred that States are not interested in ratification. However, as we must talk about international law, he felt that for some time to come we would have the MC. He said that although there could be hope that the guide would become "common" law among States, he thought that was going too far right now.

Dr. Hollis asked about differences between the HP and the MC as the HP covered commercial contracts whereas the MC applied to all kinds. He asked whether the guide was intended to be limited to commercial contracts. Likewise, he noted that the HP covers contracts with full party autonomy. The MC went further and also addressed contracts in which the parties have not made a choice of law. He asked how that would be addressed in the guide.

Dr. Hernández said that the objective was to standardize rules so that when a company in one state does business with a company in another state, they would be able to work in a harmonious manner. He said that was why there was no point in attempting to promote ratification of the MC as it would not be the way to promote international business. The guide, however, should be precisely that. It should offer the best advice to the recipient for the purpose of finding the most pragmatic formula that would facility this private interchange. In his view, that would be the added value for all who use it.

The Chair stressed the importance of having had the input of experts in PIL. He also emphasized that the Committee should offer products that would be of use. He wished to note that first, this Committee is an advisory body for *both* public and private international law. Secondly, it was significant that the Committee prepare a guide on a topic as important as international contracts. Thirdly, the work product would have to be consistent with the objectives of the Committee. And it was in relation to this latter point where he had some doubt and referred to the relevant OAS Charter provisions regarding the consultive role of the Committee. He asked whether the Committee was going a little bit further than what its objectives would allow. In his view, the guide should have a legislative nature; its objective should be to assist, as Dr. Hernández had said, international trade and commerce. Therefore, he thought it should be a legislative guide addressed to States so that they could modernize their laws. He felt that a work of 150 pages seemed more like a "statement" and suggested a shorter format.

Dr. Moreno responded to the Chair's concerns by explaining that what had been decided last April was a draft guide, which was then presented last October. He felt that if the focus were to be changed at this stage, a lot of the work completed would be lost; however, he acknowledged that it was open for the Committee to so decide.

He has found that many legislators, even professors, do not understand PIL or this complex topic in particular. The purpose of the guide would be to simplify and make this material accessible. He was concerned that legislators could take 25-30 years to modify the law, whereas arbitrators, judges, and many others could really benefit right now from such a guide. What was being created by this document was essentially "soft law" for commercial contracts. He noted that although the current draft was long, it covered a great deal of material; he reiterated that although it was intended to be simple and complete, it could not be both complete and short. He pointed out that such a document could also trigger the legislatures to take action. In1994, the attitude was "don't get involved! The MC is too new, we don't understand it!" Circumstances have changed and such a guide may prompt more ratifications.

He added that it would be necessary to include an explanation that consumer and labor law are outside of the parameters.

In response to Dr. Hollis, he explained that the HP did not cover situations where no choice of law had been made. One of the reasons was because the HP already took 4 years to complete and to also cover lack of choice would have been too ambitious.

In concluding, Dr. Moreno clarified that the idea was not to prepare a statement, but to explain the solutions of the MC, of the HP, and to direct the legislatures and so serve the parties.

Dr. Villalta said the objective was to harmonize the laws in the Americas so that States know how to act in international commercial contracts. She suggested perhaps a document that contained norms followed by comments to explain these norms.

Dr. Correa understood that the guide was intended not *only* to be legislative. In her view, it was to be a legislative guide that was sufficiently explanatory so that it would also be useful to others. She thought the work as conceived was fantastic.

Dr. Hernández mentioned that perhaps the end user could be better determined after the Committee looked at the product. At that point it would be easier to decide if it would be more suited to the legislator, the judge, the parties, etc.

He noted that the MC had started out with good intentions. However, its results offered good reason for political entities to consider whether or not to start the work of codification through a treaty. Here, it was not necessary to go through a treaty and it would have been better to have gone through a soft law instrument. Therefore, this exemplified the need for caution when embarking upon the codification process which requires huge efforts and resources.

Dr. Mata Prates felt that this exchange of ideas had brought the Committee closer to its goal. He noted that this was not work for academia, which had it rules; the Committee has its own and although we could have chosen a model law, we decided on a guide. He thought it would be useful to present a guide because few States have law on the topic and it could be presented under a resolution that was non-binding but with which you could serve your purpose. The CJI could make a significant contribution in a very important area with practical application.

Dr. Moreno responded to the last comment regarding a model law by clarifying that the guide was not intended to go against the MC – we are proud of it. If well interpreted, he said, the MC would solve the core aspects – party autonomy - in part or total, selection in a more narrow sense, etc. What was important, was the contract, so that parties could obtain from it what they had intended. This was what arbitration had achieved so successfully. He said that at national levels, States could ratify the MC or they could rework the MC in combination with the HP. He pointed out that the HP had been immediately useful and gave examples where courts have already used it. His goal was that the guide should become an equally useful document.

The Chair recognized the importance of this work and clarified that his remarks had been intended to highlight the function of the Committee, which is not the same as that of other bodies. He understood this work entailed the MC enriched with the HP and from his perspective, this would be a guide that would assist the legislature and be grounded in facts.

The Rapporteurs were asked to pursue their study and submit a draft of their proposals at the next regular session.

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5. Representative democracy

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Salinas suggested including "Representative Democracy in the Americas" as a new topic for the Committee's agenda, in keeping with talks held with the then OAS Secretary General, Mr. José Miguel Insulza, at the start of said working meetings. The proposal involves a study to

consider the progress achieved by the Organization on this subject matter. Dr. Salinas' initiative was supported by the plenary, and he was appointed the topic Rapporteur.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2015), the Rapporteur, Dr. Hernán Salinas, presented his report titled "Representative Democracy in the Americas: First preliminary report," registered as document CJI/doc.473/15. He pointed out that the report is of a preliminary nature and the purpose thereof is to participate in the implementation of the Inter-American Democratic Charter, based on a suggestion of the Secretary General during his visit to the Committee at the previous meeting in August 2014. He explained that the report is based on two premises: 1) There is no distinction between the principles of the Inter-American Charter and the principle of non-intervention, as it is a fallacious dichotomy; and 2) the topic encompasses both original democracy and comprehensive and substantive democracy.

As for the major challenges posed by the Inter-American Democratic Charter, the Rapporteur highlighted a few challenges of a preventive nature. In this regard, he proposed further empowering the Secretary General through, among other things, the ability to eliminate the consent of the State for the Secretary General to act under Article 110 of the OAS Charter. All of this would enable early warnings or monitoring mechanisms to be put into place. He also mentioned several different proposals, which would include formulating annual reports; general assessments; creating a position of special rapporteur for democracy or a high commissioner; strengthening the support capacity of the Organization; and, preparing a compendium of best practices.

In the view of the Rapporteur, it would be appropriate to institutionalize the mechanism of good offices and more precisely define in what circumstances democracy would be in jeopardy, inasmuch as a lack of precision in the terms fosters subjectivity in decision-making on when the Organization is able to act.

Another challenge pertains to the capacity to activate the Inter-American Democratic Charter and, in particular, the bodies of government that would be in a position to set the established proceedings into motion. A broad interpretation of the reference to "government" could provide for the ability of other branches of government such as the legislative body or the judiciary to do so.

Additionally, he called into question the use of suspension as a punishment provided for in the Inter-American Democratic Charter, and proposed giving broader leeway to attempt other alternatives before resorting to suspension.

Dr. Baena Soares noted that the topic involves ongoing attention by the Organization, which it has been receiving since approval of resolution AG/RES. 1080 (XXI-O/91), "Representative Democracy." He warned, however, that we must proceed with caution. As an introductory comment, he remarked that despite the importance of the political agreement achieved with the Inter-American Democratic Charter, it has a lower hierarchical rank than the OAS Charter.

Prevention is of the essence and it must emanate from within a country, it cannot be imposed through multilateral instruments. There is no specific recipe to defend democracy. The OAS's role in prevention is the support it can offer the States. Prevention is a domestic function of each State and educating new citizens is the way to ensure democracy for the future.

The Chairman agreed that the topic of democracy has consistently been on the Committee's agenda. He also mentioned that the Inter-American Democratic Charter must be analyzed in conjunction with the other instruments in order to have the full picture, including resolutions approved by the Committee.

Dr. Mata Prates supported Dr. Baena Soares' ideas and points. He disagreed with the use of the phrase "partial cession of sovereignty," in view of the fact that sovereignty is never ceded by the State. Another point of concern is the tendency to increase the powers of the Secretary General, because in his view, the OAS Charter strikes the proper balance in this regard and it is unwise to change it. Lastly, he remarked that the subject of early warning depends on how this legal concept is defined, as it is quite a broad concept *a priori*.

Dr. Villalta recalled that the Inter-American Democratic Charter was approved at a specific point in time and that the States had been pressured to work fast in light of the September 11 attacks in 2001.

Dr. Hernández García noted that Article 110 of the OAS Charter already grants implicit powers to the Secretary General as to peace-keeping in the Region and he provided the context of his vision in the context of the impeachment proceedings of President Fernando Lugo of Paraguay. He explained that the Permanent Council did not reach a specific conclusion. However, acting under the implicit powers afforded to him under said Article of the OAS Charter, the Secretary General conducted an *in loco* visit, which gave rise to a compelling report, thus providing for enhanced guarantees to deal with this type of situation.

Dr. Hernán Salinas's comments reflected the opinions of other Members on the need to proceed cautiously and take into consideration other pertinent legal instruments. As for the powers of the Secretary General, he asserted that it is an issue that warrants further clarity and, therefore, he highlighted the different positions expressed during the current theoretical discussions.

When the discussion concluded, the Chairman requested the Rapporteur to take note of the proposals and to present a new version of his document at the next session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2015), Dr. Hernán Salinas, Rapporteur, recalled that in the previous regular session he had presented a preliminary report "Representative Democracy in the Americas: First Preliminary Report" (CJI/doc.473/15) on the status of the topic throughout the Hemisphere. The debate within the Committee made it possible to ascertain that there is no consensus to amend the OAS Charter or the Inter-American Democratic Charter; and that efforts should be focused on preventive aspects.

As a methodology, he reported that we should be comparing these democracy protection norms with those of other systems, such as UNASUR, the Council of Europe and European Union, in addition to conducting a study on how domestic norms have performed.

He mentioned the need for the Technical Secretariat to provide support in order to carry out this study. Particularly, there is a need to learn how the OAS mechanisms work to verify which norms do the best job in the area of prevention and provide the best help at maintaining the democratic structure.

He further suggested thinking about the role of the Secretary General under Article 110 of the OAS Charter and see if it is possible to assign a more active role for him in these matters. Lastly, he proposed to analyze the system of sanctions that is triggered when disruptions occur to the democratic order.

Dr. Baena Soares noted that the best way to prevent and avoid such disruptions to the democratic order is to enable citizens to express in a timely fashion their disagreement with the system or their situation. Consequently, the study must include topics of domestic order and he suggested reviewing the institutional mechanisms to prevent assaults on democratic order set forth in the Constitutions of the States.

Dr. Moreno Guerra noted that the topic is related to how easy it is for citizens to demonstrate their disagreement with the system or their situation. He believed that speaking about representative democracy is a pleonasm. He also urged the Rapporteur to examine in his study how participatory democracy is addressed. He noted that today democracy is synonymous with voting. However, we must find a space for the common citizen to be able to participate. He recalled that historically the original options in Latin America were either monarchy or presidentialism.

He mentioned that the will of the people must also be able to revoke the term of a President, because those who are eligible to choose a president must also be eligible to recall him or her. Accordingly, we should not speak of disruption of democratic order, when presidents are recalled from office.

He suggested to the Rapporteur to include parameters to review whether a government is democratic and how to maintain or recall the president. He indicated that the topic cannot be limited to the legal authority of the Secretary General.

Dr. Salinas clarified that the mandate is limited to implementation of the Inter-American Democratic Charter. He stressed that the Charter is not only linked to the topic of origin, but also to the exercise of democracy. He recalled that Article 3 of the Inter-American Democratic Charter contains certain elements that make it possible to consider whether a country is truly democratic.

Lastly, the Rapporteur deemed it important to establish that preventive measures must serve to maintain democratic institutions.

The Vice Chairman thanked the Rapporteur in advance for the report of the Rapporteurship that he will present at the next session, noting that the Democratic Charter sets forth the minimum structure required for a State to be regarded as democratic. He mentioned that the Democratic Charter is an important instrument, but it does not have as high a rank as the OAS Charter. As to the comparative methodology, he recalled that Inter-American history and doctrine should be taken into account on the topic.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), the Rapporteur, Dr. Salinas, presented his second report on representative democracy (document CJI/doc. 501/16). In his verbal presentation, he commented on his preliminary report, which had been presented during the 86th Regular Session in March 2015, and contains a descriptive analysis of the practice as it related to the Inter-American Democratic Charter, bearing in mind certain preponderant elements such as non-intervention, the validity of the Charter's mechanisms (without amendment or reform of the instrument), and the principle of integral protection. Additionally, he mentioned the two phases of the mechanism, on the one hand, preventive, and on the other hand sanctionatory.

The Rapporteur then explained that this second report sought to address the preventive mechanisms via the principles set forth in Articles 17 and 18 of the Inter-American Democratic Charter. He further addressed the prerogatives of the Secretary General to act preventively and avert a rupture in democratic order pursuant Article 110 of the OAS Charter incorporated through the Cartagena Protocol of 1995. At the same time, Dr. Salinas confirmed that there should be no confusion regarding the norms, but that the challenge lay in determining the scope of the Secretary General's actions. Accordingly, he proposed looking for tools that could be provided to the Secretary General in this area.

Dr. Salinas discussed two items: (1) Early warning mechanisms; and (2) follow-up mechanisms on democratic order in the region. For these mechanisms to be able to allow for a framework of action for the Secretary General, a unit could be created to compile and receive information. Within this framework there could also be ad hoc rapporteurs to encourage the upholding of democratic order. In fact, he discouraged the creation of independent structures as they could pose obstacles to the actions of the Secretary General or operate according to different visions. One alternative could be the adoption of a peer-review mechanism, like that of United Nations Human Rights Council.

In conclusion, Dr. Salinas observed that while sufficient mechanisms existed in the framework of the Organization's functions, tools also had to be created for use by the Secretary General. He wrapped up by proposing a third report that would seek to analyze sanctioning and non-preventive mechanisms.

Dr. Arrighi indicated the Inter-American Juridical Committee's reports were of absolute importance given that they served as the basis for advising OAS organs when it came to defending democratic order in the countries of the region. At the same time, he stressed the importance of the base texts as well and noted that the solution to some of the difficulties might be found in existing norms, without having to seek out solutions in the Inter-American Democratic Charter alone. There were a series of norms about democracy adopted in 1985, in addition to a provision of the OAS Charter

- Article 2(b) - which stipulated that one of the purposes of the OAS was to promote and consolidate representative democracy. These instruments could help to address some of the gaps in the existing body of rules to defend democratic order. Dr. Arrighi pointed out that this latter provision was the one that made implementation of the electoral observation missions possible. In this regard, if an instrument declared something to be a function of the Organization, this would include all organs thereof, equally including the General Secretariat. Accordingly, the Secretary General would be able to work on those topics.

Dr. Arrighi further referred to another important instrument in this area - Resolution 1080 -, which contained broader language in that it empowered the General Assembly to take whatever measures it deemed appropriate in accordance with international law. In the case of Haiti, this made it possible to continue recognition of the government in exile as well as efforts, together with the United Nations, to implement progressive measures for the return of democratic order.

The Democratic Charter limits the possibilities for action of the Organization's organs, leaving such responsibility to the governments given that they are the ones charged with authorizing any actions decided. Moreover, all decisions fall to the General Assembly or Permanent Council, in other words, to the representatives of the governments.

Regarding electoral missions, requests had to be made by governments and by means of written agreements. Thus, the obstacles or restrictions lay precisely there, in the need for government involvement.

In his opinion, Resolution 1080 follows a more subtle logic than that of the Democratic Charter, where it is all or nothing, with no other options—where a rupture in order occurs, the State is the one left out. There are no nuances; it is not possible to negotiate with anyone. In the case of Honduras, for example, all State organs were excluded from the negotiation process; this, in contrast with the case of Haiti, where the exiled government continued to enjoy recognition and was able to take part in the negotiations.

The second problem lies in the fact that this type of blanket clauses, namely "all or nothing," had been taken up again by other regional bodies like MERCOSUR, UNASUR, the Ibero-American union, CELAC, etc. This distinction was seen in the case of Paraguay, where there was tension between the OAS and the positions of UNASUR and MERCOSUR.

Dr. Hernández García suggested that discussion on the topic be divided into two parts: (1) The role of the Secretary General (his express and inherent powers); and (2) the actors, subjects of collective measures.

As to the first point, Dr. Hernández García noted that it would be important to learn what limits legal, or in its absence then political, were imposed to the Secretary General acting in defense of representative democracy. Perhaps the Secretary General's framework for action in electoral missions could serve to verify such limits. He cited the fact that electoral missions were firstly an initiative of Secretary General Baena Soares, which were followed by a resolution adopted by the General Assembly, underling the fact that a Secretary General's initiative ended up being regulated by the most senior organ of the Organization. He noted that the resolution established two limits: that the resolution established two limits: First, it expressed the will of the States (they had to consent to electoral missions); and then, the limits imposed by finances—everything had to be done through voluntary contributions. He observed how important the authority inherent to the Secretary General was, given that the General Secretariat is an organ of the Organization. Nevertheless, it should be shown the extent to which the Secretary General is able to discharge his executive functions without limitations.

For its part, the second topic refers to the role played by the definition of each State organ. Dr. Hernández García agreed with Dr. Arrighi about the fact that the Democratic Charter was addressed to governments as both active and passive subjects. Additionally, once a breakdown in democratic order occurred, representation before the Organization was barred. In this sense, it was worth wondering whether the Democratic Charter was directed at States as a whole, wherein the executive branch acted

as representative to the Organization. Here was where the question posed by the Secretary General regarding a definition for the term "government" in the Democratic Charter took on renewed significance. He suggested that the provisions of the Charter needed to be explained further and that a determination had to be made as to whether this was a weakness of the Charter or if it was simply the best that could be managed as a political agreement.

Dr. Correa alluded to the prerogatives of the Secretary General with regard to electoral observations in connection with a Member State and recalled the task entrusted to them by Secretary General Almagro with respect to determining the scope of Article 20 of the Inter-American Democratic Charter. Her understanding was that the provisions of the Democratic Charter were restrictive in nature. It is enough to read Article 20 which limits the authority of the Secretary General to the authorization of the States. The Democratic Charter's vision did not appear to provide an opportunity for broader development of the powers of the Secretary General. In addition, the Inter-American Commission and Court could play a role in cases of human rights violations. In this context, the functions of the Secretary General had to be examined in terms of the body of rules that make up the Organization and not just the Inter-American Democratic Charter.

Similarly, Dr. Arrighi agreed with Dr. Hernández García with respect to the consequences of regular electoral missions. When Secretary General Baena Soares began the electoral missions, the States cut funding. He observed that every year the States seemed surprised that such norm existed, but thus far, they had never amended it.

In 2005, the subject of early warnings was proposed and the General Assembly stated that these would constitute interference in domestic affairs and therefore suggested that this matter be treated with great caution.

As to the notions of State and of government, Dr. Arrighi recalled that when it came to imposing sanctions, the entity suspended is the government, as in the cases of the TIAR (Inter-American Treaty of Reciprocal Assistance) and Cuba. It was the same as what was understood with Resolution 1080. In the Democratic Charter the idea was to be more extreme, and as was evident in the case of Honduras, those who ended up suffering were students who had been awarded scholarships for the Rio Course who could not attend the Course and the opposition which was unable to take its complaints to the OAS, etc. No dialogue was permitted with anyone.

What is concerning is the notion that the Democratic Charter trumped all other norms; as is the idea that it prevails over the OAS Charter. The Democratic Charter is a General Assembly resolution and not a treaty.

The Vice-Chairman noted that many of the matters debated here were directly linked to requests by the Secretary General and suggested that the rapporteur take into account the observations made by the members.

Dr. Salinas thanked everyone for their comments, noting his agreement with Dr. Arrighi with respect to the sphere of action the OAS Charter granted to the Secretary General and that at no time did the Democratic Charter override the OAS Charter, which contained broader authority. He likewise agreed with Dr. Hernández García that the limitations were more political than legal in nature - though they might have legal aspects - and thus, to find them, verification of the practice had to be done. Accordingly, the Juridical Committee should propose realistic solutions or solutions with certain political feasibility. Lastly, he announced that the next report would address the issues raised by the Secretary General.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Rapporteur Dr. Salinas, presented his new report, (document CJI/doc.506/16), which aims to facilitate understanding and clarify requirements for the application of the preventive measures of Chapter IV of the Inter-American Democratic Charter.

The report confirms the existence of privileges of the Secretary General to act according to the Inter-American Democratic Charter, and, in this sense, suggests tools for action, provided there is the

necessary political will. In this regard, the Rapporteur proposed two types of tools: one of them involving immediate action and the other referring to follow-up activities (also embodying a preventive role).

In particular, he suggested creating a unit within the General Secretariat to deal with early warning mechanisms to gather information and provide access to the various sectors of the countries (different State powers and civil society organizations), thus creating a feedback mechanism to facilitate determination of actions to be conducted by political bodies. The early warning system would then work under the supervision of the Secretary General.

In addition, he proposed inter-State reporting allowing peer assessments in order to facilitate monitoring the situation of democracy in the Hemisphere. In all cases, these mechanisms would provide information to all sectors of the state and access to civil society to the system of protection of representative democracy.

In the second part, the report analyzes the relevance of having a definition of the situations in which the Democratic Charter can be activated, such as in the case of threats, disruption and breakdown of democracy. The need of having rigid definitions that could limit the application of the Democratic Charter was dismissed.

Then the report refers to the need to establish criteria or guidelines on essential elements and fundamental components of the exercise of democracy, as set out in Articles 3 and 4 of the Charter, starting with the practices of the Organization and the proposals of authors. Practice indicates that the action established in article 20 is essential for privileging the diplomatic action prior to any penalty. Criteria are established in relation to Articles 18, 20 and 21 of the Democratic Charter. The conclusions include examples that help to determine each of the situations, having as a standard the degree of involvement articles 3 and 4 of the Democratic Charter. While each situation should require a case study, these criteria could help bodies to make decisions.

Dr. Baena Soares referred to the difficult balance between prevention and intervention in the domestic affairs of States. He dismissed the idea of “an early warning system”, the first difficulty being that of defining the notion of warning. As for periodic reports, he stated that this idea contains interventionist elements. Finally, he noted the difficulties imposed on the international community by *inter pares* reports, as this would imply a risky debating exercise.

Dr. Carlos Mata commented that the title of the document should reflect its contents, which refers to the powers of the Secretary General. With regard to content, the proposals presented in the second part do not suggest amendments to the Democratic Charter, and therefore it would appear that the contribution only refers to the interpretation of the Charter. As regards the reference to "impeachment coups” (which in Uruguay are called political trials) should be clarified what is meant by it. At the end of the conclusions, one should not "insinuate" but rather propose a criterion because the question must be seen as a contribution to the Organization. If the question involves the creation of a new body within the General Secretariat, further explanations should be given, taking into consideration the principle of non-intervention. He did not consider relevant the creation of an organ based on the justification given. At the OAS, it should be careful when creating an organ with the proposed duties. Finally, he said it was important to emphasize the role of the Committee in providing added value to the OAS activities.

Dr. Villalta requested clarification in relation to the description presented at the final section regarding the breakup of the democratic order, as it was not clear if the circumstances mentioned explain such a breakup by themselves.

The Rapporteur, Dr. Salinas, said that regarding the distinction between prevention and intervention, this could be explained by the juridical duty of the States in favor of human rights and of representative democracy. The collective action of the Organization within the juridical framework in the Democratic Charter is not an intervention, and therefore the establishment of tools and mechanisms of prevention does not imply that there is intervention, because at the end, the political organs will act,

in view of the information that can be remitted by these tools of the Organization. There is a fine line here, but the Organization has the powers to determine class action. The Secretary General should be well informed to submit a theme to the attention of the political organs. The *inter pares* action is a mechanism of technical information that is not aiming to issue political criticism. In this respect the Rapporteur inquired why a distinction is being made between democracy and human rights, and if information is already accepted with reference to promotion of human rights, why is it opposed to start-up reports on democracy?

As regards the title of the report, he requested not to limit it to the powers of the Secretary General, because the report seeks to strengthen implementing the Charter, and the mechanisms of Chapter IV. The preventive action must be reinforced, without amending the instrument, improving the criteria of the situations allowing enforcement of the instrument.

As for political judgments, the report refers to those cases in which the Constitution or the procedures determined by the law are not respected, as explained in footnote 57. With relation to the description of Article 21, the Rapporteur verified a massive infringement of human rights that implies giving place to a "rupture of the democratic order."

Dr. Baena Soares alluded to the interventionist demonstration in the Dominican Republic in the 60's - last century - and asked to not create new ghosts.

The Chairman observed that the observations made deserve further reflections, both by the rest of the members and the Rapporteur, about the final objective of the work and the direction that he should focus on. In this respect, he consulted with the Rapporteur.

Dr. Salinas confirmed the need for a larger reflection from all the Committee members in view of conceptual differences. He also observed that the membership renewal next year will have the effect on the continuation of the theme, for which it would be important to pursue this discussion and define the work objective. He proposed preparing a new synthesis of the work carried out to improve understanding among new members.

The Chairman appreciated that there were core differences among Members beyond personal preferences. For this reason he suggested not to force a decision from the Committee, but instead to allow reflection considering the elements on the table, while recalling importance of submitting a product that would be useful to the General Assembly and agreed upon by all. He asked the Rapporteur to present a report with the background information on this subject.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur, Dr. Hernán Salinas, presented his report to the Committee based on his submitted document (CJI/doc.524/17). He recalled that the subject had not come from an OAS GA mandate nor of the Committee's own initiative, but rather, had been taken up at the suggestion of former SG Insulza. He emphasized that the purpose of the study was to strengthen implementation of the Inter-American Democratic Charter (IADC) and more specifically, to find ways to do so without changing the Charters and that could contribute towards improving their mechanisms. He recalled his three previous reports: a) an initial preliminary overview; b) the second had proposed preventive action and c) the third which had further developed those proposals with respect to the improvement of the IADC mechanisms. He recalled that the debate on the 3rd report had revealed some divergent views that warranted further reflection, to which end the within Guide was to be prepared to assist with this matter.

Dr. Salinas then proceeded to introduce the Guide and stressed that the focus was on strengthening the implementation of Chapter IV and the related Articles 3 and 4 on essential elements of democracy.

As to the first item, he observed that sanctions must be the last resort as one must give democracy a chance to work. He noted that Articles 17 and 18 provide the basis for preventative action.

The second aspect was the role of the SG and its effectiveness; in his view Articles 17 & 18 give the SG very weak possibilities. He noted, however, that the IADC was a resolution of the OAS GA based on the Charter of the OAS that on one hand establishes the promotion of representative democracy and on the other, pursuant to Article 110 item 2, grants the SG a role which is essentially political; he is not simply an administrative official. Therefore, the IADC must be read in conjunction with the OAS Charter. He concluded that the SG has the power to act to preventively with specific exceptions.

Dr. Salinas continued with the third section of his report and said that non-intervention was an important principle that must be preserved. He noted that what the OAS Charter would not authorize would be unilateral action by a state or group of States, but multilateral action in defense of representative democracy would be acceptable.

As a fourth point he indicated the need for tools to strengthen these normative powers. He emphasized caution as the mechanisms start from certain assumptions. He pointed out the creation of a special unit for democracy within the OAS Secretariat that might assist the SG to obtain information, something that was not unusual in other areas, such as human rights. He noted such reports as well as those prepared by peers may serve to be of a preventative nature.

The fifth part of the report addressed a practical problem that had been presented by the SG, i.e., the need to establish criteria as to the supposed order under Chapter IV of the IADC of Articles 18, 20 and 21. He suggested relevant criteria derived from the doctrine and practice of the OAS that would help to provide greater legal certainty, less discretion and yet retain sufficient flexibility for applicability as new situations unfold and progress. He concluded his report by stressing that what had to be defended was democracy in its formation but also in its exercise.

Dr. Baena Soares reminded the Committee of his position on the matter as he had expressed during previous meetings. He emphasized that the topic was *representative* democracy and expressed concern over an academic approach that did not take into account those who were represented. He referred to Article 2 of the OAS Charter as to the essential purposes (g) to eradicate poverty… and that was a barrier to the democratic process. He stressed the need, at all levels, for education about democracy of those represented, to ensure that they could choose their own representatives. He said one had to have faith in representative democracy; it was not a prize to be awarded at the end of a process, but rather, an ongoing struggle. He was concerned that attempts at saving democracy may actually result in its death.

Dr. Mata expressed thanks for the new advancements in this complex subject but was uncertain on how the Committee would contribute to the GA by means of this Guide. He appreciated comments made by Dr. Baena Soares but noted that members did not necessarily share the same understanding of representative democracy. He said certain activities may not be due to rupture but rather, different traditions. He referred to the report and noted that as the Guide was intended for *interpretation* of the Charter, the Committee was already entering a difficult area and that no one had so requested. In relation to the suggestion that States "partially ceded their sovereignty" upon signing the OAS Charter and upon unanimous approval of the IADC, he disagreed and said this did not represent any succession of sovereignty. In his view, each State based on its sovereignty granted the international organization certain elements. Along the same line, he said that as to the principle of non-intervention, there had not been any such intervention because nearly all actions have been multilateral.

In reference to the SG report of 2007 and that another branch of the state might not interpret the term "government" in the same way, he said the classical power of the state to give authorization to the OAS flowed from the executive branch and felt this paragraph required better explanation as to why, for example, the judicial powers would be legitimate.

Dr. Mata next stated that the attributions in domestic law were very clear and that it was not the will of States to delegate power to an international organization. The situation was governed by classic international law and this was not the European Union where indeed, States had transferred powers to other entities.

He then turned to the concrete measures proposed in section 5 and expressed his concerns regarding the inability to render more precise the described situations in the abstract, other than to add the possibility of discretion. He suggested that the Committee reconsider the objective of a Guide; given the existence of 1) the OAS Charter, 2) the IADC, and; 3) other resolutions adopted by the OAS on democracy, it was difficult to see what contribution the Guide would offer.

Dr. Hollis said that from his perspective as a law professor, he agreed with Dr. Baena Soares about the importance of education to enable people to better understand representative democracy. At the same time, he saw value in this document. He thought a valuable starting point would be to consider what the SG could do already, absent Committee recommendations (e.g., the SG could already on his own *request*, although not *require*, reports, etc.). He saw this paper to be more about the regulation of the SG than about representative democracy and that the exercise was to objectively examine tools the SG may or may not apply, and thus, it was to consider not only how this might empower the SG but also the risk of giving too much power. He thought it might actually serve to strengthen rule of law by outlining what would be allowed and what would cross the line. He mentioned the concept of "implied powers" as the OAS is an international organization and, as had been mentioned by Dr. Mata, was not akin to the EU. He asked what would constitute violation of the duty of non-intervention, whether it was only States who could violate the duty or also others. He suggested the Rapporteur might wish to compare actions taken by the United Nations under Chapter 7.

In relation to section 5 of the report, Dr. Hollis said that interpretation was what lawyers were called upon to do and that it was important to have the conversation (on Articles 18, 20 and 21). He acknowledged the Committee members might not agree and that there was a risk of "getting it wrong" but that there would be value in assessing what these articles would and would not cover, although there may be disagreement on the "middle ground."

Dr. Hernández shared with the plenary three points. First, in relation to the scope of the document, he felt it important that the Committee should continue to discuss this topic. He noted that at the 10th anniversary of the IADC the topic arose and at the 15th anniversary the request from the SG was made again. In relation to preventive measures, he noted that the OAS worked on the basis of the four pillars but that the real "added value" of the OAS was linked to human rights and democracy.

Secondly, Dr. Hernández made some specific comments on the report. Regarding the mechanism proposed by Peru, he liked it although he did not think it required an amendment to the Charter and that consensus would be required to develop this concept. Regarding the principle of non-intervention and the question as to whether political statements made at a national level would or would not be considered as intervention, his answer would be "no" and that only collective action would be so considered. In relation to section 4, para. 4, he agreed with Dr. Mata insofar as the SG has not only had contact with the executive branch but with others. He found it unclear how to solve Article 18 as to "who" would be understood as the government entity that could call on the OAS. In his view, this could only be the diplomatic representative at the international organization; Art. 18 was about the OAS and its strength as an international organization.

Thirdly, in relation to the future work of the Committee, Dr. Hernández agreed with the comments of Dr. Hollis. The report was an interpretation and there did not have to be consensus, of course it was dependent on how this was to be worded in the final text, but the work would serve the political organs.

Dr. Richard commented that he found it was only logical that information should be able to come from other sources, when it was the government that itself had committed the breach of democracy, at which point the SG would call the attention of the Member State to the situation. This would create pressure on the government concerned and had an effect on democratic principles.

Secondly, Dr. Richard said that in addition to the academic work, it was necessary to take into account the OAS experience in the field. He recounted the experience in Haiti; since the end of the Duvalier regime, there had been several missions from the UN, OAS, and joint mission. He queried why, after all these missions, there had been no real progress. He pondered whether another area of the

OAS might not wish to consider conducting an evaluation of such field efforts and noted that otherwise, more papers produced by the Committee on the subject would be pointless.

Dr. Villalta concurred with the comments made. She agreed that the IADC had gaps and recalled the circumstances under which it had been adopted during the 9/11 crisis. She noted that Article 18 had been greatly debated. She spoke on her experience from El Salvador where there had been conflict between the court and the legislature and when the legislature wanted to call upon the OAS pursuant to the IADC, it was told that the call had to be made by the executive branch. Therefore, she said, there was a need for caution, to strengthen the IADC but also note the gaps and mistakes to avoid its misuse.

Dr. Correa recognized this was serious work, that the proposals went far beyond the Bogota Charter. She agreed there was no supranational organization created. She felt that the proposals made here should not come from the CJI, but rather should consider the role the charter already has. The sanctions that were proposed would require ratification and would have to go the GA to be accepted. She referred to comments made by Dr. Baena Soares to safeguard democracy and wondered how people would see this. She felt this could go against the IADC, Articles 18 19 20. She thought that the Committee could provide some reflection on its content, but would eliminate making proposals as to the powers of the SG. She expressed concern that in this precious work, the proposal could affect the principle of non-intervention, which was so essential to all States.

Dr. Moreno suggested a document that would outline these different positions.

Dr. Salinas replied to the comments by noting that the end result was not yet clear. The topic had been prompted by the former SG and the goal – to strengthen the IADC was clear. He felt that the Committee would have to at least agree about the proposals even if individual members held different positions. Then the GA would see that there had been a debate.He made the following summary:

- As to the role of the Committee, he referred to the OAS Charter and noted it was the progressive development of international law.
- On the point of non-intervention that many members had mentioned, he noted there had been different positions. He pointed out that international law regulates the relations between States, but that the sovereignty of the state had a limit and that limit was curtailed by international law.
- As to unilateral or multilateral action, to illustrate his point, he gave the example of the US and Iraq and said that action had not been multilateral because it did not have the authorization in accordance to Chapter 7 of the UN Charter. He did not agree with the view that the SG has powers but cannot have tools, although clarifying that he respected the other positions that had been presented.
- As to the comments by Dr. Baena Soares regarding the value of education, he agreed it had an essential role, but he pointed out that the purpose of the work by the Committee was to cover the mechanisms, in order to preserve democracy.
- As to the mechanisms, he said these did not work against the SG, because any mechanism that would be created, would have to be limited by the powers of the SG.
- With regard to the meaning of "government" he referred members to previous reports but agreed that he might need to better explain his intention.

In conclusion, Dr. Salinas noted that the debate demonstrated important differences. Some, such as Dr. Correa, considered that any mechanism might constitute a breach of non-intervention and he had to respect that position. He would therefore see how he could advance the discussion to find the minimum common denominator.

Dr. Hernández suggested that in his next report Dr. Salinas might also wish to consider the rights of a state in response to sanctions. He noted that Article 21 mentions suspension, which occurred only once in the case of Honduras, but that the concept was also subject to interpretation. He noted that at the time the OAS did not know what to do and queried whether suspension entailed only that of the

participation of the state in the international organization, or whether it included, for example, suspension of OAS bursaries.

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6. Guide for the application of the principle of conventionality

At the 87th Regular Meeting of the Inter-American Juridical Committee held in Rio de Janeiro in August, 2015, Dr. Ruth Correa Palacio introduced the document "Guide for the Application of the Principle of Conventionality (Preliminary Presentation)", document CJI/doc. 492/15, with a view to its inclusion as a new item on the Committee's agenda.

From the methodological standpoint, she suggested the following steps: send the States a questionnaire to gain insight on the status of the issue from States' point of view; and review decisions adopted by the Inter-American Court of Human Rights and domestic courts.

Dr. Baena Soares expressed concern over the recurring problem of States' lack of response to the Committee's questionnaires.

Dr. Salinas commented on the enforcement of human rights treaties, whose nature precludes their automatic enforcement; he said that there were considerations involving respect for national sovereignty, for example, that have to be taken into account. He noted for the record the fundamental value of that doctrine and recalled the issue of the Protocol of San Salvador and the necessary distinction with respect to its enforcement, given the principle of conventionality. Lastly, he mentioned that the issue of questionnaires was important, but that many States were averse to engage in such exercises. He suggested shortening the *questionnaire*.

Dr. Moreno Guerra congratulated the Rapporteur for starting from the premise that the constitution cannot be above treaties. If a State has constitutional problems with a particular treaty, it should not accede to it. He acknowledged the relevance of the proposed questions, including the references to the conventions on torture and forced disappearance.

Dr. Stewart mentioned that treaty implementation should take into account all OAS Member States. Second, he urged being sensitive to the particular situation of each State. Finally, he mentioned that in the *common law* system international treaties are not directly enforceable but require laws or a written rule to enable their implementation.

Dr. Collot suggested that the comparative law methodology be used in Dr. Correa's study.

Dr. Mata Prates said that the first issue to be discussed concerned the principle of conventionality. That entails considering the significance of provisions contained in international treaties, as well as the implementation of the decisions of the Inter-American Court of Human Rights. The latter necessitates a determination as to whether the *considerando* clauses (preambular paragraphs stating grounds) of a decision impose additional obligations.

Dr. Correa noted that there is nothing ideological about this study; its aim is to examine the status of the matter; moreover, the questions are not designed to analyze the scope of domestic obligations. She also said that she intended to reduce the number of questions and clarify any that have prompted additional queries. She stressed that her study does not cover social and economic rights because their incorporation in her country would require mechanisms other than human rights instruments, owing to their different nature.

Acting as Chair, Dr. Mata Prates noted for the record the agreement of the members and moved to approve the item's inclusion on the agenda of the Inter-American Juridical Committee and designate Dr. Correa as its Rapporteur.

On October 2, 2015, the Secretariat of the Committee, in accordance with the Committee's request, distributed the questionnaire (document CJI/doc.492/15 rev.1) to the Member States of the Organization.

At the 88th Regular Meeting of the Inter-American Juridical Committee held in Washington, D.C., in April, 2016, the Rapporteur presented document (CJI/doc. 500/16) and reviewed the background on the subject.

She explained that the report was divided into two main parts: the first deals with the concept of conventionality control, while the second sets out her conclusions based on the responses of the five States that had answered the questionnaire distributed by the Committee Secretariat (Chile, Colombia, Jamaica, Mexico, and Peru). She mentioned that Guatemala had also answered the questionnaire but its response was not included because it had arrived after she submitted her written report.

With regard to the first part, she highlighted the scope ascribed to the principle by the Inter-American Court of Human Rights based on the following assumptions: either human rights conventions are incorporated into a State's legal system, or convention provisions are observed by that State's judges. She also pointed out that there is a distinction between enforcing convention provisions and the effect that may be accorded to the principle of conventionality.

She noted that conventionality control occurs when a domestic legal provision is rendered ineffective by a treaty-based provision.

She said that conventionality control is usually identified with constitutionality control, since most States in the Americas incorporate treaty-based provisions on human rights into their domestic system of laws at the constitutional level, falling in step with the conventional block. In that context, such rights also enjoy constitutional rank and can be used to interpret, amend or remove lesser legal provisions, or make them unenforceable. She stressed that such issues have to do with the way in which States express their sovereignty and, therefore, should be taken into account in preparing the guide.

Among the responses received thus far, she noted that all of the States that had replied were parties to the American Convention on Human Rights, which was not necessarily to say that they had accepted the jurisdiction of the Court. She further noted that, as a general rule in the States reviewed, lawmakers were not taking steps to incorporate the treaties into their domestic legal systems by assigning them the rank of law, or that of constitutional provision in the case of States that adopt the constitutional block. In this regard, she emphasized that constitutionality control systems have not been an obstacle to conventionality control, regardless of whether the State has adopted consolidated or diffuse constitutionality control. She also indicated that she had found that the enforcement of international standards serves as justification for domestic judgments, and that there was a perceptible intention on the part of States to apply international standards at the domestic level based on criteria established by the Inter-American Court.

By way of a general conclusion, she observed that it is important to have more information with which to prepare the guide. In that connection, she thanked the Committee Secretariat for its efforts to encourage responses from States on the subject and she asked that another reminder be sent out.

Dr. Salinas urged the Rapporteur to address two issues in her report: (1) the effectiveness of human rights laws and their implementation in the domestic system of law; and (2) the interpretation of constitutional provisions in the light of convention norms, and whether or not interpretations by the Inter-American Court of Human Rights should be enforced, taking precedence over constitutional norms. He said that the guide should clarify the issue of conventionality control, not so much from the point of view of compliance with the provisions of treaties, but rather with regard to interpretation of domestic laws in the light of conventions and interpretations by the Inter-American Court of Human Rights.

Dr. Pichardo referred to the positive contribution that a guide would make in terms of facilitating the efforts of States to meet their international obligations.

Dr. Stewart observed that the concept is not very well known in the common law tradition. In that regard he asked the Rapporteur if the principle applies only to those States that have accepted the jurisdiction of the Court and if the principle should be understood as imposing additional obligations;

that is, in the sense of making binding the opinions of interpretative international bodies, such as the United Nations Committee against Torture. In his opinion, States could take the comments of such international bodies into consideration, but not regard them as binding, despite the fact that some members of such committees regard them as compulsory and binding. As he understood the presentation, the doctrine of conventionality control was apparently even stronger and entailed a treaty-based obligation to enforce interpretations by the Inter-American Court of Human Rights.

The Rapporteur said that Dr. Stewart's questions went to the heart of the matter under consideration and were precisely what she sought to verify in her research. In fact, she stated that she had observed in the Inter-American Court's jurisprudence statements that attribute to the "authorized judicial interpreter"—which in the case of the American Convention on Human Rights would be the Court itself—authority to enforce its decisions and interpretations in all States parties to the Convention, whose standards afford the minimum of protection that is needed. She also mentioned certain pronouncements by the Inter-American Court that would appear to establish an enforcement obligation for all OAS Member States, even ones that are not parties to the American Convention, in cases that concern interpretations in relation to the limits and legal effects of *jus cogens*, bearing in mind the *erga omnes* nature of the rights enshrined by this principle.

Dr. Salinas suggested that these obligations be compared with the principle that derives from state sovereignty.

The Rapporteur called upon her fellow members of the Committee to assist the authorities in their respective countries in responding promptly when the Committee Secretariat sends out another reminder about the questionnaire.

At the 89th Regular Meeting of the Inter-American Juridical Committee, held in Rio de Janeiro in October, 2016, the Rapporteur referred to a study carried out by the Inter-American Institute of Human Rights on the subject of conventionality control (Self-training manual for justice operators on enforcement of conventionality control), which has many merits since it explains how the concept evolved in the Inter-American Court of Human Rights.

She also mentioned the importance of receiving States' responses to the questionnaire in order to understand the scope of the principle and the context of its application. She noted that the Committee had only received 10 replies and that the responses from States of some of the members of the Committee were still pending.

She explained that the purpose of the study is to draft a guide to assess the scope of the issue and States' concept of it.

The Chair mentioned that the following year he would give a course on implementation of the judgments of the Inter-American Court at The Hague Academy of International Law, which had led him to investigate the subject. He also said that he was advising on a doctoral thesis precisely on the subject of conventionality control, the conclusions of which found that there are three different postures that States adopt: (1) compliant; (2) opposed – the Court lacks the authority; and (3) uncertain whether in favor or against.

He said that it is not possible to expect uniformity with regard to what the Court imposes.

He urged the Rapporteur to continue her work despite not having received more responses from States. The 10 responses would allow her to start her report on the subject and begin exploring the lay of the land. He suggested that her report at the next meeting cover the reactions of States to the judgments enforced by the Court.

Dr. Salinas noted that the issue of conventionality control is connected with the interpretation of the American Convention. He inquired which States had responded and if they included States parties to the Convention. If so, he agreed with the Chair and asked if it would be possible to have a report for the next meeting.

Dr. Hernández García noted that a guide for the implementation of this principle would be very important for all States. He explained that there is a directive from the Supreme Court of Mexico that was mandatory for the country's courts and indicated that all courts must judge based on the *pro homine* principle. He said that the challenge for the Rapporteur is to determine the scope of international human rights law. The directive is very broad as it implies the principle of *ex officio* application in addition to the need to rely on the standards underpinning all the court's jurisprudence, which seems excessive. Although the State is bound and the judiciary is part of the State, the Mexican State should not take part in the development of standards in which it has not played a role. He said that a collegial discussion of the topic could allow the Committee to adopt conclusions. Finally, he said that he had attended several seminars in which many experts confessed not to understand the foundations of the principle, particularly those from countries of an Anglo-Saxon legal persuasion. Therefore, a guide would provide useful clarification.

Dr. Mata Prates acknowledged the complexity of the issue and agreed with the opinion of the other members in favor of developing a guide, given its usefulness. He mentioned having attended a seminar on the subject in Uruguay, but from the perspective of constitutional law. In that context, a multitude of opinions were put forward on the subject. For that reason, he said that it was well-nigh impossible to set out a single position on the part of States, since the response was closely bound up with the jurisprudence of each country. Hence, the vital importance of Dr. Correa's work for explaining the various interpretations of the concept of conventionality control.

Dr. Villalta mentioned that protection standards should be sought, not only in the American Convention, but also in other human rights treaties. She recalled the Court's advisory opinion in the Avena case, in which it found that the rights to consular protection contained in the 1963 Vienna Convention had the character of human rights and, therefore, fell under the jurisdiction of the inter-American system.

The Rapporteur emphasized that the Court had decided that the rationale for its decisions should be used to interpret treaty provisions in justifying decisions at the domestic level. She reported that the States that had replied to the questionnaire were Argentina, Chile, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay and Peru. In the case of Jamaica, she said that the response noted that Jamaica did not accept the jurisdiction of the Court, despite being a party to the American Convention. Regarding the issue mentioned by Dr. Villalta, she explained that, in part, the study serves to verify all the elements of the principle's scope. The Court, for example, makes the principle of conventionality control binding upon all States simply by virtue of having signed the American Convention. She expressed concern in that regard, given that the judges' background is in domestic law, not treaty law. She said that it is important to have the opinion of non-signatories, or States such as Jamaica that are signatories but are not subject to the jurisdiction of the Court. She agreed with working with the information that had been made available but said that it was very important to have the responses of other States so that a single standard could be advanced, given that this was a self-imposed mandate of the Committee.

Dr. Salinas reiterated that a conceptual definition should be the starting point of the study. He also recommended distinguishing as a separate matter the implementation of the Court's interpretation from the enforceability of treaties in the field of international law.

He considered of the essence to define concepts because if it is to restrict to the Court's interpretation, the report will not be able to provide a complete overview applicable to all States but only the ones subject to the jurisdiction of the Court.

Dr. Hernández García referred to Dr. Correa´s remarks and explained that it was important to have a practical, accessible, and readable document on which they could then offer considerations, which should cover three levels:

1. Link to the jurisdiction of the Court;

2. Link to the regulatory contents of the American Convention; and,

3. Unenforceability of the domestic provision *vis-à-vis* the international rule.

The Chair counseled the Rapporteur on ways to avoid the final report being regarded as an extension of powers that do not belong to the Inter-American Juridical Committee, but rather, to the Inter-American Court.

The Rapporteur replied that as the document was developed it would be necessary to take the precautions to avoid any clash of competencies. However, she said that the objective is to harmonize criteria for applying principles.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur presented her report to the Committee based on her submitted document (CJI/doc.526/17).

Dr. Mata noted first, a limitation in that only 15 States have accepted the jurisdiction of the Court and that therefore this guide would not be applicable to those States that had not ratified the Convention. Secondly, as the response rate to the questionnaire was not very good, of those States that did respond, only 7 have ratified and acknowledge jurisdiction of the Court.

Dr. Mata pointed out that as regards the principle of conventionality, it would be necessary to choose one of the interpretations, i.e., hierarchy of norms. He said that if we were to begin from the perspective of hierarchy, we must bear in mind that this is a constitutional norm and must consider the steps by which a particular State became party to the Convention. A State must express its consent, with approval of the legislative power, and this process is different for each State. For some legal systems, the interpretation of the Convention by the Court should be treated as binding precedent however he said that Uruguay did not come from that tradition. He asked whether the intention was to include only decisions or also interpretations and secondly, whether the intention was to extend this provision only to parties to the Convention or to all States. He was in agreement with item 5 until the second comma and suggested that the clause thereafter be revised to read something like "…and that judges take into account the decisions of the Court."

Dr. Mata continued onto item 7 and said he was in agreement with the mid-section, but not the beginning or end. He was concerned about the way judges interpret law and the reference addressing domestic matters unique to each State, respectively.

Dr. Mata continued onto item 11 and noted that monitoring of the implementation of Court decisions as recommended here is already carried out by the Court itself. After a decision is rendered, the Court is very persistent in its follow-up through meeting with the State, with parties, etc. Therefore, he recommended that this item be reformulated.

Dr. Hollis had several questions about the guidelines, beginning with the scope. He wondered whether the catalog was intended to apply only to States party to the jurisdiction of the Court and noted that if the intention was application to all States, then there would be risks that the guidelines would not align with the domestic laws of some States. As an example, he explained that although the USA accepts *pacta sunt servanda* and the principle that domestic law is no excuse for non-compliance with treaty obligations, the problem arises with "non-self-executing treaties." Implementation of human rights treaties has been left to the legislature which will determine whether the treaty speaks directly or whether new or existing legislation will be required. Under non-self-executing treaties, the domestic judge is not allowed to apply the treaty provisions directly and must apply the domestic law. That approach is different from the one seen in other States.

Dr. Hollis pondered whether the guidelines were intended for monist States that accept international law as predominant or for dualist States that put domestic law above international law. He noted that for dualist States the guidelines would be problematic and referred specifically to item 5 that Court interpretations should be treated as binding and suggested instead language such as "…with due regard to…" He continued to items 6 and 7 and suggested to add an explanation to limit the guidelines to those States that would be able to apply conventionality. However, if the guidelines were intended

for all States, then as formulated they were problematic and would need to be more accommodating for those States with a dualist system.

Dr. Hernández agreed with the point made by both Drs. Mata and Hollis regarding whether or not the guidelines are directed to all States or only the 15 that have accepted the jurisdiction of the Court. He noted that even those 15 States would each have a different interpretation of the principle of conventionality and suggested it would be useful to provide a definition. Furthermore, he compared the title of the document with the title of the annexed guidelines and noted that the scope of the guidelines related more to domestic implementation.

He continued to item 5 in the recommendations and said that in some States, such as Mexico, the interpretations used by the Supreme Court is not limited to those cases where Mexico has been a party, but includes application of all jurisprudence. He said that "requiring" the courts to do this may be a good wish but was not realistic. This was also related to item 9 and he said that such training would require full knowledge by judges of these rulings.

Dr. Hernández concluded by pondering whether the purpose of this work should be to address the intended meaning of the principle of conventionality. He expressed the view that Committee members held different understandings of the concept.

Dr. Baena Soares complemented the Rapporteur for her clarity. He referred to item 10 and considered that training for a parallel group would cause problems. He thought it would be more acceptable if training were to be made available to all.

He also asked the question to whom the guide would be addressed. He assumed it would be only to those States party to the Convention but thought that States not party could also benefit from a guide.

Dr. Villalta thanked the Rapporteur for selection of this topic. She recalled her experiences with courts in El Salvador and noted that in many OAS States, judges were unaware of rulings by the Court or the conventions in force. She highlighted that judicial training was so important.

She agreed with Dr. Mata's comments on items 5, 7 and 11. Regarding item 13, she requested clarification on the creation of an institution, especially given that not all States are parties to the Convention or accepted the jurisdiction of the Court. She suggested as an alternative that the Committee provide recommendations instead of guidelines.

Dr. Moreno congratulated the women on the Committee on International Women's Day. He also expressed his support for a commentary document, considering that based on his experience, private international law guides explain the contained provisions. As to item 5, he reiterated concerns that had been expressed over the hierarchy and suggested that this be explained.

The Chair began by addressing the lack of a definition. One aspect would be less controversial and could be solved by the law of treaties, as all human rights treaties adhere to *pacta sunt servanda*. This implies that States must fulfill their obligations and must in good faith adopt the necessary legal measures that will make it feasible to do so and must eliminate internal obstacles. For those States that are party, the Vienna Convention on the Law of Treaties should be taken into consideration. Secondly, there is a concept in the rulings of the Court regarding the relative effect of the principle under study. If national courts are required to take into account the jurisprudence of the Court, the issue becomes controversial. If those States not party are excluded, then those States that have not accepted jurisdiction are excluded, the scope of application would be reduced even further.

He explained that the principle of conventionality should be seen as a means towards fulfillment of treaties. But if it is perceived as a means to advance jurisprudence, it would be much more difficult. Most States do not consider the rulings of the Court as mandatory. Therefore, in his view, it was necessary to start with a definition as this would give us a path to follow.

The Rapporteur responded to the comments with thanks for a rich contribution. She invited members to recall the discussion with legal advisors as to the importance and currency of this topic.

She reminded the Committee that this was her second report and that discussions on the definition were contained in the first. She reiterated that the report contained what the Court has presented on how the principle of conventionality was to be applied. She thought it was clear that the objective was not simply to apply the Convention, but also as based on the interpretations.

In response to the question of the intended audience, she said it could be divided: the first group is based on a recommendation that all OAS Member States ratify the Convention. Thereafter, based on those that accept, the second group follows.

Thirdly, she explained that reference to the concept that interpretations be treated as binding was only for those States that had accepted the Court's jurisdiction. The paper goes onto the second theory, which would include not only those party to the decision but also those that had accepted the Court's jurisdiction. It is obvious that such differentiation leads to a clear conclusion that the decision is binding only on the parties and those that have accepted jurisdiction. Not only are there binding effects, but the Court is allowed its interpretation. That is the conformity principle of interpretation and is intended to be taken into account by States.

The Rapporteur finished by stating that the purpose was to recommend follow-up for those States that have ratified the Convention and nothing more. She said that in many States - Mexico, Peru, Colombia - judges are talking about conventionality and not only in the higher courts. She agreed with the suggestions to remove the mandatory requirement from item 5 in her report. As to item 10, the intention is that training should be made available for all administrative officials - not only judges – and all who protect human rights and that such training should be on the contents and scope of the Convention and the Court's interpretation. She said this was strongly related to access to justice.

Dr. Villalta suggested, with the support of Dr. Moreno – that the title be changed to "Recommendations" rather than "Guidelines."

Dr. Hernández referred to the citation of the case from Peru (footnote 1 of the report) and asked if this was a principle from a Court decision that had general acceptance. If so, he suggested that there may be variations from state to state. He said it was important to clarify the interpretations and the jurisprudential interpretations as a whole.

Regarding the content of the recommendations, he agreed that the first recommendation was clear and valid – the call to ratification. But similarly, he said, the Committee could only *invite* States to recognize the mandatory jurisdiction of the Court as that is strictly a sovereign decision. From that point, he suggested differentiation between those States party (25) and those that recognize the jurisdiction of the Court (15). This would make the guide much easier to follow.

Dr. Mata endorsed the suggestion by Dr. Hernández to modify the first part in order to look at the different positions regarding the scope of the principle of conventionality. Then the Committee could continue with the recommendations, such as calling for the ratification of the Convention and recognition of the jurisdiction of the Court. In regard to the jurisprudence of the Court, he requested to be cautious considering that constitutional aspects play an important role in the way that each State can internalize decisions. It is important that jurisprudence be understood not only by judges but also the administration.

Dr. Hollis agreed with the first recommendation and said it should form a part of this guide. However, if the remaining paragraphs were intended to apply specifically to the inter-American instruments, the language would need to be more specific because, as worded, the guide would appear to be applicable to all human rights jurisprudence. He said he would leave to the discretion of the Rapporteur whether to include a third section.

Dr. Villalta agreed with the recommendation about traingin as there is generally a lack of knowledge about all human rights instruments – not just the inter-American ones.

The Chair agreed with the point by Dr. Hernández concerning the acceptance by States of the jurisdiction of the Court and that the Committee could only invite and not recommend.

Secondly, he said in-depth study was important for fine tuning the principle of conventionality and its application by human rights courts. He thought this should be discussed, as well as compliance with the rulings (as precedent) of the European Union Court. He thought it also important to cover the sovereignty of States and to refer, for example, to the empowerment of the state with respect to the compatibility with domestic laws. Thus, he felt additional efforts should be made to obtain responses from those States that have not responded, due to the complexity and importance of the topic.

The Chair respectfully asked the Rapporteur prepare a new report for the next session.

On March 30, 2017, the Technical Secretariat sent a reminder to Member States that have not yet responded to the questionnaire.

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7. Online arbitration arising from cross-border consumer transactions

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), Dr. Stewart submitted the document entitled "Private International Law: Consumer Protection", CJI/doc. 498/16, whereby he proposed to add to the Committee's agenda the issue of consumer protection, considering the continued interest that States and private international lawyers have in this issue, as attested in the roundtable held on April 4th, 2016. In this regard, he proposed to revisit the matter in order to make a contribution which may result in an analytical guide, principles or recommendations.

Dr. Moreno supported Dr. Stewart's initiative and stated that there have been major developments on the issue internationally in the last ten years since the proposal of the Convention on Consumer Protection, which was examined at the CIDIP-VII.

Dr. Villalta also supported Dr. Stewart's proposal and suggested working on the preparation of a guide.

Dr. Salinas concurred with respect to the importance of the issue, but opposed deciding on the nature of the final instrument to be drafted at this time without holding further discussions on the issue. He suggested that Dr. Moreno join the project as a Rapporteur, given his specialization in private international law.

Dr. Correa concurred in supporting the inclusion of the issue on the Committee's agenda. Indeed, she noted that several of the issues proposed at the roundtable are related precisely to consumer protection.

Dr. Collot also expressed his interest in participating in the discussion of the issue and in confirming the role of the CARICOM countries.

Dr. Hernández García joined the consensus that was formed with regard to the inclusion of the issue on the agenda for the next session, to be held in October 2016, and supported the appointment of Dr. Moreno as Rapporteur together with Dr. Stewart.

Dr. Moreno stated that he accepted the task of joining the team of Rapporteurs and suggested including Dr. Villalta, who expressed her thanks and her interest in participating as a Rapporteur.

The Vice-Chairman recalled the events of the CIDIP-VII with regard to consumer protection, and therefore agreed that it was advisable to draft a set of guiding principles at this time. Immediately thereafter, the inclusion of the issue on the agenda was approved, as well as the appointment of the four Rapporteurs: Moreno, Villalta, Stewart, and Collot. Dr. Villalta observed that the presence of the four Rapporteurs allows for all of the regions of the Americas to be represented. The Rapporteurs agreed to submit a document in the next session with their views on the matter.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro., October, 2016), Dr. Stewart submitted a new document entitled "Private International Law: Consumer Protection", CJI/doc. 504/16. Dr. Collot on his turn, presented document "Consumer Protection in Caribbean Community Law: Thoughts about The Revised Treaty of Chaguaramas (RTC)", CJI/doc.

508/16. In order to facilitate discussion of the topic, the Committee created a working group during the second week of its session, made up of the four Rapporteurs who, after several meetings, submitted a draft resolution on international consumer protection urging the States to establish mechanisms of international coordination and cooperation, in addition to recognizing the need for consumer protection. This proposal also included a new mandate to continue to address this topic on the Committee's agenda from the standpoint of "online settlement of disputes arising from cross-border consumer transactions." The plenary accepted the resolution unanimously and decided to forward document CJI/RES. 227 (LXXXXIX-O/16) to the Permanent Council.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur, Dr José Moreno, provided a short background to the manner by which the topic arose in the Committee.

Dr. Moreno explained that there is still very little published literature on this complex subject. He said that the majority of States in the Americas have already modernized their legislation on arbitration, courts have clearly accepted the trend and arbitration rulings are well thought of. What is needed now is a legislative change so that consumer relations are also covered. Colombia has developed a law that could serve as a useful model and he suggested that the Committee could advance on this. Now the question becomes whether to develop a model law or suggest reforms.What is urgent are quick and effective solutions. Dr. Moreno's conclusion was that he would have to look at the main areas that need to be considered, to make a connection with consumer protection institutions, to ask UNCITRAL to continue to provide support, to approach the US Federal Trade Commission (FTC) on consumer protection in the USA and to approach Colombia and Brazil for possible use of their law for help to gain the know-how for a product that would be worthwhile.

Dr. Mata responded to footnote 1 in the report in which Uruguay is noted as among the States that had not yet modernized their arbitration legislation. He reported that a draft was underway and expected that either this year or next the bill would be approved.

The Chair said he found the topic very interesting, relevant and meaningful for the region. Regarding protection of consumer rights, he said it was important to consider a range of broad alternatives, which would allow quicker development of a better product. He endorsed the suggestion to gain support from others such as UNCITRAL, etc.

Dr. Correa said this topic was of great importance and linked to the work by Dr. Villalta on international arbitration. She was of the understanding that the option of online arbitration had to have been accepted by the purchaser at the time of the sale and that for logistical reasons this rule has not been followed. She supported the preparation of a draft model law or regulation because this problem was one common to all countries of the world.

Dr. Villalta noted that consumers remain unprotected in their relations and that there is no convention on consumer protection. Thus, this work might serve to protect the weaker party. She noted that we are all consumers and it would be important for consumers to have these mechanisms.

Dr. Moreno observed that the New York Convention on Arbitration has 150 ratifications and is considered the biggest success of commercial law at the international level. Thus, it was good news to hear that Uruguay was drafting a new law.

He cautioned not to promise what could not be delivered and said to keep the product short so that it could be completed in a short amount of time. He said he knew it represented a big challenge, but that with the support of the Committee, it was possible. In fact, Dr. Moreno requested Dr. Villalta if she was willing to work with him as rapporteur and she accepted. Moreover, he requested to modify the title of the topic to the following: "Online arbitration arising from cross-border consumer transactions."

The Chair summarized that Dr. Moreno would complete a future report based on what had been proposed.

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II. COMPLETED TOPICS

1. Immunity of States

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed to the plenary that the Committee work on an instrument addressing the immunity of states in transnational litigation. He pointed out that in 1986 the Committee had presented a draft convention on the immunity of states that did not prosper. He also observed that the United Nations Convention on the Jurisdictional Immunities of States and Their Property (2004) is not in force as yet. Furthermore, he noted that States lacked appropriate legislation. In his explanation, Dr. Stewart described the positive implications that an instrument in that area could have for trade, in addition to providing guidelines for government officials. Dr. Fernando Gómez Mont Urueta proposed that the plenary agree to designate Dr. Carlos Mata Prates as Rapporteur for the subject: the proposal met with the plenary's approval.

At the 82nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2013), the Rapporteur for the topic, Dr. Carlos Mata Prates, explained that his report would be presented to the regular session of Committee in August 2013. He then engaged in a general reflection. He explained that the purpose of the Rapporteurship's work was to restrict it to states and international governmental organizations, which are subject to international law, although he was aware that the element of immunity would pertain to institutions, officials, and places, including embassies or warships. In his presentation he noted that the treatment of acts or deeds attributable to a state cannot be tried by a domestic court of another state.

The Rapporteur expressed appreciation for the proposed *questionnaire* prepared by Dr. David P. Stewart, which was sent to the States. Furthermore, he noted the important role of tribunals, citing the Law of the Sea Tribunal case between Argentina and Ghana, relating to immunity of an Argentinean warship from jurisdiction (immunity derived from the Law of the Sea Convention).

With regard to international organizations, the Rapporteur explained that immunity is conferred by rule as established in headquarters agreements. He also cited a domestic court decision concerning ALADI officials.

The Chairman asked Dr. Stewart to present his *questionnaire*. Dr. Novak urged the Rapporteur to include national practices. Dr. Gélin Imanès Collot proposed that the Rapporteur include in his document references to the aforementioned UN Convention on Jurisdictional Immunities.

Dr. Moreno Guerra proposed that elements on waiving sovereign immunity should be included and should be distinguished from cases in which sovereign immunity is maintained in order to monitor trials involving nationals. The Rapporteur cited cases in which a state by its action loses its immunity or cases in which disputes are taken to arbitration.

Dr. Stewart read his proposed *questionnaire* aloud to the plenary. The Department of International Law circulated that questionnaire to the permanent missions to the OAS, through Note OEA/2.2/26/13 of April 26, 2013.

At the 83rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2013), the Rapporteur was not present and no report was sent for the consideration of the Committee. Regarding the *questionnaire,* Dr. Luis Toro Utillano provided an explanation on the situation of its responses. He stated that so far there had been six responses from the following governments: Bolivia, Colombia, Costa Rica, Mexico, Panama and Dominican Republic. In addition, he consulted the Plenary whether a reminder should be sent to the States that had failed to respond. Dr. Fabián Novak suggested the issuance of a reminder involving all the themes and that the final date for the delivery of the responses could be scheduled for December 15, 2013.

During the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2014), the Rapporteurdecided to bring forward a part of the report he was preparing and

provided some background to the Committee's work on the issue. Citing studies conducted between 1971 and 1983, he explained that his report would build on previous work and would revisit the status of those concepts. An analysis of the replies received, from 10 States altogether, would be included.

He concluded by explaining that based on the ten responses received, none of the States had ratified the UN Convention on Jurisdictional Immunity and that only one had a parliamentary process underway with a view to said ratification.

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2014), the Rapporteur reviewed the background and acknowledged that one more State had responded, for a total of 11 States.

Dr. Novak mentioned that both topics were very broad, so he suggested restricting the subject for the moment to the issue of the immunity of states. He also suggested that perhaps Dr. Stewart could join Dr. Mata Prates.

The Chairman, Dr. Baena Soares, mentioned that the subject of the immunity of international organizations should not be neglected, especially the experience of those states hosting them. Additionally, the Chairman ascertained a consensus among those present to first address the issue of the immunity of states.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2015), the Rapporteur recalled that this subject has been on the Committee's agenda since August 2012 and that his role had been confined to addressing immunity of states, though no new responses to the *questionnaire* have been received from the States.

As a preliminary finding, the Rapporteur noted that a narrow concept of immunity has been established with regard to states. Notwithstanding, he explained that he would still have a methodological question about how to continue with preparing the report, inasmuch as there were insufficient responses to put together an overview of the practices in the Americas, given that only 11 States had responded.

Dr. Hernández García advised the Rapporteur to take into consideration in his study the failure of States in the Region to sign the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and commented on the proceedings before the Federal Senate of Mexico to move toward ratification of the aforementioned Convention. He also confirmed the tendency of courts to resort to international customary practice, inasmuch as domestic law provides no legal basis in this area of law. Regarding practice in Mexico, not many cases of immunity of states have been brought before the courts; while, in contrast, there have been a higher number of cases on immunity of international organizations.

Dr. Salinas suggested integrating the practices of States into a comparison, but using a theoretical basis to explain the status of the subject matter in international law. Additionally, he recommended conducting a comparative analysis of the differences between the 2005 United Nations Convention and the 1983 Draft Inter-American Convention on Jurisdictional Immunity of States, and then carrying out an analysis of actual practices in the States.

Dr. Hernández García suggested creating a legislative guidance on implementation of the United Nations Convention in order to explain the best way to move toward possible ratification of said instrument.

The Rapporteur pointed out that the theoretical issue is not problematic; judges apply customary law, except in the United States where a specific law has been enacted. Therefore, it is essential to know the decisions of national judges on said issues.

During a second meeting devoted to discussion of the topic, the Rapporteur introduced a preliminary report titled "Immunity of States. Preliminary Outline," document CJI/doc.480/15, which includes potential findings and expected outcomes. The report traces over time the development of

immunity of states, how it became relative, and reflects a division between jurisdictional immunity and immunity from execution of judgment.

Dr. Correa suggested including in the Rapporteur's outline a part on responsibility of the State for damages occurring as a result of the aforementioned immunities.

Dr. Salinas asserted that the theoretical framework of said report ought to refer to the draft Inter-American Convention on Jurisdictional Immunity of States, and proposed that the Rapporteur indicate whether or not approval of said Convention should be encouraged or discouraged, based on the findings of his study.

Dr. Moreno Guerra noted that it is not the Committee's mandate to urge States to ratify or not to ratify a Convention. In this regard, the contribution of the Committee is to provide guidance to address said issues, taking into account all stakeholders involved.

The Chairman reiterated the commitment of the Rapporteur to submit a report during the August meeting as a final product.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2015), the Rapporteur provided a summary on the history of the Committee's consideration of the topic, which originally included immunity of international organizations. He submitted the new document (CJI/480/15 rev.1), which mentions the background history of addressing this topic in the universal system (United Nations Convention on Jurisdictional Immunities of States and Their Property - 2005) and in the inter-American system (Draft Inter-American Convention on the Jurisdictional Immunity of States). He affirmed that these Conventions have not come into force in either of the two systems. This is because the United Nations Convention does not meet the required minimum number of ratifications and the draft inter-American Convention has not become an international instrument.

As for the scope of immunity, he believed that the concepts have been viewed narrowly because of a distinction drawn between acts of administration and acts of authority, the latter being covered by immunity, while the former would not be. He emphasized as well that the subject of labor is an exception to jurisdictional immunity.

With regard to the *questionnaires*, he noted that responses have been received from 12States, eight of which reported that they have no specific legislation on this subject matter. All States made reference to standards of customary law pertaining to jurisdictional immunity. Moreover, the concept is confined to commercial activities (*jus gestioni*). The definition of said acts, in most States, is based on a particular judge's own assessment on a case-by-case analysis and not based on any specific statutory definition.

In his report, the Rapporteur expressed his intention to pursue the following courses of action: ascertain the status of the scope of said immunities; clarify the degree of consistency of each case with the Conventions adopted within the UN and the OAS; and, draft recommendations on ratification of one of the two Conventions, in order to determine a way forward (propose amendments to the American Convention, draft guiding principles, etc.).

Dr. Salinas expressed interest in the Committee's ability to add enhanced value and, therefore, the work should not be confined only to legal instruments, but should also include Court decisions and standards of customary law.

Dr. Stewart considered that the work of the Rapporteurship must aim to determine the status of prevailing law in the Hemisphere. It is not the job of the Committee to promote ratification of the Convention, even though it believes it is a worthy document. We must endeavor to produce a more detailed analysis on the situation in countries. If it were to be established that the sphere of international law takes precedence, there should be a way to explain this claim.

Dr. Correa confirmed the deep judicial roots of this topic and believed that efforts could involve narrowing the scope of the exceptions, in addition to providing input on the responsibility of States.

She urged the Secretariat to promote a greater response to the *questionnaires* and the Rapporteur to prepare guidelines.

Dr. Collot posited two levels of immunity (jurisdictional immunity and immunity from execution of judgment), and expressed his interest in implementation of these types of immunity in the proper way and, for this purpose, the immunities must be thoroughly comprehended. Lastly, he mentioned the need to distinguish between immunity and impunity.

The Rapporteur explained that the mandate was to establish the current situation in the Hemisphere. Even though few responses have been submitted, it can be asserted that jurisdictional immunity is clearly governed by customary law on the subject matter, except in the United States, where a very comprehensive national law is in force on the subject matter. This assessment is based on rulings of national courts: national judges do not apply a statute, but rather legal precedents and, hence, the difficulty in providing a response to the questionnaire, which would require an examination of the legal precedents of each country. With regard to Dr. Collot's comment, if the country of origin declines to accept jurisdiction, a connection must be sought to the place where the events took place. Likewise, a distinction must be drawn between jurisdictional immunity and immunity from execution of judgment; the former being governed by a restrictive criterion, while the latter is absolute. Lastly, on the subject of international crimes, it must be taken into account that the Rome Statute does not allow immunity to individuals who are responsible for any of the four crimes over which the International Criminal Court has jurisdiction.

He suggested that the topic be left open in anticipation of further responses from the States.

Dr. Stewart asked for the *questionnaire* to also be sent to experts in those States from which no affirmative response has been received.

The Rapporteur agreed with the suggestion of seeking out experts, who could address the topic.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April 2016), the Rapporteur recalled the agreement reached at the August session of the previous year that a final report would not be adopted due to the insufficient number of responses to the *questionnaire*, and given that the practices of States could not be determined.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October 2016), the Rapporteur stated that during the session held in August 2015, the Committee had suggested to suspend the topic because of the low number of responses received from States. However, according to foreign ministries, this is a daily issue and some judges are beginning to consider that there is a kind of customary law in this regard.

He took up again the discussion held during the previous meeting with representatives of the Ministries of Foreign Affairs. Some legal counsels had suggested drafting a guide with information on practical aspects. He proposed then to reformulate the mandate of the Rapporteurship with the aim of drafting a guide on immunity of jurisdiction and enforcement by the States.

Dr. Salinas highlighted the emphasis stressed on the topic by the legal counsels and the importance of hearing an opinion from the Committee on the practice of States on this issue.

Dr. Hernández García pointed out that this was a perfect opportunity for studying the topic, in view of the interest shown by the legal counsels. However, the responses from States shall not provide the perfect solution in these cases. Without going into the nature of the document, what may be of interest are practical guidelines to be used as a reference. In this regard, he indicated three issues that deserve the attention of the Committee:

1. The issue concerning notices/notification;
2. Immunity from execution;
3. In labor matters to find mechanisms that allow access to justice, because immunity from execution does not mean exclusion from payment.

He proposed preparation of a draft guide by the use of an inverse exercise such that, before delivering it to the political organs, it would be sent to the seven counsels that had met with the Committee, thus being able to approve the final report at the end of the process.

Dr. Baena Soares was in agreement with the idea of working with the information available, and referred to the positive result of the meeting with the counsels that had been held on the previous day. Finally, he urged the Rapporteur to draft a guide in the format of a practical response.

Dr. Correa said it would be appropriate to go beyond a study on the practices of States, as this would be a restriction, taking into consideration that there is a core problem related to the need for respect for international law among judges. The Committee should explain how these limits will be implemented, always respecting the independence of the courts, because in the labor area, for example, restrictions of immunity from execution are not clear enough.

The Chairman said that he was in agreement with the proposal made by Dr. Hernández García about a practical guide. He mentioned a Peruvian example, as people fail to understand immunities of individuals and the reasons for such protection.

Dr. Moreno suggested contacting judges, in the light of the experience of the Department of International Law in the area of judicial training, by means of cooperation agreements involving the OAS and the Committee.

The Chairman informed that for now the discussion refers to an earlier stage, considering that what is been seek is a product and not the way to disseminate it.

Dr. Hernández García commented that nobody would dare to amend the conventions in the sense of an exception to the immunities of jurisdiction. Therefore, it is necessary to support the practical recommendations on the guide on a basis of normative support. He also explained that his intention is to monitor progress in a practical document, based on the decisions of the domestic courts.

He proposed coordinating his work (on immunity of international organizations) together with the work of Dr. Mata Prates (on immunity of states), so that both guides are coherent. He finally noted that many States do not require a law on immunities, as the Convention is enough. In this regard, he is considering drafting a guide containing general principles.

The Chairman then proposed working on a practical instrument including the suggestion made by Dr. Correa and fulfilling the mandate, in all instances, with the responses of those States that have provided one.

Dr. Salinas agreed with Dr. Hernández Garcia´s proposal, but was of the opinion that the report should determine the stage of the question, and after that the guide would be drafted.

Dr. Villalta observed that the meeting held on the previous day with the legal counsels had provided new light and information, and expressed her agreement with Dr. Moreno´s suggestion on the importance of training judges, together with some information about the use of immunities in El Salvador.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur presented his report to the Committee based on his submitted document (CJI/doc.530/17). The Chair opened the floor for discussion.

Dr. Hernández García expressed some concerns related to the scope of the proposal, which was to be immunity of states. However, in para. 5 the scope appeared to be rather broad and would include diplomatic and consular staff, employees or functionaries, ministers, etc. If the scope was to be that broad, this would have consequences regarding which norm would be applicable at a national level in national courts. As per para. 35, the questionnaire responses had indicated that courts enforce customary law. He asked about the Vienna Convention and whether the Rapporteur could share the analysis that had been done in that regard.

The Rapporteur replied that he was considering immunity from jurisdiction in a general sense but that as a priority, the task would be to consider immunity of states. He acknowledged that indeed, for diplomatic and consular staff the Vienna Convention would be applicable. The scope of his work was to encompass only states as the other topic was immunity of international organizations.

The Rapporteur noted that this subject had already been studied extensively and it was an issue that would arise frequently for the legal counsel at foreign ministries. Whether in the litigation of an accident or the breach of a contract for sale of goods, the judge must first decide whether this was the act of management or of a sovereign. He said that although we seek legal certainty, the classification was undetermined and decided on a case by case basis. He noted that the topic had been studied by both the Committee and the UN, but that the draft inter-American Convention had not been adopted, even though it was well prepared and was still a good instrument. He summarized that the Committee could call upon states to its adoption, but that this would not trigger much change because customary law would continue to govern.

Dr. Villalta said that this was a very important topic for courts and legal departments because judges ask for advice on this matter all the time. She found it unfortunate that States have not ratified these conventions.

Dr. Hernández García requested the Rapporteur to add that Mexico has ratified the UN Convention.

The Chair requested that the debate be reflected in the Committee's Annual Report to enable the political bodies to review the results of the work of the Rapporteur. He then declared the topic closed.

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2. Conscious and effective regulation of business in the area of Human Rights

During its XLVI Ordinary Sessions, the General Assembly of the OAS gathered in Santo Domingo, Dominican Republic, in June 2016, adopted a mandate in the area of human rights and business. In this regard, the resolution calls on the Inter-American Juridical Committee as follows:

> To prepare a compilation of good practices, initiatives, legislation, jurisprudence and challenges that may be used as a basis for identifying alternative ways to address the issue, to be considered by the Permanent Council within one year; and to request the organs of the Inter-American human rights system to make contributions and share experiences on the process (document AG/RES. 2887 (XLVI-O/16).

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), the plenary chose Dr. Villalta as Rapporteur of the topic, and she pledged to provide a report within the allotted timeframe in order to submit it for the consideration of the Permanent Council.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the rapporteur, Dr. Elizabeth Villalta, submitted a report to the Committee, document (CJI/doc.522/17) and addressed seven major aspects of the topic: (a) global initiatives, (b) regional initiatives, (c) domestic legislation, (d) case law in the inter-American human rights system, (e) good practices, (and herein she noted that as businesses have gradually embraced the concept of social responsibility, these have emerged in various ways, including corporate codes of conduct). She concluded her report by outlining (f) challenges in addressing this issue and then offered (g) several alternatives. These included: i) coordination of global and regional efforts to support the development of a binding legal instrument; ii) designation by the OAS of a Special Representative on Business and

Human Rights; iii) encouragement of OAS Member States to include Corporate Social Responsibility ("CSR") provisions in their respective domestic legal frameworks and iv) in trade agreements; v) to request that the Inter-American Court of Human Rights issue an Advisory Opinion; vi) dissemination of international standards on business and human rights; and viii) development of National Plans of Action, among others.

Dr. Mata pondered whether "responsibility" was in the traditional sense of the word and whether there was only one social responsibility. If so, this would result in fragmentation. He was concerned with an approach whereby one would start not from the act itself but from whom might commit that act. This would create a complex scenario because if there was to be one set (of responsibility) for the corporation, then it would be necessary to have another for the state and so forth. In his view this would not be positive; if one were to base responsibility on the actor, the result would be fragmentation. He then referred to the mandate given to the Committee and said that in his view, with the report presented by the Rapporteur, the Committee would have complied with its mandate.

Dr. Hollis offered some comments followed by questions. First, he referred to page 5 of the report and noted that adoption of the cited UN Resolution on the elaboration of a legally binding instrument (RE: Ruggie Principles) (A/HRC/RES/26/9) had not been unanimous as the United States of America had voted against. Secondly, he referred to page 8 of the report that contained a summary of relevant US domestic laws. He said that clarification was required due to a recent decision by the US Supreme Court as a result of which the Foreign Corrupt Practices Act would no longer have extraterritorial application. He offered to assist with this clarification.

Dr. Hollis noted that the report contained several instances of language such as "corporations are *required* to respect human rights … *must* protect .." etc. He requested explanations of the use and meaning of such language; although in his own personal capacity he would agree therewith, he questioned whether such statements were intended as a matter of international law or domestic law.

Dr. Hollis agreed that it would be in the interest of the community to have a binding legal instrument on the subject - one of the alternatives that has been suggested in the report (page13) - but he wondered whether such a recommendation would fit within the mandate given to the Committee.

Dr. Correa considered that this theme provided an important source of protection of human rights. She said that is why it would be important to underline decisions by the Commission and the Court that have recognized the responsibility of States, where the acts of individuals have exceeded minimum standards and have breached human rights. She noted that specifically investment treaties should include protection of human rights and collective rights, such as the right to a healthy environment. This could avoid the situation where States continue to pay for the abuses by these multinational companies. Similarly, whenever a trade agreement includes a chapter on investment, it should include clauses aimed at providing minimum standards to protect human rights not only in labor issues but also relating to collective rights.

Dr. Moreno suggested that where the report contained references to public order, this should be supported with illustrative examples. In that regard, he mentioned work that has been undertaken by him in partnership with Dr. Villalta concerning a guide on the law applicable to international contracts. Moreover, he offered to add some of the relevant concepts on responsibility from their draft.

Dr. Hernández agreed with Dr. Mata that the report fulfilled the mandate given to the Committee. In his view, the Committee should consider alternatives that would fall under the inter-American framework and this should be the focus. He noted that Dr. Novak had already prepared a report on the topic that had been advanced by the Committee and suggested that this should be the first recommendation, not as an alternative, but as an action direct from the Committee.

Secondly, he noted that the Court, as part of the inter-American system, has authority to hand down decisions. In that regard, the Court could help to establish general principles that would go a bit further.

Dr. Baena Soares noted the importance in giving a certain hierarchy and emphasized the need to be clear regarding the alternatives; while some responsibilities would be considered "necessary" others would be "convenient." He considered that Drs. Mata, Moreno and Hernández had raised important considerations and presented an ideal that would be difficult to attain.

Dr. Salinas offered a few comments while bearing in mind that the General Assembly request was to prepare a compilation and then to identify alternatives, based on the instruments that had been highlighted in the paper. He invited members to look at the contribution that should be made by the Committee. He also agreed that there would have to be a hierarchy of the instruments presented as some were more relevant than others, all of which would need to be clearly shown.

He reflected that it might be helpful to identify for the General Assembly those human rights under consideration and to explain that a reference to "corporate social responsibility" does not necessarily include all human rights and that human rights do not comprise one large block. He said that protection of some rights would be more urgent and some would be more relevant in relation to CSR. He noted that a discussion of human rights must emphasis the fundamental principles. This, he felt, would assist the General Assembly in its pursuit of this matter.

Dr. Villalta agreed, given the pending deadline as pointed out by the Chair, to incorporate these comments into her report by the end of the week. In response to comments by Dr. Hollis, she explained that in her review of all UN documents in relation to the Ruggie Framework, it had only been the binding instrument that had not been accepted unanimously but that the principles themselves had been agreed upon unanimously. Therefore, she had wanted to introduce the three basic areas of the Ruggie Framework and considered that this could serve as one of the alternatives. With regard to free trade agreements, it would be important to include discussion of business and human rights, as had been pointed out by Dr. Correa. She suggested that the Committee should ask the Court and Commission on whether they have been working in this area and for a consultative opinion as was done, for example, in 2003 in relation to migrant workers.

Dr. Correa referred to paragraph 3 of the mandate given by the General Assembly and suggested that it might not be necessary for the Committee to make such a request because the mandate already sets this forth and it would be for the Court to respond. The Committee might wish to consider language in its recommendation such as "it would be possible for this to be done based on a consultative opinion issued by the Court."

Dr. Mata suggested adding to the proposed guide that is being elaborated by Drs. Villalta and Moreno a reference to this issue, considering that it might be of interest to the General Assembly. In response, the Chairman explained that the guide in matters of contract is undertaken out of the Committee's own initiative and not from the General Assembly mandate. Secondly, he said it would be important to note in the report that this represents the work of the Committee and the earlier work done by Dr. Novak.

Dr. Villalta submitted a new version in response to the comments on her report that had been made by Committee members, and in particular, as follows:

- Comments by Hollis in reference to the UN resolution because although the Ruggie Principles themselves had been unanimously approved, the legal instrument had not.
- Corrections to the summary of US law such that the statute applies only to human rights abuses "…committed in the United States."
- Simplification of the recommendation to support adoption.
- Comments by Dr. Hernández: in response to his request for greater emphasis of the Guiding Principles on CSR prepared by former member Dr. Novak, these have now been included as an Annex. (see page 6, para. before (c))
- Mentioned human rights system and its contribution in particular regarding an opinion concerning the responsibilities of States.

- Inserted a reference to "collective rights" in matters relating to free trade agreeements.

Dr. Correa clarified that her comment related not only to free trade agreements in general but specifically with relation to investment agreements or chapters on investment such that clauses aimed at providing minimum standards to protect human rights would be required.

In response to the Chair's comments, Dr. Villalta noted that the Ruggie Principles have been categorized into three groups. This was already done by the Department of International Law as they have collected all the instruments. She referred to page 14 in relation to companies and specific human rights and said that this is where one can find the hierarchy.

Additionally, Dr. Villalta explained that the resolution would become a critical annex to the report on the topic that would be submitted to the OAS General Assembly. She then reviewed the preamble. In response to a question from Dr. Mata on the meaning of "initiatives" in the first paragraph, she replied that the wording had been taken verbatim from the mandate.

Dr. Mata asked whether it was usual to include the last paragraph that the Committee "remain at the disposal of the political bodies…" to which Dr. Negro replied that this was simply an alert that the Committee was open to further discussion.

The resolution accompanying the report was unanimously approved and it was decided that both documents be delivered to the Permanent Council.

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3. Protection of cultural heritage assets

During its XLVI Ordinary Sessions, the General Assembly of the OAS gathered in Santo During its XLVI Ordinary Sessions, the General Assembly of the OAS gathered in Santo Domingo, Dominican Republic, in June 2016, instructed the Inter-American Juridical Committee as follows:

> To study existing legal instruments, in both the inter-American and the international system, on protection of cultural heritage assets in order to inform the Permanent Council, prior to the forty-seventh regular session, about the current status of existing regulations in this area to bolster the inter-American legal framework in this area AG/RES. 2886 (XLVI-O/16).

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Hernández García offered to serve as Rapporteur and the members promptly accepted. In view of the time constraint of the General Assembly's mandate that required a report be issued within one year, the Technical Secretariat drafted a report called: "Support document on cultural heritage assets – Universal and Regional instruments and Bilateral examples" (DDI/doc.5/16, August 30, 2016) which would assist the work of the Rapporteur. Additionally, the Rapporteur presented a preliminary report on the matter, document (CJI/doc. 512/16).

He mentioned that many countries in the Hemisphere are parties to the most important instruments worldwide. In this respect, he described the situation using as an example the UNIDROIT Convention regarding stolen or illegally exported cultural heritage assets (which includes 37 member countries, 11 of which are in the region).

He explained that the common object of conventions on this topic is the definition of property. He proposed to draft a practical guide that would allow States to approach the subject from two perspectives: prevention and recovery. He observed that it did not start from scratch, since there are guidelines in the field by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Dr. Salinas invited the members to provide their contributions, as the time available to produce the report was limited. He suggested a workgroup to help support the work of the Rapporteur.

Dr. Villalta recalled the report on the Protection of cultural assets in situations of armed conflict (CJI/doc.451/16). She also recalled a report that had been presented that indicated ratifications of international treaties related to the subject (CJI/doc. 507/16).

Dr. Mata Prates proposed a methodology for the distribution of the documents by e-means to facilitate interactions and analysis of the topic by other members.

The Rapporteur said that he expected to distribute the report before the next regular session.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur made his report to the Committee in the form of a Power Point presentation, document (CJI/doc.527/17). He began by reviewing the mandate that had been given to the Committee by the OAS General Assembly pursuant to Resolution AG/RES. 2886 (XLVI-0/16) (above).

Dr. Baena Soares noted that with the increase in the number of legal texts, the greater was the need to adapt to realities. He noted that loss of cultural heritage property had been due to conflicts and also due to sales at auction houses, particularly in Europe. He noted that regardless of the reason, goods have been destroyed even though conventions exist for their protection and with the support of States.

Dr. Correa referred to one of the recommended topics for development, namely, (vi) the lack of established criteria for the determination of the "good faith purchaser." She suggested that there should also be complementary criteria for the "bad faith purchaser" and that to put a stop to illegal trade it would be necessary to attack through the pocket book.

Dr. Mata noted it was probable that all States have laws regarding cultural heritage assets but that as had been said, the problem was a global one. What was needed was some mechanism so property could be recovered after it has left a country illegally. He said this was not only a matter for the executive power, but that ordinarily a request would be made to a judge who would apply *national* law. Thus, what would be required was domestic implementation so that international norms could be applied. Dr. Mata referred to point 4 in the report's conclusions which suggested the preparation of a User Guide and agreed that this would strengthen *national* legislation. But, he noted with respect, that this would not solve a problem that required an international solution. He referred to the UNESCO guidelines that emanate from that treaty and thereby gain legal *status*. He noted that even if a judge were to be made aware, these would be difficult to apply directly. He therefore suggested that the Committee recommend ratification and implementation of one or two instruments, perhaps in particular those at the regional level.

Dr. Villalta noted that the report had essentially completed the mandate. She asked, however, whether the Rapporteur would consider also completing the User Guide so that the report could be presented as fully completed.

Dr. Cevallos thought the report contained good legal background, but expressed concern over the conclusion. He was of the view that without international cooperation, there would be absolutely no hope for improvement and that was the point that the Committee would need to drive home. He said it would be in the application of the legislation and that without a legal basis, the courts would have no interest otherwise. What was required, he said, was something that had coercive strength and to advise the General Assembly that it would be necessary to create a collective conscience. In his view, States do not give the matter priority in practice, although they may say otherwise.

Dr. Hollis noted that the report represented analysis of 18 treaties and 49 instruments. He recognized the problem of the difference between obligations on paper and non-compliance and noted that this problem was not limited to this topic. He said that there had been a shift from treaty-making to implementation, which was more difficult. In relation to the proposed User Guide, he asked who the intended audience would be. Although all States have an interest in the matter, he noted that there was a small group of "market States" of importance in relation to non-compliance which motivated the trade in cultural property. He wondered if the guide was intended for all for market States, how this challenge could be navigated.

Dr. Moreno said his comments were similar to those of Dr. Mata. He felt the emphasis should be recovery of the assets. However, as only 11 States had ratified the UNIDROIT instrument and many more are parties to the UNESCO instrument, he questioned what posture the Committee should adopt in regard to this situation.

The Chairman concurred with comments made and that the report fully covered what the General Assembly had requested. He said it provided a general overview and the current status of the instruments in order to strengthen the inter-American system, which was the more relevant aspect. He shared the view that this was a global issue, with emphasis on illegal trade of these assets and thirdly that this required international cooperation. He pointed out that international cooperation flowed from the existence of international treaties and as was demonstrated, with the exception of the UNESCO instrument, these have not been extensively ratified. He noted further, the deficiency of the UNESCO instrument in that it does not offer protection to artifacts not registered. He then turned to the San Salvador instrument and noted that although it covered precisely the illegally traded artifact, the paradox was that this instrument had not been widely ratified. In his view, the political entities should consider what would be required to promote ratification of this convention and to strengthen it at the regional level. He acknowledged that international cooperation could only occur on the basis of international instruments as it could not be accomplished through national laws. However, he shared the opinion that without ratification of international and inter-American instruments the issue cannot advance and expressed the view that a guide in order to strengthen the implementation was required, as well as the international basis, and promotion of the ratification of San Salvador convention.

The Rapporteur responded that all comments were pertinent and would help him finalize the report. As to the issue of implementation of the existing rules and whether international cooperation would first require that rules exist, he replied as follows: where obligations are required by *both* parties, this would require involvement of the executive branch and in such circumstances it is usual for parties to resort to the courts. Although there are international rules, existence of national law makes it more feasible to comply with the international law. In some cases, regardless of what the international community has achieved, we "hit the wall" at the national level. This is based on the experience of Ecuador and Mexico. There is a high cost to go to a European court to recover the property; this is not due to lack of will or executive power. Governments wish to cooperate, but where there is a division of power this is particularly difficult. Neither the OAS nor UNESCO would be able to change this reality. Thus, he said, the question is how can the Committee best contribute? He then offered the following suggestions:

1. We must universalize the international rules. The starting point would be to call upon States to consider the existing instruments and to ratify not only the UNESCO instrument but the San Salvador instrument, very simply because it is within the inter-American sphere. This would be a signal that one government, or branch of government, would send out to the international community.

2. International cooperation translates into the will of States and that they are willing to be bound. In terms of the User Guide, this could not be completed by the June deadline; moreover, as a tool to strengthen the legal framework, the political body might not consider it necessary. This would be for the CAJP to determine, and if so, then the Committee would proceed.

   In response to the question raised by Dr. Hollis as to the intended end user, it would be directed to those officials who would apply these instruments. In many countries, this would be the judiciary. The Guide would not be binding but would assist with interpretation and would enable the possibility to put into practice and highlight the regional practices that have worked in other States.

3. In response to Dr. Correa's question regarding criteria for the good faith purchaser, he noted guidelines in para. 30 that States should adhere to the 1995 UNIDROIT Convention, article 4. Under these provisions, the holder of stolen cultural property would have the right to be paid

if that person did not know the good was stolen and acted in good faith. Due diligence would be necessary to take into account the quality of the piece, the price paid, the records, and it would be the good faith holder who would have the burden of proof. This would meet the burden of restitution; the victim would bear the burden.

4. It is necessary to consider what would make restitution easier. Some States would have to change legislation to be able to recover the good. Thus, one can see a cycle with the more players in the circle, the better. It is necessary to break from the "vicious circle of egg and chicken", which implies that if the market States have nothing to offer, then we cannot move forward. Therefore, what is needed is a political call to ratify.

Based on comments by the Committee members, the Rapporteur revised the report in order to include in the conclusion a reference to other continents and changed the original call for ratification to make it broader. He also added a request to States to ratify the San Salvador Convention and to encourage States to adopt legislation and to cooperate. A proposal regarding a User Guide was also added.

In response to questions about the lack of ratifications of the San Salvador Convention, Dr. Hernández García said that it he did not know the reasons but would speculate that perhaps the focus on the UNESCO convention, produced by a subsidiary UN body, had distracted attention away from the regional instrument. He thought that the Committee should emphasize inter American instruments without going into the reasons. He considered it also as an opportunity for States to demonstrate commitment.

A resolution accompanying the report was unanimously approved, and it was decided that both documents be delivered to the Permanent Council.

4. Guide for the protection of stateless persons

At the forty-fourth regular session (Asuncion, Paraguay, June 2014) the General Assembly issued a new mandate and instructed the Inter-American Juridical Committee to draft, in consultation with the Member States, "a set of Guidelines on the Protection of Stateless Persons, in accordance with the existing international standards on the topic", AG/RES. 2826 (XLVI-O/14).

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Carlos Mata Prates was designated rapporteur for the topic.

At the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2015), the Inter-American Juridical Committee adopted the report entitled Guide on the protection of stateless persons (CJI/doc.488/15 rev.1) through resolution CJI/RES. 218 (LXXXVII-O/15).

At the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October, 2016), the Rapporteur provided some remarks on the report of the Committee on the protection of stateless persons by the United Nations High Commissioner for Refugees (UNHCR).

He reported that after approval of the report of the Committee, the UNHCR started to analyze the document and the result of the analysis are the comments that had been forwarded. He observed that there are two possible approaches to the theme: one academic and one practical, and that the second in particular is the approach adopted by the Committee. In this regard, almost all the references made by the UNHCR are included in the report. However, he expressed interest in adding a chapter to the report introducing suggestions of good practices for the States. He recalled that the conclusions adopted by the Committee establish that the existing norms are sufficient, and that they need implementation.

He also stated that the UNHCR document refers to several instruments that are not binding, but that are merely "*soft law*", citing as examples the UNHCR Manual of Procedures, the declarations at the regional and universal level in the core of the Regional Agency, decisions and sentences of the Inter-American Court and decisions of the Inter-American Commission. He suggested that the

Committee could add to the report some directives making reference to the UNHCR manual as well as to guiding criteria for the States, such as the decisions and rulings of the inter-American system for the promotion and protection of human rights.

It must be noted that on October 13, 2016, the Committee was visited by Drs. José Murillo and Juan Ignacio Mondelli of UNHCR, with whom the plenary held a rich exchange on the Guide to the protection of stateless persons.

In light of the aforementioned developments, the Rapporteur presented a revised version of the report approved by the plenary of the Committee in the previous year, CJI/doc. 488/15 rev.2.

The Rapporteur mentioned the norms that should be incorporated into the report of the Committee while urging their ratification and implementation:

- 1954 Convention Relating to the Status of Stateless Persons;
- 1961 Convention on the Reduction of Statelessness; and,
- American Convention on Human Rights (Article 25).

Should these norms be applied, the situation of stateless persons should be resolved in the existing cases, considering that these norms are sufficient to resolve the problem.

In addition, he addressed some aspects of the UNHCR for reducing statelessness, which could be included in a chapter of the guide addressing the orientation towards the development of a "strategic framework". This may be explained because they are *lege ferenda* for indication of good practices for States.

The Rapporteur noted that the UNHCR's comments are of a different nature when compared to the guide approved by the Committee, taking into account that the instrument adopted by the Committee is related to existing *lege lata* elements. Finally, he expressed appreciation for the references to the Inter-American human rights protection system, noting in this regard that it is not a matter of *lege lata*, but rather involves indicators on how States could develop protection.

The Chairman noted that in the light of the amendments to the UNHCR model law in November, it would be interesting to check how this is implemented, so that the Rapporteur may include these amendments in his report. He also stated that it is important to include the resolution of the June 2016 General Assembly in Santo Domingo, within the norms to be taken into consideration, because the resolution deals with prevention and promotional measures. Lastly, he asked to consider the judgment of the Court regarding the situation of Dominicans of Haitian descent and Advisory Opinion No. 21.

Dr. Villalta thanked the Rapporteur and asked about facts on the highest number of stateless persons in the Americas.

Dr. Stewart was also grateful to the Rapporteur, and asked about the suggestion to create a specialized organ to assist cases of statelessness. He proposed reformulating the criteria, recommending that States take concrete steps to resolve the situation of statelessness, which may or may not include setting up a new organ.

As regards the comments of the Chairman, the Rapporteur considered that as the date for the UNHCR meeting was approaching, at which the aim was to update its model law, there would be no inconvenience in waiting for the results of said meeting in order to include the updated status of the amendments.

Regarding a second issue, he reported that he was not in favor of adding a resolution of the General Assembly, as he was of the opinion that States are aware of its contents already.

In addition, the question of referring to one or two decisions of the Inter-American Court would have the effect of "freezing" the document in time and disclosing the name of the State affected by a negative decision may place the Committee in an uncomfortable situation.

Regarding the issue mentioned by Dr. Villalta, although the reasons that explain the phenomenon of stateless persons are extremely complex, the definition given by article 25 of the American Convention on Human Rights is very precise.

The Chairman proposed the following actions in response to issues mentioned by Committee members:

- Take note of the results of the UNHCR meeting and introduce updates as necessary;
- Include the resolution adopted by the General Assembly in Santo Domingo;
- In matters involving decisions, introduce a determination in relation to the cases addressed by the Court, both decisions as well as consultative opinions, making a distinction between penalties and responsibility of the State *vis-à-vis* the criteria issued by the Court, in order to alleviate the Rapporteur´s concerns; and,
- Clarify the issue raised by Dr. Stewart regarding the setting up of a new organ.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur presented his report to the Committee based on his submitted document (CJI/doc.529/17). He explained that the original report, which had been adopted through CJI/RES.218 of August 7, 2015, was subsequently revised to incorporate comments from the UNHCR and was adopted at the 89th session (CJI/doc. 488/15 rev. 2 of October 4, 2016).

He reported that subsequently, at the invitation of UNHCR, he took part in meetings held in Quito, Ecuador (see report on that topic) and that as a result, final revisions were made to the document attached to his report ("Draft Articles on Protection and Facilities for the Naturalization of Stateless Persons").

He explained that what was done was to prioritize what determines stateless persons. At the normative level, one should consider the ratification of the 1954 and 1961 instruments. These instruments do not have an adequate level of ratification by OAS member States that are in line with the problem of statelessness. Bearing in mind the 2014-2024 Plan to End Statelessness, he said it was necessary to establish a procedure that takes into account the vulnerability of a stateless person and to consider creating a special entity to offer services in line with the human rights involved. In summary, what has been added to the report is related to the "Plan to end Statelessness", in accordance with the meetings attended in Quito 2016.

Dr. Mata noted that in relation to the American Convention on Human Rights, Article 20 is a key aspect to the entire system and he was not sure why States do not fully apply this norm on the right to nationality. He remarked that if everyone has a right to nationality, then no one could be removed. This article is decisive in terms of statelessness but there is jurisprudence that does not take this into account. Therefore, there is a need to strengthen it.

The Chair thanked the Rapporteur and requested the Secretariat to reflect the work in the annual report, and declared then considering the topic closed.

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5. Considerations and reflection on the work of the Inter-American Juridical Committee

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2015), the Members of the Juridical Committee decided to begin a process of reflection with a view to improving its performance for the Organization and it Member States. It asked Dr. Correa Palacio to compile a list of topics suggested by members to serve as a basis for the drafting of the multiyear agenda, taking into consideration the needs of the Organization and the States as a whole.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2015), the space for reflection that began at the previous session carried on. On that occasion,

Dr. Correa Palacio introduced document CJI/doc.484/15, "Considerations on the Work of the Inter-American Juridical Committee: compilation of topics of interest," which covers three focus areas of work: 1) procedural work; 2) substantive work; and 3) topics suggested by other Committee Members. The first group included considerations of a procedural nature of the Inter-American Human Rights Protection System, which emerge from dialogue held with the President of the Inter-American Court of Human Rights. She also encouraged inclusion of concerns expressed by Secretary General Luis Almagro regarding the issue of access to justice and equity.

After brief discussions on the proposal made by Dr. Correa, the topics agreed upon were in summary the following: 1) drafting a preliminary plan for the next session (April 2016); 2) presenting to the political bodies of the OAS a list of topics that are expected to be addressed in the long term; and 3) appointment of Dr. Correa Palacio as Rapporteur for the Topic.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), the Rapporteur presented document CJI/doc. 484/15 rev.1 and resumed the discussions on the matter

The Rapporteur recalled the concern voiced by Committee Members about setting themselves a medium- and long-term agenda. She then pointed out the existence of whole spheres of international law, such as private international law and human rights law, where there are numerous international treaties that, in practice, have not been implemented. She suggested that the Committee should conduct studies in order to understand the reasons why not all States accede to or ratify those treaties. She also alluded to the possibility of holding events of outreach such as the previous day's Round Table, attended by members of government bodies and of civil society.

Finally, she referred to some of the issues discussed during the meeting with experts on private international law (Washington D.C., April 4, 2016), such as the continuation of the Committee's work on simplified corporations, the compilation of commercial practices, and drafting guidelines on private international law.

Dr. Salinas commented that the Committee was by nature a consultative body and should thus serve the interests of the Organization and the Member States. Accordingly, he pointed out that creating guidelines for the implementation of international treaties should be a principal work of the Committee. Second, he recalled that the Committee's work had to be in sync with the Region's interests. As to operating procedures, he suggested consulting ministries of foreign affairs and international law associations and asking for their opinions. Third, Dr. Salinas noted that the agenda proposed by the Rapporteur focused mainly on human rights issues, which involved some overlap with other OAS organs.

Dr. Hernández García recalled the agreements reached at the last Committee session in August 2015 and suggested that points 1 and 3 (drafting a preliminary plan and nominating the Rapporteur) had been complied with, but that it would be good to have the basis for an agenda plan.

He urged the Chairman to meet with the delegations of States attending the regular session of the General Assembly, which would take place in July in the Dominican Republic. He also reminded the plenary about the suggestion of meeting with the legal advisers of the ministries of foreign affairs. Both opportunities could result in important feedback.

He expressed concerns over addressing sensitive human rights issues without incorporating issues in public and private international law.

Dr. Villalta stated that in her opinion two topics were especially important: compilation of commercial practices and international law guidelines.

Dr. Moreno also congratulated the Rapporteur. He noted that the current political environment was very different from that of the 1970s when the Committee first embarked on its codification of private international law. Today the world needs universal and global solutions. Another change had been the development of alternative sources of law. By way of example he cited The Hague Principles on Choice of Law for International Contracts.

The Vice-Chairman pointed out that the institutionalization of international law was now based of areas of specialization, as illustrated by international organizations such as the World Trade Organization (WTO) and the World Health Organization (WHO), and others. He also agreed with what Dr. Moreno had said regarding how arbitration awards were reached in the International Centre for Settlement of Investment Disputes (ICSID).

He noted that the role of the Committee should be to serve as a "coordinator" of studies or proposals put forward by other international organizations.

A criterion for selecting issues to work on should be usefulness for the States and for the Organization. In his view, the Committee should perform a pro-active function of notifying States of what the Juridical Committee can -- and wants to - do.

Dr. Salinas proposed having a draft work plan and multi-year agenda ready for the next session.

Dr. Arrighi stated that in his view the Inter-American Specialized Conference on Private International Law process, as practiced thus far, had run its course. He noted, too, that the CIDIPs had emerged as a substitute for the quest for a general codification when the latter approach had proved unable to resolve the problems that arose some 30 or 40 years ago (e.g., the Bustamante Code). The CIDIPs were designed to establish specific codifications. That had been an eminently Latin American project. The final moment for CIDIP had come with the discussion of consumer rights issues which had mixed public law and private law with mandatory rules, and mixed States governed by civil law and common law. Given that scenario, the CIDIP was not able to handle the topic.

In Dr. Arrighi's opinion, the region had entered a third period in which coordinated efforts were needed to forge instruments that were more democratic, more flexible, and in sync with the global nature of today's problems. As for specific issues, it would be important to resume examination of consumer rights and to address the legal repercussions of environmental protection, which also figured on the Secretary General's agenda.

Dr. Moreno asked whether the subject of torts had already been taken up by the Committee and what the current status was on that issue.

Dr. Villalta responded that that had been the first subject assigned to her as Committee Rapporteur. She explained that during CIDIP-VI, the subject had been suggested by Uruguay, but no consensus had been reached regarding it during the negotiations. As a result, it was suggested that the Committee look into it, the idea being that, after working on it, the Committee would draw up a convention or model law.

Dr. Arrighi explained that the Committee had the faculty to suggest topics on its own initiative, so that Dr. Moreno could resume his examination of that substantive issue.

Dr. Hernández García proposed that Dr. Correa consider giving a presentation on the outcomes of the Committee's reflections on topics for its agenda during the forthcoming meeting with the States' representatives on the OAS Permanent Council's Committee on Juridical and Political Affairs (CAJP). He agreed with Dr. Arrighi's assessment that the Committee had competence to choose topics on its own initiative. He also concurred with Dr. Salinas' idea of allotting time and setting deadlines for that work.

The Vice-Chairman noted that it would be important to have a provisional agenda to present to the Secretary General and the CAJP.

The Rapporteur proposed to focus on a provisional agenda of substantive issues.

It is worth mentioning that the activities and meetings held in Washington, D.C. during the 88th Regular Session enabled the Committee to receive suggestions for topics for a possible multi-year agenda. Valuable inputs were obtained from the roundtable discussion with experts on private international law, the meeting with the Secretary General, and the participation of members in a meeting before the CAJP.

During 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), the Rapporteur mentioned proposals for new topics received during the last two years with the aim of preparing a multi-annual agenda. She emphasized that the list presented in her first report, document CJI/doc. 484/15 rev.1, is a compilation of the topics already mentioned and that Members should use it only as a reference.

She informed the Committee that the following topics were still included in the proposed agenda and that they had been suggested by members:

She then listed the topics that had emerged from the roundtable discussion on private international law, mentioned above, as follows:

1. Commercial usage and customs;
2. Electronic commerce;
3. Compilation of commercial customs/usage;
4. Rights of consumers;
5. E-commerce;
6. E-payments;
7. Online Resolution of Disputes, the UNCITRAL principles;
8. Conflict of laws in cross-border transactions;
9. Perspective from the Americas on the Hague Conference proposed Draft text on recognition of foreign decisions;
10. Review of the instruments approved in the CIDIPs;
11. Take up again the discussion of the topic on simplified corporations.

The Rapporteur explained that all the topics suggested at the meeting with the representatives of the legal advisors of the ministries of foreign affairs held on 5 October, 2016, were already included in the above list. However, for practical purposes, these are repeated below:

1. Immunity of jurisdiction;
2. Notices/Notifications;
3. Alternative mechanisms;
4. Arbitration as an alternative means for the resolution of disputes;
5. Presumption in favor of the immunity of States;
6. Law of the Sea.

The Chairman pointed out that development of this final list of topics is essential in order to make discussions easier and to determine priorities regarding the topics to be addressed.

Dr. Salinas proposed the following criteria for the selection of topics:

1 mandates of the General Assembly;

2 equilibrium between public and private international law;

3 taking into account the suggestions and remarks presented by legal counsels; and,

4 assessing the juridical nature of international instruments.

He also suggested that the topic mentioned by Dr. Galindo about interinstitutional agreements should be included in this list of topics that was being compiled by the Rapporteur. Dr. Galindo is the legal counsel for Brazil.

The Chairman proposed that the suggested topics be grouped into different areas such as: human rights, democracy, and private international law, among others. In addition to grouping the topics by area, priorities should be established.

Dr. Hernández Garcia proposed developing a time-frame for the topics, in order to submit a more complete work program to the General Assembly. Dr. Salinas added the following criteria to those detailed above:

1 Precision is a must when topics are formulated. For example, the topic of "the rights of indigenous peoples" offers varied facets in view of its widespread nature. This is why different aspects and the definition of the aspect to be studied are required;

2 Topics should be practically useful;

3 Take into consideration the expertise of each member in order to provide useful contributions and also to strengthen the result of the work carried out, taking into account the sophistication of the topic;

4 Avoid duplicating the work with the results of other forums. For example, the topic on public/government procurement has already been addressed in depth by UNCITRAL;

5 Studies must be useful for the OAS and provide added value to the work of the Organization.

6 Always bear in mind the availability of human and economic resources of the Committee.

He concluded by highlighting four topics that were mentioned by the legal advisers that should be included in the list of topics to be addressed under Dr. Correa´s supervision:1) Executive and inter-institutional agreements; 2) cybercrimes; 3) protection of marine environments; and 4) the role of the reservation as observed in practice in the area of treaties – list of instruments approved and reservations presented. It was suggested that the Secretariat present these lists for the evaluation of the Committee, determining which reservations or declarations, in their opinion, are not in agreement with the purpose and aim of the treaty.

In a following meeting, the Chairman referred to the list of topics for the multi-annual agenda of the Committee prioritized according to the consensus that had been achieved during previous sessions. He further recalled that the suggestions made during the meeting with the representatives of the legal counsels of the ministries of foreign relations of the Member States have been included. In this context, he presented the following three-part list:

Mandates of the General Assembly:

Protection of cultural heritage, and

Companies, the environment and human rights.

Private International Law topics:

International Consumer Protection;

Alternative means for the resolution of disputes (online resolution of disputes and others); and,

Commercial usage and customary law.

Public International Law topics:

- Immunity of States;
- Immunity of International Organizations;
- Protection of the marine environment and liability of States;
- Cybersecurity; and,
- Legal nature of international interinstitutional agreements.

The Chairman commented that in the area of private international law some of the topics appear to be too broad, such as the one on commercial usage and customary law. He also mentioned the new topics 2 and 3 in the area of private international law and 3, 4 and 5 in the field of public international law. He then proposed that the Committee focus especially on these new themes.

Dr. Salinas was asked to address the topic on the effects of inter-institutional agreements.

Dr. Moreno stated that these new issues on private international law are a follow up on the study on international law applicable to contracts and consumer law. On the subject of alternative means for the resolution of disputes, these are indeed more specifically related to the issue of consumer rights.

The Chair asked whether the issue of commercial customs and practices would be linked to the issue of international contracts. Dr. Moreno explained that in fact it is a continuation of the discussion that took place during negotiations of the Mexico Convention. He suggested formulating the issue as follows: Principles, customs, usage and practices in international contracts.

Dr. Salinas said he was doubtful if these two issues on private law are of immediate concern. If in fact they are, there may be an imbalance between public and private international law.

The Chair recalled that, according to the agreement of the members, the work on the topic of international contracts must be approved in March and that then there would be room for another topic on private international law.

Dr. Villalta stated that the working agenda now includes two items of private international law and that as these items address complex matters, she therefore suggested to leave pending for a later date the analysis of new initiatives.

Dr. Moreno explained that the outcome of the discussion on these two issues on the agenda could lead to new topics. He also noted that the Vienna Convention on the International Sale of Goods creates an opening for non-state rights and for lex mercatoria. Therefore, when the current study ends, the Committee should pay attention to such controversial issues. He considered of utmost importance trying to verify how national solutions are handled in order to see how commercial usage and trade customs in the regions are expressed.

The Chair said he was in agreement with Dr. Moreno´s proposal. As regards the search for balance between private and public international law, he urged the group to take into account the specializations of each one of the members of the Committee.

Dr. Stewart asked about the purpose of the study, taking into consideration the rather broad reach of the notion of lex mercatoria. He also asked for additional explanations about the topic on institutional agreements, translated to English as “juridical nature of interinstitutional agreements”.

The Chair explained that this issue had been brought up by the representatives of the legal advisors of the ministries of foreign affairs and had been mentioned as one of their most pressing problems. He explained that various organs of governments that are not part of the Ministries of Foreign Affairs sign agreements with entities from other States that often create or infringe international obligations.

Dr. Moreno said that this is also an issue in private international law.

Dr. Mata Prates agreed with the usefulness of a guide on practices on interagency agreements for the foreign ministries of States. He explained that in Uruguay there is a draft decree on procedures explaining how to process these arrangements internally, and that it highlights a relationship between public international law and domestic law.

The Chair recalled that the legal advisor of the Ministry of Foreign Affairs of Paraguay mentioned having worked on a document with guidelines for Paraguay´s internal agencies. This means that together with the Uruguayan decree and with the practices in other countries, there would be elements for working on a guidance document. Furthermore, according to his point of view, legal advisory bodies would be grateful to receive a work product of this kind.

Dr. Mata Prates stated that a project had been developed in his country but has not been approved so far, showing the complexity of the matter. He mentioned the internal discussion that had been held during the process of approval of the decree. State power companies have warned that if permission needs to be secured every time they sign an agreement of this kind, this could affect the operation of the power system in the country.

The Chair thanked Dr. Prates for the accurate account of the situation. He said that the problem might be even more complex because some ministries believe they also have the right to sign treaties. However, that is not in accordance with international law in the light of the Vienna Convention on the Law of Treaties, regarding agreements concluded by persons with no legal standing. He gave the example in his country in which the Ministry of Commerce needed to amend the law in order to allow a representative to conclude international treaties.

Dr. Collot mentioned that there are two very important issues in the proposed Agenda: cyber-security and immunities of international organizations. He explained that some people benefit from immunities, and that in this respect it is important to understand the possible liability mechanisms. He exemplified with a real case, where an individual from a member State of an international organization killed a person while driving a car with the logo of the organization. The individual sought protection under the immunity of the organization. The case was tried and a penalty imposed on the organization, which also had its accounts held under embargo. However, this was the extent of the matter and finally the Haitian government intervened and compensated the victim; hence the importance of concentrating on procedures.

Regarding the topics of private international law, Dr. Collot stressed the importance of the topic of means for alternative dispute resolutions. On the subject of commercial usage and custom, he referred to the online system called Legal Data, comprising most commercial instruments with reference to the laws of many countries, totaling 244 instruments (representing about 10% of all trading instruments worldwide). He was also of the opinion that this theme is too broad, and proposed separating it into specific topics.

Dr. Moreno said that regarding the subject of customary practices and usage he was in agreement with its inclusion. However, he proposed that the specific approach or scope of the work or methodology be determined in the future.

Dr. Villalta mentioned that in many Central American countries mayors or heads of department were also signing international agreements. In Nicaragua, for example, a law on border security was passed, as they signed agreements even on border matters. The procedure is forcing the Ministries of Foreign Affairs to review all agreements.

The Chairman requested the Secretariat to present a final list of approved topics.

Thereafter, Dr. Negro presented the final list of topics. He explained that the document would be entitled: List of new topics, and would comprise the following:

1. Topics of Private International Law:

    - Resolution of disputes on consumer issues; and,

    - Principles, usage, customs and practices in international procurement.

2. Topics of Public International Law:

    - Protection of marine environment and State responsibility;

    - Cyber security; and,

    - Legal standing of interinstitutional agreements of an international character.

The Chairman asked the Members if they wished to make any comment. Dr. Salinas suggested adding the expression "and its effects" after the expression "legal standing" in the last issue of Public International Law.

Dr. Moreno asked if the topic of institutional agreements was to be included within the categories.

Dr. Mata Prates explained that there is no obstacle to any member being rapporteur of the subject so it was not necessary to change the list.

As there were no other objections, the list of new issues as provided above was approved. In fact, the Department of International Law has elaborated a document that reflects the list of new topics, document DDI/doc.1/17.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), the Rapporteur presented her report to the Committee based on her submitted document CJI/doc.531/17. She began her report with a brief background for the benefit of the new members and explained that the Committee had consulted with legal advisors of member States, sought the input of academics, and also held discussions with experts in private international law. The compilations take into account some proposals of Member States and the Secretary General as well. She also explained the interest of the members to follow up certain criteria aimed at organizing the working plan and setting priorities among the proposed themes. Among them, the Rapporteur underlined the following: to classify the lists by areas, private and public international law; to find an equilibrium between the two areas; to be specific or concrete; to take into account its practical usefulness and the specialization of the Committee members; to avoid duplicating work done by other international organizations; to provide an added value; to consider human and financial resources. She suggested that the list form the basis for a work plan that should be defined.

The Chair noted that the new members might also wish to add new topics. He said he had already spoken with Dr. Hollis who had expressed interest to take on a study in cyber security, a field over which the legal advisors have expressed serious concern. Secondly, he said it was necessary to remove from the list those topics that the Committee had dealt with, even if at some point the topic may return (i.e., cultural heritage, etc.)

Dr. Villalta was of the view that items 13 and 14 would better fit in the PIL grouping and this was agreed. For the benefit of new members, she and the Chair explained that the legal advisors had raised the question on the status of "simplified" or "executive" agreements that do not require ratification or the non-binding "MOU" as these are all treated differently in different legal systems.

Dr. Hernández referred to the previous report of Dr. Correa in which the required action had been clearly outlined and asked whether this could be shared with the General Assembly. He then referred to her current report (doc. 531/17) and in reference to items 5 and 12 requested more particulars as to what the legal advisors had wanted the Committee to study. In response, Dr. Toro explained that the representative from Mexico had asked for a study on the implication of national legislation on the law of the sea and had noted that few States have laws in this field, specifically on aspects of marine waste or ocean activities and that this was where the Committee could offer a practical guide.

Dr. Hollis said he was pleased to have a list and workplan and was willing to work on two topics – cyber security and interinstitutional agreements. He noted that he had experience in the topic of agreements and how a State decides to choose a binding vs. non-binding instrument but with legal effects. He considered that the matter of how a state chooses at the domestic level to organize that power was a separate matter and gave the example of Colombia, where all such agreements must receive approval by Congress.

Dr. Correa offered to take on an additional topic to be added to the agenda of the Committee relating to foreign judicial decisions.

As a result of the exchange, it was agreed to structure the list of topics as follows: 1) those assigned and 2) others; the first group would include the name of a person in charge (though not all topics would require a rapporteur) and expected date delivery, taking into account the need for flexibility. It was agreed that the workplan/list would be shared with the General Assembly and no longer be part of the Committee's agenda, despite the decision to keep the issue open for discussion.

LT/msg – 22/5/2017 JT June.