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General Secretariat
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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 93rd regular session, in light of the agenda adopted on March 2, 2018, document CJI/RES. 239 (XCII-O/18).

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THEMES UNDER CONSIDERATION

1. 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 creating an instrument on immunity of States in transnational litigation. He reported that in 1986 a draft Convention on immunity of States introduced by the Juridical Committee did not go anywhere. Additionally, he noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property has still not come 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 area could have in the field of trade, in addition to serving as a guide for government officials.

The Committee has only followed up on the subject of immunity of States until the 86th Regular Session (2015).

However, during the 86th Regular Session (Rio de Janeiro, March 2015), the plenary Committee decided to divide the treatment of the subject of immunities and appoint Dr. Hernández García as Rapporteur in charge of immunity of international organizations.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), the Rapporteur for the topic, submitted his report, document CJI/doc.486/15 based on the preliminary document (DDI/doc. 5/15).

He was pleased at the decision to separate the field of immunities into two sub-topics to be addressed by the Committee: immunities of States on one hand, and immunities of international organizations on the other. He noted that 12 responses to the questionnaire conducted in 2013 were 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 the countries 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.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April, 2016), the Rapporteur for the Topic, Dr. Hernández García explained that this report was the result of an analysis of 15 international conventions, and took into consideration, *inter alia*, the constitution of international organizations, headquarter 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 countries 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

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 that they refer 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.

Representative of International Organizations were on a pair 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 allowing for resorting to domestic laws.

The Rapporteur said that the next step would be to analyze further 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 limmited 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.

Dr. Hernández García 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 were 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.

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

At the 90th Regular Session (Rio de Janeiro, March 2017), the Rapporteur presented the third report on the subject, document CJI/doc.528/1, recalling that his first report had outlined the three main reasons for addressing immunity of international organizations separately from immunity of States, and that he had proposed that the Committee should draft a set of "General Principles of International Law in the Americas with respect to the Jurisdictional Immunity of International Organizations." In order to do so, he had suggested an examination of relevant treaties and host agreements, which had been presented in his second report, and a review of case law, which was what he was presenting in this third report.

Dr. Hernández 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 he had drawn on the judicial decisions from 18 OAS Member States. The Rapporteur explained that it represented a collection of the raw material from which the principles could be developed. Two common elements had emerged from the first group of decisions he analyzed: immunity from suit and exceptions or limits to immunity.

The Chair noted that the decision was made by the Committee to separate the topic of immunity into that of States and that of international organizations, because the scope of each type of immunity is very different under international law, at least, it is in theory. However, the case law has shown that this distinction was not always clear, especially with regard to the topic of *juri gestionis*. Immunity of international organizations was found to be necessary to enable these entities to fulfill the purposes for which they have been created. The Chair also mentioned the emerging trend with respect to the settlement of disputes.

Dr. Mata Prates pointed out that one of the key differences between the two—immunity of States and of international organizations–was that international organizations would have entered into a headquarters agreement with the host State, establishing immunity.

Dr. Correa offered a perspective using an example from Colombia, which in her view was common to most States. Even though the judge would speak in favor of the jurisdictional immunity of a State or an international organization, when public assets have been damaged by an international organization, the local court will limit or suspend immunity. This is also what happens with regard to fundamental rights, such as the right to petition and in labor law issues.

Dr. Hernández noted that the decision to differentiate the two—immunity of States from immunity of international organizations—had originally been deemed necessary for methodological purposes, but it could be discarded. The importance of this exercise, he said, would be to extract principles and find solutions. He explained that since it was impossible to conduct an exhaustive study, he had focused on decisions of higher courts. Thus far, it would appear that 1) jurisdiction is restricted by the fundamental rights of individuals and by labor laws and, 2) immunity will be recognized provided that there is an alternative way in place to resolve the dispute. It was his hope that this would have a practical application.

During the 91st Regular Session (Rio de Janeiro, August 2017), the Rapporteur presented the fourth report on the subject, document CJI/doc.545/17, and then asked the plenary to contribute its comments. He explained the background to the topic, the initial report of which included a comparative analysis of national legislation, treaties establishing intergovernmental organizations, headquarters agreements, and legal precedent-setting decisions. He then discussed this new document, the purpose of which is to ascertain the scope of immunity, the existence of exceptions or limits set forth in treaties, the

scope of the exceptions in relation to commercial activities, the scope of the principle of respect for public order and recourse available to third parties to remedy violations.

The study reached two conclusions:

- It was established that immunity, as defined in the terms of the treaties creating it, is handled on a case-by-case basis. In fact, headquarter agreements establish specific terms that may be general as well as *ad hoc*.
- No international practice can be identified in order to produce an instrument with general principles of international law, due to the case-by-case treatment of immunity of international organizations.

He then proposed preparing a "Practical Guide to the Application of Jurisdictional Immunity of International Organizations," which sets forth guidelines regarding solutions provided by treaties or courts, to serve as a tool to operators of justice or executive officers, in addition to guiding States on future headquarter agreements.

The Practical Guide establishes twelve guidelines, each followed by the Rapporteur's explanatory notes about the reasons behind the guidelines.

The first guideline: consensus between the member States as a source of immunity of international organizations. Applicable law is not the result of a customary norm, but of the will of the States, who decide to grant said immunity to the organizations, mostly through treaties. Therefore, once said instrument is approved, they are binding on States.

The second guideline: objective of international immunity. It can be ascertained from treaties establishing intergovernmental organizations that immunity is granted in order to make their object and purpose, their functional nature possible and not to benefit any individual. On this score, he cited Article 133 of the OAS Charter.

The third guideline: scope of immunity. The property and assets of international organizations are immune from acts carried out in the execution of their object and purpose, except when expressly waived. There is disagreement as to the determination of the absolute or relative nature thereof. This immunity faces two limits: it is limited to acts carried out in the execution of its object and purpose, and when the organization waives its immunity.

The fourth guideline: limits on jurisdictional immunity. Organizations lack immunity from proceedings arising from acts of private law, except when the immunity is necessary to preserve autonomy. A distinction should be drawn from strictly commercial acts of private law, carried out as any other individual would do in the market (a context not covered by the immunity). Furthermore, under legal precedent-setting court decisions, immunity has been granted for acts linked to the execution of the purpose of the organization, such as contracting of employees (case of *Broadbent v. OAS*). In the case of the victims of the cholera epidemic in Haiti, a US appeals court recognized immunity from acts carried out in performance of their mandates. The threshold set for cases in dispute in the realm of private law is the criterion of necessity, meaning that it is necessary for the central function of the Organization (case of *Amaratunga*).

The fifth guideline: private law dispute resolution mechanism. International organizations should provide for the means for the resolution of disputes of international private law in order to guarantee access to justice for individual parties to any controversy. Generally speaking, at the UN and OAS, these mechanisms are built into administrative labor tribunals; however, in both instances remedies are only accessible to officials who have immunity.

The sixth guideline: characteristics of dispute resolution mechanisms. The mechanisms should be adequate and effective. The European Court of Human Rights has set three requirements: immunity must not restrict the right to due process, limitations on immunity must pursue a legitimate purpose and there must be a reasonable relationship of proportionality between the means and ends achieved.

The seventh guideline: Lack of a previously established dispute resolution mechanism. When there is no mechanism in place, the practice is to cover these gaps through insurance.

The eighth guideline: cooperation with the host State in administration of justice. Organizations and their employees should facilitate adequate administration of justice, ensure the enforcement of the law and prevent abuses. Both the UN and the OAS Charters have provisions on the obligation to cooperate with local authorities, though limited to acts of their employees.

The ninth guideline: appearance before domestic courts. Despite their immunity, international organizations must appear before domestic courts. In this regard, the Rapporteur ascertained that in the case of Haiti, the United Nations did not appear when it was summoned before the courts and that this failure to appear runs counter to the general obligation to cooperate with domestic authorities.

The tenth guideline: immunity against enforcement of judgments. Both the organization and its property and assets are protected against measures enforcing judgments.

The eleventh guideline: waiver of immunity of jurisdiction. Waiver of immunity of jurisdiction does not cover *ipso facto* waiver of immunity from enforcement of judgments. However, the waiver must be expressly made.

The twelfth guideline: Drafting of a convention. It is not deemed necessary for the OAS to consider the drafting of a legally binding instrument, and in this regard, the case-by-case approach of the issue supports the preparation of a guide for the benefit of the administrative and judicial bodies of the State.

The work is circumscribed within the jurisdictional immunities of international organizations, without including the immunities of international civil servants or permanent representatives of the member States, and should be considered as a starting point to be developed according to the practice of the international organizations.

Regarding the course of action, the Rapporteur encouraged members to submit their comments, and proposed circulating the proposal to the foreign ministries to gain feedback prior to its adoption within the Committee.

Dr. João Clemente Baena Soares remarked on the importance of headquarter agreements and that, among other duties as Secretary General, he had been in charge of drafting the OAS's agreement, because there was none in force at that time.

Dr. Duncan Hollis invited the Rapporteur to consider maybe including the topic of privileges, which although it has not been the subject of many disputes in this sphere, it has been so in other spheres, citing in this regard developments on the subject of archives in the sphere of cybersecurity where a section on privileges is presented in terms of potential violations that could be committed.

Regarding the guidelines, he noted that guideline two in the English version must refer to the object; while, in guideline three, the situation of an absence of immunity should be addressed, making it clear when such a right is not included or is waived, but it must be clearly established and not be deduced based on the existing situation. As for guideline five, liability must be established taking into account the close connection between the fourth and fifth guidelines. Regarding the eighth and part of the ninth guidelines, the verb tense must be made consistent with the rest of the text, unless the intent is to express mandatory nature. Lastly, in the ninth guideline, the situation needs to be clarified with respect to the cases in which it appears that it has been determined or there exists a clear appearance of immunity.

Dr. Alix Richard shared a personal experience in which it was his job to defend the OAS in a case of compensation for individuals who worked on an Organization project in Haiti. He explained that 10,000 people had died of cholera in Haiti. While at first the UN disputed any recognition of that fact, in the end the Secretary General of the global organization recognized moral responsibility, but the fundamental problem is impunity, inasmuch as no deal has been struck on fair compensation for the

victims and for the country. He suggested trying to find solutions that take into account these types of situations.

Dr. Carlos Mata Prates congratulated the Rapporteur for his report, and concurred with his opinion on the way forward, which would not entail a binding legal instrument. As for the guidelines, he noted recommendations of different types that should be standardized. Therefore, he requested that a distinction be drawn between situations or cases where there is or is not a headquarters agreement in effect. The third and fourth guidelines have the same support behind them and, therefore, he proposed merging them into a single guideline. He also suggested clarifying the limits pertaining to acts of private law and *iure gestioni*. As for the fifth guideline, the situation experienced in Haiti calls for instituting a tribunal or arbitral proceeding for dispute settlement (made up of two independent persons) in order to avoid conflicts with a principle of human rights and facilitate a space for the resolution of a claim in an impartial forum. It also applies to persons who are not employees. He asked to find a more accurate term with regard to the threshold of necessity in private law disputes. He also urged bringing the sixth and seventh guidelines closer together. The eighth guideline is about an obligation to cooperate and not an act of courtesy, he said. Lastly, in the ninth guideline, it should not be confined to appearing, but should include as well the effect, which is to either accept or reject jurisdiction.

Dr. Ruth Correa made very specific suggestions, such as establishing tribunals and respecting the criterion of necessity in establishing them. For this purpose, she suggested deciding what acts could be heard by the domestic jurisdiction in each State. Additionally, she proposed reference to the criterion of accessibility. As regards guideline nine on the need for the organization to appear, she requested that it should only be required to allege lack of jurisdiction based on the immunity enjoyed by it. To her understanding, a ruling by the judge on competence is essential. Therefore, she recommended that an appearance be included, which would involve making the case for immunity of jurisdiction on its own behalf. Lastly, with relation to reparation for damages to the victims, some reference to liability that States may have should be included. She cited in this regard precedents in which the State of Colombia was found liable for being the entity that decided to establish the immunity.

Dr. Elizabeth Villalta noted that not all States are parties to the conventions on the subject matter, such as the 1946 London Protocol.

The Chair singled out guidelines seven, eight, and nine. Specifically, he found it essential to define the type of immunity through a link to the particular treaty and the establishment of its object and purpose, so that it is determined by customary law. As for the distinction between an act of *iure imperii* (act by right of dominion) and an act of *iure gestione*, he thought that it should not be subjected to the criterion of necessity, but instead based on fulfillment of the object and purpose of the action. He expressed his support for the opinion of Dr. Hollis about the ninth guideline, in light of the fact that simply appearing does not mean that immunity is forfeited. He also noticed a connection between guideline four and guidelines seven, eight, and nine, when no dispute resolution exists. Likewise, he supported the idea of including the topic of privileges.

The Rapporteur thanked everyone for their comments, which allow him to think deeper about the content and he cited, in this regard, the crosscutting nature involved in the object and purpose of acting. He also expressed agreement with the analogy of *imperii and gestioni*, and with placing more emphasis on the topic of access to justice.

On October 13, 2017, the Rapporteur presented a revised version of his report, titled "Immunity of International Organizations: Document for Comments," which features eleven guidelines, based on the premise that the Guide will not be binding and on the intention of reflecting the practices of States and international organizations on this subject matter. Accordingly, comments were requested from the offices of legal counsel of the ministries of foreign affairs of the OAS Member States, through the permanent representatives to the OAS, as well as certain international organizations. On October 27, 2017, the Technical Secretariat of the Committee sent out the request for comments or suggestions, the responses to which are expected by January 31, 2018.

During the 92nd Regular Session (Mexico City, February 2018), the Rapporteur presented his fourth and final report, (document CJI/doc. 554/18), on which Member States had forwarded their comments, as well as from the Inter-American Development and the OAS General Secretariat, among others.

He explained that the Guide presented has a practical use and establishes the principles that were generally accepted, restricting its approach to jurisdictional immunity of international organizations and excluding other components of diplomatic law, gathering international customary norms, and making recommendations for future headquarter agreements or for agreements to set up international organizations.

The Rapporteur highlighted some of the amendments in the rules, as a result of the last revision, and pointed out:

Item one: the source of jurisdictional immunity of organizations is the agreement of the will of their members, who accept providing such immunity to the organization, in order to make it operational.

Item two: the jurisdictional immunity has the sole purpose of allowing the organization to implement its mission.

Item three: immunity of jurisdiction embraces the properties and assets of organizations.

Item four: immunity of jurisdiction has its own limitations, such as the share in the market of goods and services, including the labor market. However, labor disputes that put at stake the autonomy of an organization enjoy immunity if and when the organization provides mechanisms to settle disputes that do not leave the individual without proper defense.

Item five: the mechanisms of organizations for the resolution of disputes must guarantee access to justice for employees, and do not exclude the possibility to submit the dispute to the national courts in labor issues related to local employees.

Item six: organizations must ensure that the staff is well acquainted with the available mechanisms for the settlement of disputes.

Item seven: obligation to cooperate with the receiving State in the administration of justice (unchanged).

Item eight: in practice, organizations have to report to local courts through the ministries of foreign affairs in order to avoid compromising their immunity. However, he added that perhaps the ministries of foreign affairs are not legally entitled to report to judges.

Item nine: organizations must endeavor to enforce the decisions of national courts in good faith, as long as this does not affect their own autonomy.

Item ten: no major amendments.

Although the Rapporteur proposed to include the comments of the members and send the project to the CAJP for further comments by Member States and to seek the approval of the General Assembly, he concluded by proposing to include a further revision of his report during the next session of the CJI, for approval of the plenary.

Dr. Hollis thanked the Rapporteur on the hospitality offered by the Mexican Ministry of Foreign Affairs and congratulated him for his excellent work in the drafting of the Guide. He proposed the possibility of using such a wording in order to establish that organizations “should” appear in national courts, because the current wording in English - “must” - seems to indicate that this has been in fact the practice, which is not necessarily true. In closing, he suggested including a note at the beginning of the document, explaining that the Guide has principles and recommendations derived from the practice within its limited approach, in order to facilitate the political feasibility of the document.

The Rapporteur was in agreement with the comments made by Dr. Hollis, and agreed to make the corresponding amendments.

Dr. Mata pointed out that the immunity of international organizations has its origin in the headquarter agreement, and, that as a result, customary norms have limited relevance. In this regard, he asked whether the Guide establishes principles for the adoption of future headquarter agreements, or if it is understood to interpret already existing agreements.

He also proposed merging items four and five in order to consolidate the question involving labor disputes; regarding item eight, he suggested establishing an obligation for organizations to appear before the courts, as has been the normal practice. Finally, he proposed that the Rapporteur amend the last item, being a conclusion rather than precisely an item.

The Rapporteur considered the potential merger of items 4 and 5. As regards item eight, he stressed his concern that national legislation does not include a provision entitling the ministry of foreign affairs to appear before a court in order to assert the immunity of jurisdiction of the organization.

Dr. Correa mentioned item seven, and expressed her concern that the title of the item suggests that organizations have the obligation to cooperate with the administration of justice of the receiving country; in her opinion, this is not the role of international organizations. She also suggested changing the title of the item in order to indicate that the obligation of the organization is to stick to the local legislation. The Rapporteur agreed to Dr. Correa´s suggestion.

The Chair expressed his general agreement with the comments made and expressed doubts about the convenience of merging items 4 and 5, as the latter implies that even when the international organization lacks jurisdictional immunity on a certain issue, there must always be a domestic justice system, and that if the organization does not have immunity regarding a certain topic, the path is to resort to local courts.

The Rapporteur proposed a revision of the wording of both items in order to clarify their line of reasoning and agreed with the Chair that the next step will be to present a final project for the approval of the Committee members during the next session in August.

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2. Law Applicable to International Contracts

At the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), Dr. Elizabeth Villalta presented a document entitled "Private International Law" (CJI/doc.446/14), thus introducing a topic which had not been on the agenda established in August 201.

The aim was to promote 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 the reasons for so 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 Mexico could settle many international contracts problems with the Hemisphere's own solutions.

The Director of the Department of International Law, Dr. Dante Negro informed of the participation of them both (the Rapporteur and himself) 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 in having Inter-American Juridical Committee support 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's 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 took part in the ASADIP meetings, noted that some members of the ASADIP held senior positions with their governments and never suggested ratification of the Conventions was a priority. He added that doing 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 ones 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 what Dr. Arrighi spoke about was important to understanding why the Convention had not been ratified by a significant number of countries. 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.

During the 85th Regular Session (Rio de Janeiro, August, 2014), Dr. Elizabeth Villalta presented another report, entitled "Law Applicable to International Contracts," document CJI/doc.464/14, which refers to all the Conventions on Private International Law adopted at the Inter-American Specialized Conferences on Private International Law (CIDIP's).

She explained that some countries indicated that the translations of the Conventions were not particularly fortunate, and that that was an obstacle to its ratification. Dr. Villalta mentioned that there were ways of correcting those deficiencies, so she suggested that the Committee bring countries' attention to the mistakes.

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.

Dr. Arrighi said there had been no clear indication of where errors had been made in the translations. In his opinion, 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 (Rio de Janeiro, Brazil, March 2015), one the Co-Rapporteur for the topic, Dr. Elizabeth Villalta submitted a new version of the report, document CJI/doc.464/14 rev.1, which incorporates 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 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 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 Villalta, introduced the document "Law Applicable to International Contracts" (CJI/doc.487/15), reviewing 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 González, 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 added he felt there was more of a consensus on drafting a Model Law or Guiding Principles on the subject.

Dr. Villalta 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 our times, the consensus seemed to support a soft law solution.

The Vice-Chairman noted that the consensus would be to keep the topic on the agenda.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), one of the Co-Rapporteur for the Topic, Dr. Villalta reminded members that at the 86th session a *questionnaire* had been approved, in which most States declared to be in favor of the principle of party autonomy and 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 Inter-American 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 the 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.

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, and agreed 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 that 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. 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 referred to how it 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 traditional justice. He pointed out that some of the countries 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. 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 was focused instead on promoting the pool of Private International Law of inter-American conventions. 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 Committee Secretariat was available to support the work of 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, as its influence could manifest itself in other ways, such as by ensuring that their principles are inserted into domestic legal systems. He further noted that many of the obstacles to possible ratification did not seem to 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.

The members agreed to designate Dr. Moreno as Co-rapporteur on this topic, and that the next step would be to have the Rapporteurs draft a guide on principles, to be presented at the next session.

It should be noted that during this session the Inter-American Juridical Committee organized a roundtable with experts on Private International Law where it was discussed about the future of Private International Law and specific topics, such as the Inter-American Convention on the Law Applicable to International Contracts; the written report of the roundtable is registered as document DDI/doc. 3/16.

During the 89th Regular Session (Rio de Janeiro, October, 2016), Dr. Villalta recalled the background of discussions on the issue of international contracts and informed about the guide on international contracts drafted with Dr. Moreno. This guide is based on the main principles of the Mexico Convention on the Law Applicable to International Contracts, on The Hague Principles on the Election of the Law Applicable to International Contracts, and the most important international

instruments in this field. She also reported that the responses to the *questionnaire* had been considered for the drafting of the Guide, in addition to the surveys carried out with professors and jurists of the Hemisphere.

Dr. Moreno stated that he could notice 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 resulting from diplomatic discussions, such as for example articles 9 and 10.
- Some of the terms were not 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 can be used as a model for domestic legislation and become an academic reference for law operators regarding the solutions proposed in the Mexico Convention, among others. In addition, the guide will facilitate interpretation and understanding of complex concepts such as autonomy of the will and therefore can be useful for judges and arbitrators to use it in their decision-making processes. This can have an impact and lead to the ratification of the Convention and serve as a model to facilitate amending national laws and expand the scope of possible solutions, including the proposals of the principles of The Hague.

The Chairman expressed his support for the perspectives on the guide proposed by the rapporteurs.

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

Dr. Villalta said that the added value of the guide is to expand the American regulatory system to incorporate more modern solutions in the national systems. She mentioned that since during the 88th Session, held in Washington, the Plenary decided to support the rapporteurs in the preparation of a guide, they did not consider reasonable suggesting a model law.

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

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

Dr. Mata Prates considered a "soft law" proposal by the Committee of great value to help jurists interpret and apply existing norms.

The Chairman recalled that the Rapporteurs would also need members to analyze the possible solutions presented. As no member had objected the solutions offered, he asked the rapporteurs about the elements 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 Legal Committee can draft.

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

The Chairman agreed to 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.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), both rapporteurs, Drs. Elizabeth Villalta and José Moreno, shared their views on developments on the subject matter. Dr. Moreno mentioned efforts concerning the law of contracts and the 1980 Rome Convention in Europe and developments in the regional arena, with the Bustamante Code, the Montevideo Code and the work of the Inter-American Conferences on International Private Law (CIDIPs).

Dr. Moreno then explained the developments of The Hague Conference on Private International Law (PIL) in the area of contracts and, in particular, The Hague Principles, which are intended to aid legislators in their efforts to modernize contract rules. In fact, he noted that both the advances of The Hague and of the regional Convention have been a catalyst for the legislative changes in his country, Paraguay.

Dr. Moreno added that he had participated in the Working Group of The Hague Conference to draft the Principles and then later served as his country's representative in the political body that approved the document. At said forum, he said, the contribution of the Mexico Convention was consistently recognized as one of the principal sources.

Dr. Mata acknowledged that the purpose was to create a guide of these principles. He concurred that the States were not interested in ratification of the regional convention. However, he felt that we would have the Mexico Convention for some time to come as a point of reference. He said that although there could be hope that the guide would become law, common among States, he thought that for now, that was a bridge too far to cross.

Dr. Hollis asked about how the rapporteurs' document would deal with the differences between the Mexico Convention and The Hague Principles, in view of the fact that the former encompasses all kinds of contracts, while the latter addresses full party autonomy to commercial contracts. He wondered, therefore, whether the guide was intended only for commercial contracts.

Dr. Hernández said that the objective was to standardize rules so that when a company from one State does business with a company from another State, they are able to do so smoothly. He also contended that the essential thing was to promote international business, and a guide on the subject matter would be the ideal way to do so. It should offer the best advice to the user for purposes of finding the most pragmatic solution to facilitate private exchange. In his view, that would be the added value for all who use it.

The Chairman stressed the importance of having the input of the experts in the field of private international law. He also emphasized that the Committee should offer products that would be of use, in keeping with its objectives. He said that precisely on this last point he harbored some doubt as to the consultative role of the Committee (emanating from the Charter). He wondered whether it would be going a bit beyond the scope of the Committee's objectives. In his judgment, the guide should have a legislative nature and assist international trade, as Dr. Hernández had said. Therefore, he thought it should be a legislative guide addressed to the States so that they could modernize their laws. He felt that a 150-page manual seemed more like a "declaration" and suggested a shorter format.

Dr. Moreno addressed the Chair's concerns by explaining that last April the decision had been made to write a draft guide. He felt that if the approach were to change at this point, a great deal of the prior work would be lost; however, he acknowledged he was open to whatever the Committee should decide.

He has found that many legislators, even professors, did not have much of an understanding of private international law and, for this reason, the guide was intended to simplify the material and make

it more accessible. He was concerned that legislators could take 25 to 30 years to amend domestic laws and regulations; while arbitrators, judges and many others could truly benefit right now from the guide. What was being created by this document, he stated, was essentially "soft law."

Dr. Moreno agreed with the comment of Dr. Hernández that the guide had been originally conceived of for commercial contracts. He noted that even though the current draft was long, it covered a great deal of material; even though it was intended to be simple and comprehensive, it just could not be both at the same time.

He added that it would be necessary to include further explanation about how consumer and labor law fall outside the parameters of the Guide.

In response to Dr. Hollis, he explained that The Hague Principles did not cover situations where no choice of applicable law had been made, which would have been way too ambitious.

In concluding, Dr. Moreno clarified that the idea had not been to prepare a declaration, but to explain the solutions from the Mexico Convention, The Hague Principles, and thus guide legislatures and, in so doing, serve the parties.

Dr. Hernández mentioned that perhaps the end user could be best determined after the Committee looked at the final product. At that point, it would be easier to decide whether it would be more suitable for legislators, judges, the parties, etc.

He also noted that the Mexico Convention had started out with good intentions. Nonetheless, its results offer good reason for political entities to consider whether or not to undertake the work of codification through a treaty. Thus, it was not necessary to go through a treaty and it would have been better to use a soft law instrument. Consequently, this stands as an example of the need for caution when embarking on a codification process, which requires a great deal of effort and resources.

Dr. Mata Prates felt that this exchange of ideas has brought the Committee closer to its goal. He also noted that it was an academic labor, which has its own rules; while the Committee also has its rules and even though we could have chosen a model law, we decided on a guide. He thought that it would be useful to introduce a guide because few States have a law on this subject, in addition to the non-binding nature. The CJI could, in this way, make a meaningful contribution to a very important area with practical application.

Dr. Moreno answered the last comment regarding a model law, by clarifying that the guide was not intended to go against the Mexico Convention, about which he said he is proud. If it is properly interpreted, he said, the regional convention would partially or totally solve core issues, such as party autonomy, selection in a narrower sense, etc. The important thing was for parties to be able to get what they had intended out of contracts. This is what arbitration had achieved so successfully. He said that at all national levels, States could ratify the Mexico Convention or they could rework it in combination with The Hague Principles. He noted that these two instruments had been immediately useful and provided examples where courts have already used them. His goal was for the guide to become an equally useful document.

The Chairman understood this document to entail enriching the Mexico Convention with The Hague Principles and, from his point of view it would be a guide to aid legislative bodies because it is grounded in facts.

When the analysis of this item concluded, the rapporteurs were asked to submit a draft of their proposals at the next regular meeting.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the Rapporteur on the subject, Dr. José Moreno, elaborated on his report, "First Draft of the Guide on International Contracts in the Americas," document 540/2017 corr.1. noting that the report reflects a collective effort in which many experts from different countries of the Hemisphere have taken part, such as accomplished professors from Argentina, Brazil, Canada, the United States, and Uruguay.

In his description of the report, he said the introduction explains the beginnings of international private law and efforts in the global arena (The Hague Conference, UNCITRAL and UNIDROIT), as well as in the inter-American arena, citing the Bustamante Code, the 1940 Treaties of Montevideo, in addition to mentioning the work of the CIDIPs (underscoring the high number of ratifications). At the regional level, he cited processes of integration within Mercosur and the European Union.

Under the heading of codification techniques, the Rapporteur explained that over the past 20 years, 10 conventions have been adopted out of a total of 79, mostly of a procedural nature, and he expressed his concern over difficulties in the diplomatic process of treaty approval and ratification, which means that many instruments do not end up being ideal or are subject to reservations, thus undermining their unifying purpose.

He said our times have seen a proliferation of mostly soft law instruments; out of a total of 65 instruments adopted over the past years, 11 have been in the sphere of the OAS, in particular at CIDIPs VI and VII, and he noted in this regard the contribution of the CJI through the model law on access to public information, the model law on simplified stock corporations and the model law on electronic customs receipts for agricultural products.

In this context, he presented the Committee's objectives through the adoption of a Guide to International Contracts, which takes into consideration elements of the 1944 Mexico Convention:

- Facilitate the adoption of solutions through different mechanisms (calling for either adopting the OAS instrument or regulating said principles in domestic laws);
- Serve as an interpretative guide and even as a lingua franca for judges, arbitrators and contracting parties;
- Facilitate throughout the region the acceptance of universally widespread solutions with respect to party autonomy and acceptance of non-state law;

Next, Dr. Moreno gave a list of anachronisms in the field of contracts:

- Longstanding or 'out of date' legal solutions;
- Lack of consolidation of the principle of party autonomy and its derivatives;
- Reticence regarding acceptance of non-State law;
- Failing to find equivalents of non-state law in the legal and arbitral sphere;
- Use of the notion of public order in the sphere of private international law.

Consequently, in addition to being the first in the region, the guide will serve as a bridge instrument to the work carried out by The Hague Conference and UNCITRAL.

Upon making the report available, the Rapporteur invited everyone to take whatever time necessary to review it, given that it is not his understanding that the final version would be adopted at this meeting.

Dr. Villalta highlighted the positive influence of the Mexico Convention both at the universal and regional level and the Committee's potential to make a new contribution through the Guide.

Dr. Hollis found it necessary to draw a distinction between the descriptive and the normative parts, and commented that this should be reflected equally throughout the report. In this regard, he requested brief summaries to be included. As to the contribution of the Committee, he expressed the need to list available alternatives with their respective explanations and reasoning, which means a decision must be taken as to whether we want a document of a normative nature or a compilation.

Dr. Hernández expressed his appreciation for the impressive document, in addition to commending Dr. Villalta for the explanation about the motivation for the Guide, which is to aid operators in making decisions on the subject of contracts and not pursue further ratification of the Mexico Convention, in view of the fact that treaties should not be considered the only legal solution. As to the content of the report, he thinks that the document could be adopted as presented by the

Committee, but he fears that in its current version it would not achieve the intended purpose, because we are not seeking an academic but rather a practical document. For this reason, it must be more concise, clearly identify the normative part and explain the principles and solutions to be promoted based on benchmarks that were found.

Dr. José Moreno asserted that even though it is not the intention of the rapporteurs, the Guide could lead to ratification of the Convention, certain that it could serve as an important benchmark for the States, and the specialized institutions, in the same way that The Hague Conference and UNCITRAL have, and this can help to disseminate and support it.

As to the comments of Dr. Hollis, he explained that the expectation is that these instruments serve a broad range of stakeholders, actors such as legislators, judges, parties and, therefore, the ideal thing would be to make clear throughout the document that the operator is very much at the forefront. He clarified that the Guide aims to provide a reasonable and well-founded explanation about the status of the issue in each particular case. The Rapporteur is intending to provide a collection of the positions of the States.

As for the normative part, he fears that in seeking to take a position on certain points, a choice has to be made between the Mexico Convention and The Hague Principles and, consequently, this alternative should be seriously evaluated. Today's guides are complex, technical and extensive and the Rapporteur has taken particular care in drafting a more brief and to-the-point product; in fact, it was shortened from 300 to 120 pages. With relation to corrective solutions, he proposed revisiting principles of the Mexico Convention, although the Conference also offers good options. He noted that we do not have the same conditions as The Hague Conference, which was supported by other institutions and experts from all over the world and was conducted over a much longer period of time. He proposed keeping the text in its current form, while considering the technical aspects of it, and voiced the need for the region to have an instrument available in the near future.

Dr. Hernández clarified his previous remarks expressing interest in producing practical reports that offer relevant solutions to address the issues raised, because the alternatives proposed in some instances varied widely.

Dr. Richard asked for these reports to be translated to enable wider dissemination of the Committee's work among experts from his country, in addition to international organizations such as the African Union.

Dr. Mata Prates underscored the difficulties that arose in light of the fact that no consensus has been reached on some topics, and he expressed his gratitude for the efforts made by the rapporteurs in summarizing positions in the report. He asked the Rapporteur to reduce the high number of options to as few as possible, choosing only solutions with a solid foundation. He fears that it will lose effectiveness if it does not help the operator with concrete solutions.

The Chairman noted his concern over the practical nature of the Committee's work, because the intention is not to criticize extensiveness. The expectation in the end is for the document to serve as reference material and aid in explaining proposed solutions. It is intended to explain how a solution is and is not incompatible with the standards and thus move forward in the normative area, whether the norms are final or, where there is no agreement, it should be so indicated.

Dr. Duncan Hollis felt that more clarity is needed about what we are trying to do, a kind of road map. The document already describes what we are doing, but in each case, it should determine where there is agreement, disagreement and ambiguity. When there are mixed opinions, we must decide which one is the most appropriate one and explain our reasoning. The challenge is to figure out whether we are seeking to create a supplemental document to The Hague Principles or a replacement to it. In fact, the report will be valuable even though there may be disagreement and no solutions can be offered.

Dr. Ruth Correa felt it necessary to find possible solutions to applicable norms and procedures. Concretely, she suggested not including topics of arbitration in the study, because they involve issues that could be categorized as quasi-contractual. This topic could actually give rise to a separate paper. In

fact, she asked the plenary for further explanations on the elements that a guide should include. If we are asking the rapporteurs to imply which ones are the best solutions through definitions, then she will go that route in her report.

Dr. Villalta she invited Dr. Moreno to determine what is most relevant to private international law today, in addition to identify applicable law in each case, so a principle can be issued based on the issue.

The Chairman proposed that it is essential to draw a distinction between guides and model laws, considering that the former have a practical side to them, which enables States to apply them based on the principles and standards presented and do not constitute doctrinal or authoritative writings; while model laws are a set of norms that are supposed to aid States in legislating.

Consequently, he proposed to the Rapporteur to keep the report as it currently stands as a point of reference for the guide.

Dr. José Moreno clarified that The Hague Conference does not have guides, but UNICITRAL and UNIDOROIT do. These guides are characterized to a great extent, among other things, by being extensive, complex and explanatory documents. There are variations in guides; in this regard, he proposed following the example of the UNIDROIT Guide on agricultural land investment contracts. It has an index, preface and includes an explanation, providing context to the topic without taking positions, but presents an opinion. UNCITRAL, for its part, does have guides that take positions.

He expressed his interest in drafting a quality document that respects the requested criteria. The positive thing about the guide, he said, is the flexibility to expand documents and even propose corrections. As to the topic of arbitration and investments, he added it is something that can be put off until a later date.

In concluding, the Chairman drew a distinction between guides flowing from non-governmental and governmental organizations. In thanking the Rapporteur, he asked him to take the observations into account to create a new version for the next meeting.

The matter was not discussed during the 92nd Regular Session (Mexico City, Mexico, February, 2018) as the deadline for specialized organizations and experts to submit comments to the draft Guide on International Contracts in the Americas, (document 540/2017 corr. 1) distributed by the Department of International Law, was still two months away.

The Rapporteur was pleased to have received many responses so far, and indicated that once the deadline had lapsed, he would review the information to present a revised document in the next session.

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3. 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 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 its 86th Regular Session (Rio de Janeiro, Brazil, March 2015), the Committee received the Rapporteur's report "Representative Democracy in the Americas: First preliminary report," document CJI/doc.473/15. He pointed out that the report is of a preliminary nature and its purpose is to participate in 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 accede to 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 Juridical Committee.

Dr. Mata Prates 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. 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 Chair 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), the Rapporteur reported that we should be comparing democracy protection norms with other systems, such as UNASUR, the Council of Europe and European Union, in addition to conducting a study on how domestic norms have performed. 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 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 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.

During the 88th Regular Session (Washington D.C., April, 2016), the Rapporteur, presented his second report on representative democracy (document CJI/doc. 501/16). In his verbal presentation, he commented on his preliminary report, focusing on a descriptive analysis of the practice as it related to Chapter IV of 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 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 interpretation, 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 Human Rights 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.

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 he found 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 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 under the supervision of the Secretary General, 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.

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, dismissing the idea of “an early warning system”, the first difficulty being that of defining the notion of warning, with elements that appear to be interventionist, noting the difficulties imposed on the international community by *inter pares* reports.

Dr. Carlos Mata commented that the title of the document should reflect its contents, which refers to the powers of the Secretary General. He suggested to clarify the reference to "impeachment coups” (which in Uruguay are called political trials). At the end of the conclusions, one should not "insinuate" but rather propose a criterion. He did not see the relevance of creating an organ within the General Secretariat, and encouraged the members to be mindful of the principle of non-intervention. Finally, he

said it was important to emphasize the role of the Committee in providing added value to the OAS activities.

The Rapporteur, noted that the distinction between *prevention* and *intervention*, is explained by the legal obligation of the States in favor of human rights and of representative democracy, observing that 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 political organs. The inter-pairs action is a mechanism of technical information that is not aiming to issue political criticism. In this respect the Rapporteur inquired why a difference 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 about 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 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 pursuing 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 core differences that go beyond personal precisions. For this reason, he suggested not forcing a decision from the Committee, but instead allowing a reflection considering the elements on the table, while recalling importance of submitting a product useful to the General Assembly, agreed 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), Dr. Salinas presented a report titled "Guide for Reflection on the Topic of Representative Government in the Americas," document (CJI/doc.524/17), recalling that the debate on the third report had revealed differing points of view between the members, that warranted further reflection and, therefore, he had prepared the Guide focusing on provisions of Chapter IV and Articles 3 and 4 regarding the essential elements of democracy.

As for the first item, he noted that Articles 17 and 18 provide the basis for preventive action, measures regarded as crucial in a context where sanctions must be the last resort.

With respect to the second item, the Rapporteur noted that the role of the Secretary General and its effectiveness under Articles 17 and 18 of the IADC is inherently weak, unless it is read in conjunction with the OAS Charter, which enshrines the promotion of representative democracy and

grants the SG an essentially political role; he is not simply an administrative official; the Secretary General has the power to act preventively - with some specific exceptions.

In the third section of his report, he mentions the importance of the principle of non-intervention, pointing out that, while the OAS Charter does not authorize unilateral action by a State or group of States, multilateral action in defense of representative democracy would be acceptable.

In this context, he proposed the creation of a special unit for democracy within the OAS Secretariat to assist the Secretary General in obtaining information, a habitual task in other areas, such as human rights.

The fifth part of the report addresses a practical issue raised by current Secretary General Luis Almagro regarding the need to establish criteria as to Articles 18, 20 and 21. He suggested in this regard that said criteria should come from the doctrine and practice of the OAS, which would help to provide greater legal certainty and less discretionary power. He concluded his report by stressing that not only should democracy be defended in its formation, but also in its exercise.

Dr. Baena Soares emphasized that the topic was *representative* democracy and voiced concern over an academic approach that did not take into account those who were being represented. He cited 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, in order to ensure that they could choose their own representatives. He said that representative democracy is 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 Prates noted that members did not necessarily share the same understanding of representative democracy. He said that certain activities may not be the result of rupture but rather, different traditions. He noted that the Committee was also entering a difficult area and that no one had requested it to do. As he understood it, States do not cede their sovereignty upon ratifying the OAS Charter, their powers under domestic law were very clear and there was no desire by 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. Along that same line of thinking, 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 he felt this paragraph required a better explanation as to why, for example, the judicial powers would be legitimate. He then turned to the concrete measures proposed and noted that most of the legal concepts were ambiguous. He said, with the utmost respect, that even though he was talking about the need to change these provisions to render them more precise, he feared that greater precision could not be rendered in the abstract, without leaving potential room for discretionary power. He suggested the Committee revisit the objective of a Guide, given the existence of: 1) the OAS Charter, 2) the IADC, and 3) other resolutions adopted by the OAS, because it would be difficult to see what contribution the Guide could make.

Dr. Hollis noted that this paper was 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. 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. He asked what would constitute a violation of the duty of non-intervention, whether only States could violate the duty or could anyone else do so as well. He suggested the Rapporteur might wish to compare actions taken by the United Nations under Chapter 7.

As to section 5 of the report, Dr. Hollis said that lawyers were called upon to engage in interpretation 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 it would be valuable to assess what these provisions would and would not cover.

Dr. Hernández shared three points with the plenary. First, in relation to the scope of the document, he felt it important that the Committee should continue to discuss this topic, inasmuch as the topic arose at the 10th anniversary of the IADC at the request of the SC and then at the 15th anniversary again at the SG's request. In relation to the 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, he made several specific comments. He liked the preventive action mechanism, although he did not think it required an amendment to the Charter and that consensus would be required to carry out 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 that they would not because only collective action would be considered legitimate. In relation to section 4, paragraph 4, he agreed with Dr. Mata Prates insofar as the SG has not only had contact with the executive branch but with other branches as well. He found Article 18 unclear as to "who" would be understood as the government entity that could appeal to the OAS. In his view, this could only be the diplomatic representative at the international organization; Article 18 was about the OAS and its strength as an international organization.

Thirdly, he concluded that since this was merely an *interpretation*, there was no need for a consensus, but everything was contingent upon the final text to be submitted to the political bodies.

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 itself that had committed the breach of democracy, at which point the SG would bring it to the attention of the Member State to verify the situation. This would create pressure on the government concerned and have 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 this field. He recounted the experience in Haiti; since the end of the Duvalier regime, there had been several UN, OAS and joint missions. He wondered why, after all of these missions, no real progress had been made. He pondered why another area of the OAS might not wish to consider conducting an evaluation of such field efforts and noted that otherwise, it would be pointless for the Committee to produce more documents on the subject.

Dr. Villalta shared her experience in El Salvador where there had been conflict between the Court and the legislature and when the legislature wanted to appeal to the OAS pursuant to the IADC, it was told that the appeal had to come from the Executive branch. Consequently, she suggested acting with caution, in order to strengthen the Charter and avoid missteps.

Dr. Correa felt that the proposals made here should not come from the CJI, but rather should consider the role the charter already has, and that the proposed sanctions would require ratification by the GA to be accepted. She wondered whether the measures proposed by the Rapporteur could go against Articles 18, 19 and 20. She thought that the Committee should provide some thoughts on their content and refrain from making proposals as to the powers of the SG. She expressed concern that the proposal could affect the principle of non-intervention, which was so essential to all States.

Dr. Moreno suggested the drafting of 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 summarized as follows:

- As to the role of the Committee, he referred to the OAS Charter and noted that it was the progressive development of international law.

- On the point of non-intervention that several members had mentioned, he noted that 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, 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 played an essential role, but he noted 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 had demonstrated important differences of opinion. Some members believed that any mechanism could constitute a breach of non-intervention and he said 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 to the Rapporteur that in his next report he might also want to consider the rights of a State in response to sanctions. He noted that Article 21 mentions suspension, which has occurred only once in the case of Honduras, but that the concept was also subject to interpretation. He encouraged the Rapporteur to indicate whether suspension entailed only the participation of the State in the international organization, or whether it included, for example, suspension of fellowships/scholarships for individuals from the State, etc.

During the 91st Regular Session (Rio de Janeiro, August 2017), the Rapporteur elaborated on his report, document CJI/doc. 537/17, which is a summary of agreements and differences in substance between them for the purpose of sparking debate and figuring out where the subject will go within the Committee.

The Rapporteur explained that the object of the report is to put forward proposals aimed at enhancing the mechanisms of implementation of the Inter-American Democratic Charter and not to interpret said document. Moreover, the output into which the proposal will crystalize has not been determined, in light of the importance of having agreements on the subjects to be addressed. There is a consensus as to the harmony in the interpretation of the powers granted to the Secretary General and there is no need for consent in order to bring to the attention of the States situations that jeopardize the representative democracy of a State, based on an analysis in keeping with Articles 3 and 4. The fundamental differences stem from the explicit nature of the powers of the Secretary General. Likewise, he noted differences as to the need to grant the Secretary General tools through the early warning mechanism or of the purpose of monitoring developments of democracy in the region. To some members, this would trigger a violation of the principle of non-intervention. He stressed the rapporteurship's interest in clarifying some terms of the Inter-American Democratic Charter with regard to situations set forth in Articles 18, 20 and 21.

Dr. Joel Hernández made it clear that it is not about interpreting the Democratic Charter or the OAS Charter, and this enables the Committee to remain strictly within the sphere of the law. Likewise, he thought it is important to mention the effects of the sanctions and, in particular, suspension. Regarding the type of outputs, he proposed following the example of the CDI, that is, to avoid exhaustive lists and produce a document with conclusions and comments. Lastly, he urged the Rapporteur to include the situation of Venezuela, characterized by an assault on some of the legally established branches of government under the Constitution, which involves addressing a current issue.

Dr. Duncan Hollis noted that international organizations have powers that are necessary in order to fulfill their missions. Accordingly, we must determine what the implicit powers of the Organization are and whether the Secretary General has powers in the event of conflict with the principle of non-intervention. As he understands it, issuing a warning to a State does not mean conflict. Nonetheless, he has not seen conflicts in any of the reports. Lastly, as for the powers, he noted that the political aspects of the situation do not prevent the Committee from assuming a role to enable it to clarify how this is implemented.

Dr. Carlos Mata Prates noted that the Committee should not ignore the prior contributions made by the Committee on the subject matter. He explained he is unable see the practical aspect of the proposal, in view of the fact that we have not determined the nature of the instrument to be prepared. As for the mission of the OAS Charter and of the Democratic Charter regarding the principles of non-intervention, he called for caution and to eliminate any reference to intervention, whether unilateral or collective in nature. With regard to the powers of the Secretary General, the document should be reworked, but in any case, the objectives we are pursuing in the document must be spelled out.

Dr. Jean-Michel Arrighi illustrated the differences between current instruments and those prior to the Inter-American Democratic Charter, which were based on the existence of a coup d'état, situations characterized by four elements:

- A State asks the OAS for help;
- A group of countries thinks that there is a crisis in a country and this country accepts such a statement;
- A crisis exists, but the country does not accept or ask for help (Article 20 of the Democratic Charter based on events in Fujimori's self-inflicted *coup* in Peru);
- There is no government.

In this context, he also noted that the countries should think about the consequences of setting into motion the mechanisms provided for in said instruments, in particular, when suspension is proposed. For this purpose, he believed that it would be very useful to produce a document that makes a pronouncement on the harmonization of sanctions of the three provisions in force on the subject matter: General Assembly Resolution 1080, proposes partial measures or measures of a different nature; Article 9 in the OAS Charter of the Protocol of Washington, which has not been ratified by all States; and the Inter-American Democratic Charter.

The Rapporteur on the subject expressed his appreciation for the contributions made, and the contribution of Dr. Arrighi. He explained that the type of democracy promoted by the Inter-American system is representative democracy that the objective of his report is to enhance the mechanisms of implementation of the Democratic Charter with respect to Chapter IV, but the instrument to be worked on depends on the type of proposals that are made. As to the subject of non-intervention, he explained that what is being proposed are collective actions that do not clash with unilateral actions. He was grateful for the suggestion about the importance of integrating matters linked to the effects of the sanctions, in addition to defining the implicit powers of the organization and the Secretary General. He also noted the Committee can and should participate in the defense of democracy, as is the role of every organ of the Organization. As for the effort to harmonize laws, it is relevant, but it should be discussed whether to include it in the report or in another document.

Dr. Carlos Mata thanked the Rapporteur for the proposal of having a document ready in March.

Dr. Joel Hernández acknowledged that States could benefit from the catalogue of options available to them. He thought what is concerning to the actors, in addition to suspension, is whether or not there are enough votes and the rift it could open between States.

Dr. Duncan Hollis regarded as positive the suggestion of focusing the report not only on implementation of the Democratic Charter, but also on the other instruments available on the subject

matter and do so with a joint approach to make it possible to capture the situation in all States of the Organization.

The Rapporteur asked how to approach the work in light of the proposals put forward, along with the new ideas: the suggestions of Dr. Hernández as to the effects of the sanctions, the suggestions of Dr. Arrighi on the harmonization efforts, and the issue of Venezuela.

Dr. Joel Hernández suggested that the proposals be written into a document of conclusions, with comments to support them. Adjustments will have to be made in order to include treatment of harmonious interpretation of existing instruments and outline the different solutions that can come from the OAS and also at the national level as a result of suspension. As to the issue of Venezuela, it urgently requires a statement, and the Committee is empowered to carry out said study, in light of the fact that one of the purposes of the OAS is the defense of democracy.

Dr. Duncan Hollis explained that the intention is to expand the content of the report, so we can clarify and compare the Democratic Charter in light of other mechanisms. Perhaps Venezuela can serve as a case study, not as a report focused on said country.

Dr. Juan Cevallos urged approaching the issue by taking into consideration the reality of the situation of Venezuela, in which the final product flows from reflection and analysis from a legal technical point of view.

The Rapporteur expressed appreciation for the discussion and the suggestions made. He noted that the presentation of the proposal is to take place when it is deemed appropriate. Therefore, the matter was not discussed at the 92nd Regular Session (Mexico City, Mexico, February 2018).

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4. Guide for the Application of the Principle of Conventionality

At the 87th Regular Session 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)" (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, while 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 suggested shortening the questionnaire.

Dr. Moreno Guerra congratulated the Rapporteur for starting from the premise that the constitution cannot be above treaties. He acknowledged the relevance of the proposed questions, including the references to the conventions on torture and forced disappearance.

Dr. Stewart 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, which 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 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 Juridical 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 Session (Washington, D.C., April 2016), the Rapporteur presented document CJI/doc. 500/16 "Guide for the Application of the Principle of Conventionality" 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 countries that had answered the questionnaire distributed by the Committee Secretariat (Chile, Colombia, Jamaica, Mexico, Peru and Guatemala), clarifying that the latter's 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 country's legal system, or convention provisions are observed by the country'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 countries 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, which was not necessarily to say that they had accepted the jurisdiction of the Court. She further noted that, as a rule, in the countries reviewed lawmakers were not taking steps to incorporate the treaties into their domestic legal systems by or assigning them the rank of law, or that of constitutional provision in the case of countries 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 country 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 the interpretation of 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 the interpretation of domestic laws in the light of conventions and the interpretations of 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 countries 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 countries 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 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 give enforce the interpretations of the Inter-American Court of Human Rights.

Dr. Correa 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 are compared with principle of the margin of appreciation that derives from state sovereignty.

At the 89th Regular Meeting (Rio de Janeiro, 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 noted that the Committee had only received 10 replies to date, and 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 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) undecided. Therefore, he found it unlikely to obtain uniformity with regard to what the Court imposes.

He urged the Rapporteur to continue her work despite not having received more responses from States, and suggested that her report at the next meeting cover the reactions of states to the judgments enforced by the Court.

Dr. Hernández García noted 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 Juridical Committee to adopt conclusions.

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.

Dr. Correa 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 said that the states that had replied were Argentina, Chile, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay and Peru. In the case of Jamaica, she said that the response noted that the country did not accept the jurisdiction of the Court, despite being a party to the American Convention. 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 of the American Convention; or of countries, 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 the 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. Naturally that involved implementing the Court's interpretation; the enforceability of international treaties is a separate matter, however. It is important to know the concept because if we restrict it to the Court's interpretation, then states parties, particularly those subject to the jurisdiction of the Court, will be taken into account, but we would not get a complete overview.

Dr. Hernández García 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 Chairman consulted 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 to the Inter-American Court, to which Dr. Correa 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 on the subject, Dr. Ruth Correa, presented her proposal "Guide for the Application of the Principle of Conventionality," document CJI/doc.526/17.

Dr. Mata Prates first noted a limitation in that only 15 States have accepted the jurisdiction of the Court and therefore this guide would not be applicable in the States that have not ratified the Convention. Secondly, the response rate to the questionnaire was not very good and of those States that did respond, only 7 have ratified and acknowledged the jurisdiction of the Court. Likewise, he pointed out that as regards the principle of conventionality, it would be necessary to choose one of the

interpretations to validate. He said that if we were to begin from a perspective of hierarchy, we must determine how the Convention would be framed in domestic law and the rank that would be conferred onto it by a domestic judge. For some, the interpretation of the Convention by the Court should be treated as binding legal precedent; however, he said that Uruguay does not keep to 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 the 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 expressed his agreement only with the middle section, but voiced concern over the way judges would be called upon to interpret law and the reference addressing domestic matters unique to each State. He suggested rewording the part of item 11 relating to supervision of the application of the decisions of the Court, in particular, its follow-up through meetings with the State and the parties.

Dr. Hollis requested further explanation from the Rapporteur about the scope and wondered whether the catalogue was intended to be applied only to States party that have accepted the jurisdiction of the Court or to all OAS Member States. He expressed fear that the guidelines would not align with the domestic laws of some States. By way of example, he explained that, although the United States accepts the principle of *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", in which case, the domestic judge is not allowed to apply the treaty provisions directly and must apply domestic law.

He further 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 asserted that for dualist States, the guidelines would be problematic and referred specifically to item 5, which grants binding nature to interpretations of the courts and he suggested adding an explanation to limit the guidelines to those States that would be able to apply conventionality.

Dr. Hernández 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. On this issue, he compared the title of the document with the title of the attached Guide and noted that the scope of the guidelines related more to domestic implementation.

He turned to item 5 and said that in some States, such as Mexico, the interpretations used by the Supreme Court are not limited to those cases where Mexico has been a party, but includes application of all jurisprudence. On this score, he said, the proposal to observe the interpretation of the Inter-American Court would not be realistic in a judicial system as complex as Mexico's. Dr. Hernández concluded by pondering whether the purpose of this work should be addressing the intended meaning of the concept of conventionality, in light of the different understandings of the concept.

Dr. Baena Soares posed the question of who would be the target audience of the guide. He assumed it would only be States party to the Convention, but he felt that non-party States could also benefit from a guide.

Dr. Villalta 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. Regarding item 13 on the creation of an institution, she requested clarification on how it would function, especially given that not all States are parties to the American Convention.

The Chair began his remarks by addressing the lack of a definition of the core concept. He said that one aspect would be less controversial and could be solved by the law of treaties, inasmuch as all human rights adhere to the principle of *pacta sunt servanda*. Secondly, this becomes more complex and highly controversial if national courts are required to take into account the jurisprudence of the Court. If we exempt those that are not parties, then we also exempt those that have not accepted jurisdiction of the Court; and hence the scope of application would be reduced even further. In his view, the principle of conventionality should be seen as a means towards fulfillment of treaties, not as an end in and of

itself, given that most States do not consider the judgments of the Court as mandatory. Lastly, he asked the Rapporteur to start by crafting a definition that would serve as the start of a path to follow.

The Rapporteur members to recall the discussion with the legal advisors as to the importance and currency of this topic. She reminded the plenary that this was her second report and that the discussions on the definitions were reflected in the first one. She said that this concept did not come from the rapporteurship, but was instead based on precepts previously used by the Court. She thought it was clear that the objective was not simply to apply the Convention, but also to use the interpretations as a basis for rulings. In response to the question of the intended audience, she said it could be split into two groups. The first group is based on the recommendation that all OAS Member States should ratify the Convention, i.e. it consists of countries that have not ratified the instrument. The second group consists of countries that have ratified it. 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 is geared toward the second theory, which would not only include parties to the decision but also those that had accepted the Court's jurisdiction. It is obvious that such a 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 to interpret. 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. As to item 10, the intention is that training should be made available to all administrative officials – not only judges – including those in charge of protecting human rights and interpreting the decisions of the Court. She said that this is closely connected to access to justice.

Dr. Villalta suggested, with the support of Dr. Moreno, changing the title to "Recommendations" rather than "Guidelines."

Dr. Hernández 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 for ratification. But he clarified that, at the end of the day, it is a sovereign decision, suggesting differentiating 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 Prates endorsed the suggestion to change the first part in order to look at different positions regarding the scope of the principle of conventionality before continuing 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 being cautious because constitutional aspects play an important role in the way each State brings decisions into its domestic law. It is essential for jurisprudence to be known not only by judges, but also by the administration.

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

The Chairman agreed that the Committee could only invite and not recommend acceptance by States of the jurisdiction of the Court.

Secondly, he said in-depth study was important for fine-tuning the principle of conventionality and its application by human rights courts. He proposed including the discussion on compliance with judgments as well as rulings (as precedents) 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 regarding compatibility with domestic laws. Thus, he proposed making additional efforts, due to the complexity and importance of the topic, to secure responses from the States that have not responded.

The Chair suggested the Rapporteur prepare a new report for the upcoming session, and closed discussion on the topic.

On March 30, the Technical Secretariat of the Committee sent out a reminder to the States that have not responded to the questionnaire.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the topic was not considered, but at the 92nd Regular Session (Mexico City, Mexico, February 2018), the Rapporteur presented an outline of the study of the topic by the CJI, drawing some conclusions that are included in the Guide for the Application of the Principle of Conformity (document CJI/doc.557/18).

Dr. Mata congratulated the rapporteur on the quality of the work presented and suggested making a slight modification in the wording so that the document might appear to be more operational and less descriptive. He pointed out that the legislator neither enforces the norms nor is he the first addressee of the international norm, being the one with least entitlement to apply it. He also said that the international law focuses its provisions on the State, and the State, in turn, has to regulate enforcement of the norm in its domestic legislation.

Regarding the consultative opinions of the Inter-American Court of Human Rights, he pointed out that the report presented does not address them adequately, and that in view of the relevance that these opinions have gained recently, it would be advisable to provide details on its obligatory nature, explaining whether enforcement is obligatory for all the States that recognize the jurisdiction of the Court or only for those who so request it, or for none of the States. He also suggested adding a sub-chapter on the legal effects of consultative opinions.

Dr. Hollis thanked the Rapporteur for the work and effort displayed in the document presented and suggested altering the proposal of the Guide, which should be directed only to the States that are members of the American Convention on Human Rights.

The Chair congratulated the Rapporteur on her valuable contribution to the work of the CJI, and commented that the obligation of the Inter-American Court of Human Rights to communicate its rulings to the States does not necessarily imply that the latter accept the Principle of Conventionality as an obligatory compliance. He repeated that the State is sovereign to implement the decisions of the Court, and recalled that consultative opinions are not binding, in the terms of the Convention itself.

The Rapporteur explained that she had taken into account some of the comments made in the previous session by Dr. Mata with regard to the role of judges vis-à-vis the Principle of Conventionality. She clarified that she avoided using the word "sentences" due to the fact that the interpretation is made by means of judicial decisions, monitoring procedures and consultative opinions.

She went on to explain that the local judges of the member States of the Convention, when they apply the conventionality norm, must bear in mind the interpretation that the Court has made in sentences and consultative opinions; this is why she did not wish to suggest in her text that the opinions are per se binding.

In this regard, the Chair suggested revising the wording for the sake of clarification of the last item discussed, in the sense that the only obligation as such is that of enforcing the Convention.

Dr. Mata made further reference to the inclusion of consultative opinions of the Inter-American Court. Accordingly, he asked to include a sub-chapter explaining and providing the fundamentals as to i) whether the enforcement of these opinions is "preferential" but not binding, ii) whether the State requesting the consultative opinion must necessarily adopt it, and iii) if all the remaining party States are obliged to enforce consultative opinions.

Seconding this view, the Chair suggested removing the reference to consultative opinions and limiting the Guide to enforcement of the Court´s decisions. In his opinion, considering that the Court´s jurisprudence is a precedent, it goes beyond the scope of the wording of the Convention and the intent of party States. He submitted the topic to the consideration of the members.

Dr. García-Corrochano said that in the area of international law, conventions usually set up a tribunal for interpreting the convention itself, and that said organ cannot exceed the scope of the

convention that actually created the organ. However, some courts at the international level claim that they are entitled to produce norms. He clarified that when States wish to take on obligations they reach agreements through their representatives rather than ask the tribunal to create those obligations.

The Rapporteur informed that the Guide is the result of the study of several factors, including the practice of the States, and that it is based on the scope that the Court itself has provided for the control of conventionality. She offered to present a revised version for the consideration of members, clarifying the items previously addressed. She then announced that she would provide comments on the role played by consultative opinions and follow-up decisions, but would not remove the references to these opinions.

The Chair asked the Rapporteur to provide a change in wording to reflect the consensus of the minimum criteria of the CJI so as to avoid voting on the item; should this prove impractical, he proposed omitting the discussion of the issue. The members agreed to this proposal.

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5. 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.

During the 91st Regular Session (Rio de Janeiro, August 2017), the Rapporteur was pleased to present his report, document CJI/doc.553/18, which focused on four elements: differentiation, capacity, effects and procedures. The topic of differentiation involves identifying and distinguishing between three categories of commitments in the international context. On this score, he highlighted three ways of undertaking international commitments and defined each one: treaties, contracts and political agreements. In order to ascertain its nature, it must be determined whether the instrument is binding and, if so, whether it is a treaty or a contract. If the nature of the instrument is not expressly stated, there may be indications of the authors' intent, such as the structure of the texts and the wording used to express consent in undertaking an obligation, the appointment of a trustee, etc. Every case must be analyzed on an individual basis because of the specificity of each instrument.

In the Rapporteur's view, there is a presumption that these documents are best if they are binding. The Rapporteur also expressed his preference for treaties when choosing between them and contracts. As for the topic of capacity to enter into treaties, he explained that even though this is a power of the sovereignty of States, there is no clarity regarding who may represent the State or act as its proxy in entering into treaties. Although it is a practice in the United States and Canada for agencies to obtain authorization of representation, in countries such as Egypt and South Africa government agencies lack such capacity. In this regard, current practice seems to be that recognition of government agencies is based on the internal consent of the State and the external consent of the counterpart. He also posited differences between Federal States, citing the example of Canada, whose distribution of competencies grants the province of Quebec certain powers in the international sphere, which the Argentine Constitution does not grant its provinces. As for municipal agencies, he gave the example of the authorization granted to municipalities in Mexico to undertake obligations.

The Rapporteur underscored the problematic widespread practice of unauthorized agreements between agencies of different countries, and explained that political commitments render limitations on capacity inapplicable in binding agreements. As to the effect of instruments, he cited as the main element respect for the principle of *pacta sunt servanda* and, therefore, overriding effects lie in the terms themselves. In this context, he recognized three main sources: the law of treaties, acts of retorsion and the law of State responsibility. Political agreements, he further explained, are not subject to any

particular regime and the law of treaties and the provisions of State responsibility are not applicable to them. However, they may have political effects and, sometimes, though they are not binding, they could indirectly have legal effects. There is variation in domestic procedures to terminate an instrument and the way States authorize binding and non-binding agreements. States almost universally assign the task to the executive branch, assign the approval procedure to the legislative branch and, in some instances, include judicial review. Few countries have no checks in place on the executive by other branches of government. In the United States, the procedure provides for the Department of State to act as a check on the agency or federal or municipal branch (Circular 175). As for political agreements, it is difficult to obtain information on the full range of procedures, the number of instruments, the type, the subjects and the obligations pursued.

He concluded his presentation by proposing a menu of options with regard to the road map as to what to expect from the report in terms of general principles, responsibilities and best practices. In this context, he proposed drafting queries for the governments by means of questionnaire to learn each State's practice and asked the members their opinion about whether this should be done, mainly because of the lack of information on States' practices.

The Chairman regarded as highly important the paper the Rapporteur presented, which had been introduced originally at the meeting of the legal advisors, who should be participating at some point in the discussion on the subject along with the others.

Dr. Hernández noted the shortcomings of Mexico's law on treaty ratification, and explained that international agreements struck at any level in his country can lead to international responsibility of the State and, consequently, in terms of formal requirements, every agreement must be backed by a prior legal opinion to be executed, based on the legal competence of the entity, with the obligation to be included in the government registry.

He also expressed his agreement with the classification presented by the Rapporteur, but suggested that treaties be split into two types: *latu sensu* and *estricto sensu* (State to State agreements that require parliamentary approval). When a classification is required based on the entity executing it, then there must be a distinction drawn between agreements or treaties entered into between executive branches, agreements that are entered into between ministries, and lastly, agreements entered into between subnational units (the practice varies, in some places agreements may only be executed between similar categories of entity). As to the Rapporteur's questions, he asserted that a practical guide should be drafted to establish general principles. As a second component, a catalogue of best practices should be included (requirements for their formalization, coordination mechanisms, etc.). A list of agreements with different characteristics should be provided in light of legal requirements at the domestic level.

Dr. Carlos Mata Prates requested separating the field of international law from the field of domestic rights (which requires resorting to constitutional law) when distinguishing declarations from treaties. As to the classification based on the effects, it would be worthwhile, he said, to frame it to determine whether or not they have legal effects. When a pronouncement is made in favor of a treaty, a link should be established with the domestic law that takes into consideration the application of domestic procedures. In the case of political declarations, there should be clear guidelines without dwelling on determining whether or not it creates legal effects. The task is complex. Accordingly, he proposed to the Rapporteur to flesh out the topic of the effects of instruments instead of the determination of their nature, inasmuch as it can be established based on the actor that participates in it and serves as a point of reference to establish its nature, but in every case, the State is responsible.

Dr. Correa explained that regulation in Colombia is made up of different controls or checks in terms of procedures for the signing of international instruments. She requested the Rapporteur to take into account the declarations adopted by legislative and judicial bodies in several forums, which do not necessarily fall under the scope of the mandatory.

Dr. Elizabeth Villalta agreed that a questionnaire should be submitted to all States to find out about the experience of each region, which should include the following questions, in addition to other ones:

- The type or category of instrument that they sign;
- Whether they are parties to the Vienna Convention on the Law of Treaties or whether they enforce it as customary law;
- The way in which political declarations are put on the record.

The report should allow us to draw a conclusion on how States use treaties.

Dr. Juan Cevallos proposed seeking the participation of the States in the drafting of the document.

Dr. José Moreno noted that political commitments should be fleshed out and, in this regard, he suggested devoting some space to the topic of centralized registries. He also concurred on the importance of simple questionnaires.

Dr. Alix Richard concurs with the Committee members about the report presented by the Rapporteur. He cited the existence of agreements between cities of Haiti and other cities of world and urged the Rapporteur to include this arrangement. He explained in broad strokes the domestic system of ratification in Haiti, which requires review of the constitutionality of treaties. Lastly, he mentioned the signing of memoranda of understanding as a recent practice.

Dr. Carlos Mata asked the Rapporteur to differentiate the international sphere from domestic spheres, in view of what said distinction means, in particular, to a judge of an international forum. A study of the domestic sphere would involve a complex domestic discussion about the provinces and scopes of the constitutional law of each State, a considerable challenge. Consequently, he suggested that the Rapporteur focus only on the international sphere. He mentioned international courts, in their judgments, regarding domestic acts as unilateral. He also supported the idea of short texts in the questionnaire.

Dr. João Clemente Baena Soares shared that, in his experience, establishing agreements between foreign entities or municipal units with Brazilian ones has not had a positive effect and have had to be neutralized through effective provisions.

The Chairman first stressed the importance of differentiating between a non-binding agreement and an international treaty; which can be done by reviewing the practice of the States. We should find out how States address this issue, including learning about the different types of legal provisions that the States apply and their practice.

The topic involves, he said, two areas: agreements between States and agreements between non-State entities. In the first group, he suggested looking at the intent of the parties to see if they are binding or not (he cited the case of maritime delimitation and territorial issues between Qatar and Bahrain). In the second area, he suggested reviewing the status of agreements signed by non-State entities, in terms of domestic law and the practice of States with regard to these instruments. It is something that must be done cautiously. In addition to that, we should try to review the issue of breaches and whether it incurs State responsibility, based on the traditional rules. As to legitimate expectation or *estoppel*, he proposed that they be treated cautiously. He agreed the questionnaire should be brief and concrete, to address crucial issues and encourage the highest number of responses possible. It is also essential, he noted, to hold a meeting of the legal advisors of the region to discuss, among other topics, work on this subject matter.

The Rapporteur explained that his original idea was to be able to present a wide range of options. As to the approach, he thought that the idea is mostly to stick to the sphere of international law, but at the same time certain domestic topics are relevant, particularly with regard to instruments drafted by agencies or subnational or regional governments. Although the way each country regulates its domestic

cases is not going to be explained, because of the implications of State responsibility, domestic law has to be taken into account.

He proposed as the next step to review the questionnaire with the support of the Secretariat, and once it is approved by the members, to circulate it among the States. He will also review the situation of the simplified agreements and he noted that it would be unwise to flesh out the topics concerning *estoppel*. The intention therefore is to distinguish treaties from declarations, and determine the status with respect to adoption of agreements by subnational entities, in a non-judgmental way, respecting the sovereignty of each State.

Dr. Joel Hernández requested that the Rapporteur include a section on minimum standard rules in political declarations.

The Chair supported Dr. Hernández's proposal and urged the Rapporteur to include references to overt violations of norms pertaining to the capacity or competence to enter into treaties. That would make it necessary to link international law and domestic law in order to determine the international standards existing in the subject matter with respect to the determination of the nature of the instrument. Lastly, he proposed that the questionnaire be sent out as soon as possible.

At the 92nd Regular Session (Mexico City, February 2018), the Rapporteur referred to the distinction made between treaties, non-binding (political) agreements and contracts, and recalled that the CJI approved sending questionnaires to Member States, 10 of whom responded in due course: Argentina, Brazil, Colombia, Ecuador, United States, Jamaica, Mexico, Peru, Dominican Republic and Uruguay. The second report submitted in the present session (document CJI/doc.554/18) is a synthetic analysis of the responses received, and proposes a path forward to prepare a series of practical guidelines on the matter.

He found that most of the member States who sent in responses to the questionnaire are signatories of the Vienna Convention on the Law of Treaties, but it is in the internal definition of international treaties that differences arise. Likewise, he noted that all those who answered coincided that political agreements lack any legal worth, but differ in their perception of the content that such agreements should have in order to be considered non-binding in accordance with the internal legislation of each State.

Dr. Hollis also found that the main difference lies in whether the language and context of the juridical act are determinant for us to know if we are dealing with a binding agreement.

The Rapporteur emphasized that the figure of institutional agreements presents certain unusual particularities even for most States. This is generally a question of internal law, but the very concept is diffuse, and this is where Member States could benefit from some clarification as to the juridical authority of their agencies and ministries to sign agreements that are binding to international law.

In this sense, he detected enormous differences as regards the binding agreements signed between provinces or regions of different countries, and whether they are obligatory only for these provinces or for the entire State. This allowed the Rapporteur to appreciate how opportune the CJI exercise is in respect to preparing guidelines to align both parties of an agreement concerning the nature of same.

Dr. Hollis concluded by proposing that a new effort be made to obtain a greater number of responses to the questionnaire, given that despite its importance and usefulness, a mere ten answers represents a minority of the membership of the OAS.

On the other hand, he proposed preparing a draft or guidelines for entering into international agreements, rather than some general principles of a practical, political nature to be adopted by Member States, which could prove far less fruitful.

The Chair thanked the Rapporteur and agreed that emphasis should be made in the sphere of institutional agreements, since the CJI's contribution on the issue of treaties would not be substantial, and the Vienna Convention has proved to be sufficient for Member States.

He also agreed to renew urging Member States to send their answers to the questionnaire and suggested enhancing the focus of the guidelines to be presented in order to have an outline of these available at the meeting with legal advisors of ministries to be held at the next regular session.

Dr. Mata complimented the Rapporteur on his thorough analysis and pointed out that in the case of the Uruguayan unitary system, foreign affairs are conducted by the Executive, while departmental governments can sign institutional agreements with prior parliamentary approval and only on certain matters – usually credit – with the central government playing an obligatory subsidiary role. Consequently, a departmental government lacking parliamentary authorization cannot oblige the Uruguayan State to take responsibility for such measures; this is what is called an inter-institutional agreement, because it only obliges institutions, not the entire State.

Conversely, in a federal system the States or provinces have other powers with regard to signing treaties and the concept of institutional agreement. Dr. Mata therefore suggested caution not to enter into an analysis of human rights or to repeat what is already regulated by conventional common-law legislation. Here he agreed with the Rapporteur as to the advisability of the guidelines concentrating on those topics that the Vienna Convention treats superficially, as well as on the effect of institutional agreements and political declarations. He added that these guidelines will also be useful to judges and arbiters, which makes such documents a very valuable asset for the CJI.

Dr. Correa congratulated the Rapporteur on his work synthesizing the responses of the States, and went on to point out that the Legislative and Judiciary powers often attend international meetings where they make declarations or assume some commitments besides the formal processes of signing agreements, adopting informal mechanisms in which they make their intentions clear but whose legal effects are often lacking clarity for the parties involved.

In her opinion the State is responsible for the agreements that fail to comply with the formalities of a treaty; this is a theme that concerns internal law, which would make it somewhat difficult to prepare guidelines.

Dr. José Moreno also congratulated Rapporteur Hollis and expressed his confidence in the usefulness of guidelines that could help the States to drive ahead regulatory changes; he suggested that the guidelines should contain examples in order to give them a pedagogic feature.

Dr. Alix Richard, appreciating the work of the Rapporteur, asked the Chair if he could personally answer the questionnaire on behalf of his country, in collaboration with Haitian experts, or if it was necessary to answer via the official channels.

As he saw it, a document of guidelines would be extremely useful for Haitian judges, and disseminating this document would greatly enrich the work of the lawyers in this area.

The Chair clarified that without jeopardizing the official answer, which is the proper way to obtain the position of the State concerning the questionnaire, nothing prevents a member from offering his opinion and in this way making an input contribution.

He also remarked that the Vienna Convention is supplementary and does not prevent internal law from allowing instruments the right to sign these agreements, and that in such cases the practice of the American States and comparative law on the world level would constitute a useful tool that could also lend clarity to the guidelines. He concluded that the CJI's most significant contribution would be a document of good practices.

The Rapporteur agreed with the members that the guidelines are an international-law project that is not meant to change internal law, and explained that the purpose of the document is two-fold: i) to clarify which are international agreements are binding, so as to prevent some of the parties being surprised when compliance is demanded or if some responsibility is required of them, and ii) to determine who is responsible in the case of institutional agreements, whether the State or only the

institution that signs the agreement, this being the area with the most diverse legal opinions among the member States.

Finally, the Rapporteur offered presenting a preliminary draft for a practical guide for the appreciation of the members in July 2018.

The Chair agreed that the guidelines will concentrate on institutional agreements and the analysis of good practices that the region can adopt, and asked for a document to comment on the exchanges with the legal advisors scheduled for the next regular session in August 2018.

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6. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards

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.

At the 92nd Regular Session (Mexico City, February 2018), the Rapporteur recalled that her work consisted of conducting a search on the prevailing legal framework and good practices, in order to demarcate the situation of the topic in the region. She mentioned the New York Convention, the Panama Convention and also the Montevideo Convention as the baselines for determining the present situation of the theme in the region, and she referred to the relative progress implied by the suppression of the exequatur in Europe (in certain cases).

From her comparative study we may infer that the recognition of foreign judicial decisions depends on the reciprocity practices in the area of treaties among States, and that there seems to be more flexibility for the recognition of the decisions awarded by arbitrators, vis-à-vis the sentences awarded by the courts, in addition to the requirements in terms of homologation that the latter must follow.

She also pointed out the differences in the procedural burden required for trade arbitration awards and the costly procedures that the decisions ruled in litigation trials must endure. In the case of judicial decisions with evidential purposes, these are subject to homologation (confirmation) in some States such as Bolivia, or otherwise to authentication procedures.

She also noticed differences between the competent authorities for the homologation of judicial decisions (high-rank officials) and the authorities in charge of enforcing arbitration awards (low-rank judges).

In her opinion, communications and information technologies have not been used properly for simplifying the recognition process and the enforcement of sentence procedures.

Finally, the Rapporteur proposed drafting a guide of good practices on facilitating the recognition of judicial decisions, so that these good practices might devise and implement a speedy procedure for the recognition of foreign judicial awards, especially in the absence of opposition by the party subject to the execution process.

Dr. José Moreno highlighted that there is abundant information on the recognition and enforcement of decisions both in ASADIP and in other forums on the issue, and that these could be used as valuable input for the work being carried out by Dr. Correa. At the same time, he asked the Rapporteur to specify the scope of the proposed guide.

Dr. Carlos Mata complimented Dr. Correa on her work and agreed with Dr. Moreno as regards the need to specify the scope and purposes of the proposed guide, taking into consideration that there is significant progress on the topic both at the domestic and regional levels, making special mention of The Hague Conference.

Dr. Hollis pointed out the relevance of the study made by Dr. Correa and highlighted the challenge in implementing a simplified recognition system for judicial decisions amidst such a diversity existing in the region regarding the requirements and procedures in that area.

The Chair was of the opinion that the New York Convention provides a solution to the problem involving the enforcement of foreign decisions in the area of arbitration, and suggested that the focus of the rapporteurship should consist in seeking standards beginning with the Panama Convention regarding the enforcement of national decisions and identifying the difficulties that this Convention has encountered in terms of massive ratification. He also suggested proposing specific actions, because the CJI cannot restrict its activities just to efforts of systematizing and codifying, and must be proactive in terms of propositions and effectively contribute to the progressive development of international law.

The Chair's suggestion was therefore to concentrate efforts on enforcement of foreign decisions by local judges, and to make further progress in the study before determining the desired results.

Dr. Moreno was of the opinion that the topic is not completely resolved by the New York Convention and that there is still a considerable path ahead. He added that as the topic is being thoroughly addressed in other forums, perhaps the proposed guide should not elaborate too much on the issue of arbitration.

Dr. Correa explained that the proposal could consist in a legislative guide aimed at facilitating the procedure of homologating enforcement of sentences, or else a guide of good practices containing proposals enabling a more dynamic solution to the enforcement of decisions. The work would be restricted to the decisions awarded by the institutional organs of the Judiciary so as to facilitate juridical cooperation.

The Chair was in agreement with the need to introduce a dynamic procedure in the enforcement of foreign judicial decisions, but explained that the issue was well routed in The Hague Conference, so it would perhaps be wise to wait and see if those efforts reach a safe harbor or - on the contrary - just reach a point of stagnation. Should the Hague Conference - in which several OAS members are involved – achieve any result, it should be assessed whether the CJI can and should use such an outcome as the starting point for further study.

He therefore proposed keeping the topic on the CJI agenda, in order to ask the legal advisers of the ministries of foreign affairs during the next session about the attitude of the OAS States vis-à-vis the work carried out by The Hague Conference, in order to determine whether the CJI is in fact the competent forum.

The Rapporteur suggested sending out a questionnaire to the member States in order to find out their opinion on the issue.

Dr. Moreno urged keeping the topic on the agenda and waiting to see the result of the consultations with the legal advisers.

The Director of the Department of International Law explained that not all the member States are involved in the preparatory work of The Hague Conference. For that reason, the Chair, taking into consideration that the Conference must not be seen as the sole parameter in the decision-making process, proposed sending the questionnaire suggested by Dr. Correa, and added that – on the basis of the responses received and the consultations carried during the next session – the CJI might be in a position to make the corresponding decisions.

Dr. Mata was of the opinion that the questionnaire must be drafted very carefully so that the questions focus on the efficacy of procedures instead of merely concentrating on the description of those procedures.

Dr. Moreno asked the DIL to compile the material that The Hague Conference and the ASADIP made available to the public, for further study by the Rapporteur.

The Chair agreed with this suggestion and proposed convening a meeting with the legal advisers in the region during the next session, in order to receive less standardized responses, the preference being for more candid replies regarding the efficacy of enforcement procedures, and then compiling the inputs regarding the content and wording of a proposed questionnaire that might eventually be forwarded to each State. The members approved this proposal by unanimous decision.

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7. Protection of Personal Data

At the 92nd Regular Session of the Inter-American Juridical Committee (Mexico City, February 2018), Dr. Carlos Mata spoke of the work of the CJI on the theme of protection of personal data, and proposed that the Committee return to and follow up on the theme to enable contributing to the revision of the Model Law on Access to Public Information in the light of the work of the Ibero-American Network of Protection of Data (RIPD).

Dr. Hollis requested that the follow-up to be done on the theme of protection of data should not be restricted to the activities of the RIPD, nor reduced to attempting to implement this in the Americas, given the risk of excluding common-law countries.

Dr. Negro explained that document DDI/doc.9/17 presented by the Department of International Law on Monday's session includes a comparison between the work of the CJI and the new Ibero-American standards precisely so that members use this analysis as a starting-point to produce a result made to measure for the member States of the OAS.

Dr. Correa agreed with Dr. Mata Prates as to the advisability of the revision of the Model Law on Access to Information articulating with protection of personal data in the hands of authorities.

Dr. Hollis asked that this discussion include the theme of the responsibility of whoever has possession of the personal data of third parties, and their obligation to notify these third parties when the personal data in their possession have been compromised or used in some unauthorized manner.

Dr. Cevallos warned that the CJI should not ignore this chance to revise the juridical bases on which both themes – protection and access – lie.

The Chairman concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Mata suggested using the document presented by the Department of International Law to start developing a proposal to update the guide of principles drawn up by the CJI, as well as incorporating other perspectives.

The members agreed to revisit the subject as proposed by Drs. Mata and Hollis, and appointed Dr. Carlos Mata as the Rapporteur.

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8. Access to Public Information

At the 92nd Regular Session of the Inter-American Juridical Committee (Mexico City, February 2018), Dr. Dante Negro called the attention of the members to the theme of access to public information, reminding them that the General Assembly has granted a mandate to revise the Inter-

American Model Law on Access to Public Information in the light of the new themes to be incorporated into the text of same, suggesting that the CJI appoint a member to participate in the process of prior consultations.

He informed those present that the Department of International Law is carrying out consultations with prominent social actors to prepare a proposal for the CJI to analyze when the occasion presents itself.

Dr. Luis García-Corrochano suggested that a revision be made of the themes studied by the rapporteurs of other institutions, such as the *Institut de Droit International*, in order to identify possible input material for the work of the CJI.

The Chairman concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Luis García-Corrochano offered to work on the issue for the time being, subject to the discussion being re-opened in August in the light of the mandates granted by the General Assembly.